

Hypothetical Fact Scenario For Air Pollution Control NOV

XYZ Corporation [XYZ]'s Portland Cement plant [facility], is located in your District. XYZ utilizes a kiln in its cement making process that is an emission unit. The facility is located in an attainment area for all criterion pollutants. Portland Cement plants are one of the listed "Major Facility" categories in Fla. Admin. Code Table 62-212.400-1. The facility also has a potential to emit 100 tons per year of at least one regulated air pollutant. The facility is major for the HAP hydrochloric acid. The facility was issued a Title V permit on December 31, 1998. The Title V permit establishes an emission limit for hydrochloric acid of 0.9 pounds per hour.

On April 1, 2000, you witnessed a stack test at the facility. This stack test was an annual compliance stack test required by XYZ's Title V permit. On May 2, 2000, XYZ submitted the stack test report to you for review. The stack test report indicated emissions of 2.0 pounds per hour of Hydrochloric acid. You also notice in your review of XYZ's files that you have not received the 1999 annual operating report. In addition, XYZ has not performed its annual compliance stack test for 2000-2001 that should have been conducted by April 1, 2001.

BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

IN THE OFFICE OF THE
_____ DISTRICT

Petitioner,

v.

OGC FILE NO.:

XYZ CORPORATION

[For corporations, insert entire name as listed in corporate information records. For joint owners of the property, include all owners. For businesses not listed in corporate information, contact OGC for advice on naming the proper parties.],

Respondent.

NOTICE OF VIOLATION, ORDERS FOR CORRECTIVE ACTION,
AND ADMINISTRATIVE PENALTY ASSESSMENT

TO:

Certified Mail Number

Pursuant to the authority of Section 403.121(2), Florida Statutes ("Fla. Stat.") the State of Florida Department of Environmental Protection ("Department") gives notice to _____ ("Respondent") of the following findings of fact and conclusions of law with respect to violations of Chapter 403, Fla. Stat.

FINDINGS OF FACT

PARAGRAPHS APPLICABLE TO ALL COUNTS

1. The Department is the administrative agency of the State of Florida having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of Chapter 403, Fla. Stat., and the rules promulgated thereunder in Fla. Admin. Code Title 62.

2. [DESCRIBE THE RESPONDENT AND WHAT IT DOES, WHERE IT IS LOCATED. FOR EXAMPLE: Respondent is a corporation that owns and operates a Portland Cement plant ["facility"] located at 5555 Industrial Lane, Tampa, Hillsborough County, Florida. SECTION, TOWNSHIP, RANGE ALONE IS NOT SUFFICIENT.]

3. [DESCRIBE THE FACILITY. FOR EXAMPLE]: As a part of its operations, the facility utilizes a kiln that is an emission unit. As part of its operations the facility emits hydrochloric acid. The facility has the potential to emit at least 10 tons per year of hydrochloric acid which is a Hazardous Air Pollutant ["HAP"].

4. [DESCRIBE THE INSPECTION OF THE FACILITY OR PROPERTY THAT LED TO THE DISCOVERY OF THE VIOLATIONS OR THE DEADLINES/ REPORTING REQUIREMENTS THAT WERE NOT MET. ONLY INCLUDE THOSE EXHIBITS WHICH ARE NECESSARY FOR THE CAUSE OF ACTION, SUCH AS A PERMIT. DO NOT INCLUDE WARNING LETTERS OR INSPECTION REPORTS. YOU MUST STATE ENOUGH SPECIFIC FACTS SO THAT SOMEONE WOULD BE ABLE TO UNDERSTAND WHO, WHAT, HOW, WHEN AND WHERE THE VIOLATIONS OCCURRED. THIS FACT RECITATION MUST BE MORE DETAILED THAN THAT NEEDED FOR A CONSENT ORDER. FOR EXAMPLE]: On April 1, 2000,

the Department witnessed Respondent's stack testing at the facility as required by [rule or permit condition]. The results of this test were submitted to the Department on May 2, 2000. The stack test report indicated emissions of 2.0 pounds per hour of hydrochloric acid. Respondent's Title V permit establishes an emission limit of 0.9 pounds per hour of hydrochloric acid. In addition, the Department has not received the 1999 annual operating report from XYZ and XYZ has not conducted its 2000-2001 annual compliance stack test.

5. IF YOU ARE INCREASING THE PENALTY FOR A HISTORY OF NON-COMPLIANCE, YOU MUST INCLUDE THE INFORMATION IN § 403.121(7). FOR EXAMPLE: On July 3, 1999, the Department entered a Consent Order OGC Case No. 99-0000 with the Respondent, which contained a finding of violation and a civil penalty of more than \$2,000.00. [NOTE: IN REALITY 403.121(7) LIMITS HISTORY OF NON-COMPLIANCE TO CONSENT ORDERS, FINAL ORDERS AND/OR JUDGMENTS THAT HAVE AN EFFECTIVE DATE AFTER JUNE 15, 2001. HOWEVER, TO MAKE THIS EXAMPLE WORK WE'VE USED AN EARLIER DATE]

COUNT I

[EACH COUNT SHOULD CONTAIN A SEPARATE VIOLATION. THE COUNTS SHOULD DESCRIBE FACTS WHICH RELATE TO THE VIOLATIONS. IF YOU ARE ASSESSING MULTI-DAY PENALTIES, YOU MUST SPECIFICALLY RECITE THE NUMBER OF DAYS OF VIOLATION. FOR EXAMPLE:

6. As of [TODAY'S DATE], Respondent failed to submit its 1999 annual operating report.

COUNT II

7. The results of the stack tests conducted on April 1, 2000 indicated hydrochloric acid emissions of 2.0 pounds per hour.

COUNT III

8. As of [TODAY'S DATE], Respondent did not conduct the required 2000-2001 annual compliance stack test.

[IF YOU ARE INCLUDING ECONOMIC BENEFIT, YOU MUST INCLUDE IT IN THE SPECIFIC COUNT THAT APPLIES. FOR EXAMPLE:

9. The cost of the test described above is \$100.00. Respondent saved that money by not conducting the tests.]

COUNT IV

10. [ALWAYS INCLUDE THIS COUNT] The Department has incurred expenses to date while investigating this matter in the amount of not less than _____.

CONCLUSIONS OF LAW

The Department has evaluated the Findings of Fact with regard to the requirements of Chapter 403, Fla. Stat. and Fla. Admin. Code Title 62. Based on the foregoing facts the Department has made the following conclusions of law:

11. Respondent is a "person" within the meaning of Sections 403.031, Fla. Stat.
12. Respondent is the owner and operator of the facility.
13. [DESCRIBE WHAT THE FACILITY IS, IF THIS IS IMPORTANT TO CAUSE OF ACTION. FOR EXAMPLE: Respondent's facility is a Title V source as defined in Fla. Admin. Code R. 62-210.200. The facility is also a major source of air pollution as defined in Fla. Admin. Code R. 62-210.200, and is a major source of hydrochloric acid which is a HAP.

14. The Department is imposing an administrative penalty of less than or equal to \$10,000.00 in this Notice of Violation as calculated in accordance with Section 403.121, Fla. Stat.

15. [IN THESE PARAGRAPHS YOU MUST RECITE THE RULES AND STATUTES WHICH RELATE TO THE SPECIFIC COUNTS. THE PENALTY ASSESSMENT FOR EACH COUNT SHOULD BE IN A SEPARATE PARAGRAPH. EACH COUNT MUST HAVE AT LEAST ONE CORRESPONDING CONCLUSION OF LAW. FOR EXAMPLE:] The facts in Count I constitute a violation of Fla. Admin. Code R. 62-210.370. [IF ITS IS ALSO IN THE PERMIT ADD THAT SPECIFIC CONDITION CITATION] which requires that a Title V source submit an annual operating report to the appropriate Department office by March 1 of the following year. [THE FOLLOWING SENTENCE WILL BE ADDED FOR ALL COUNTS] The facts also constitute a violation of Section 403.161, Fla. Stat., which makes it a violation to fail to comply with Department rules.]

16. The violation in Count I requires the assessment of an administrative penalty under Section 403.121(4)(f), Fla. Stat. of \$500.00 for each failure to submit the required annual operating report to the Department.

17. The facts in Count II constitute a violation of specific condition 17 of the Title V permit.

18. The violation in Count II requires an assessment of an administrative penalty of \$5,000 under Section 403.121(3)(f), Fla. Stat. for an air emission violation from a major source that was major for the pollutant in violation. [NOTE: \$1000 IS ASSESSED FOR THE AIR EMISSION VIOLATION AND YOU ADD AN ADDITIONAL \$3000 BECAUSE THE SOURCE WAS MAJOR FOR THE POLLUTANT IN VIOLATION [IE. HYDROCHLORIC ACID] AND ANOTHER \$1,000 BECAUSE IT WAS 150% OF THE ALLOWABLE]

19. The facts in Count III constitute a violation of specific condition 18 of the Title V permit.

20. The violation in Count III requires an assessment of an administrative penalty of \$2000.00 under Section 403.121(4)(d), Fla. Stat. for failure to conduct required monitoring or testing.

21. The base penalty assessed for Counts I, II, III and IV (i.e. the summation of paragraphs 16, 18 and 20, above) is \$7500.00. The Consent Order 99-000 constitutes a history of noncompliance as defined under Section 403.121(7)(a), Fla. Stat. Therefore the base penalty is increased by 25% or \$1875.00.

22. The facts related in Count III establish Respondent gained a direct economic benefit of \$100.00 by failing to conduct the required testing. Therefore, the base penalty is increased by an additional \$100.00 pursuant to Section 403.121(8), Fla. Stat.

23. The total administrative penalty, including the base penalty, the history of noncompliance and the economic benefit, is \$9475.00.

24. The costs and expenses related in Count IV are reasonable costs and expenses incurred by the State while investigating this matter, which are recoverable pursuant to Section 403.141(1) Fla. Stat.

ORDERS FOR CORRECTIVE ACTION

The Department has alleged that the activities related in the Findings of Fact constitute violations of Florida law. The Orders for Corrective Action state what you, Respondent, must do in order to correct and redress the violations alleged in this Notice.

The Department will adopt the Orders for Corrective Action as part of its Final Order in this case unless Respondent either files a timely request for a formal hearing or informal proceeding, pursuant to Section 403.121(2)(c), Fla. Stat., or files written notice with the Department opting out of this administrative process, pursuant to

403.121(2)(c), Fla. Stat. (See Notice of Rights.) If Respondent fails to comply with the corrective actions ordered by the Final Order, the Department is authorized to file suit seeking judicial enforcement of the Department's Order pursuant to Sections 120.69, 403.121 and 403.131, Fla. Stat.

Pursuant to the authority of Sections 403.061(8) and 403.121, Fla. Stat., the Department proposes to adopt in its Final Order in this case the following specific corrective actions that will redress the alleged violations:

25. Respondent shall forthwith comply with all Department rules regarding air pollution control. Respondent shall correct and redress all violations in the time periods required below and shall comply with all applicable rules in Fla. Admin. Code Chapter 62- [LIST APPROPRIATE RULES].

26. [IN THIS SECTION YOU MUST INCLUDE SPECIFIC CORRECTIVE ACTIONS WHICH RELATE TO EACH OF THE COUNTS. FOR EXAMPLE: Within 10 days of the effective date of this Order, Respondent shall submit to the Department its 1999 annual operating report.]

27. Within 10 days of the effective date of this Order, Respondent shall pay \$9475.00 to the Department for the administrative penalties and direct economic benefit imposed above. Payment shall be made by cashier's check or money order payable to the "State of Florida Department of Environmental Protection" and shall include thereon the OGC Case number and the notation "Ecosystem Management and Restoration Trust Fund." The payment shall be sent to [INSERT DISTRICT ADDRESS].

28. In addition to the administrative penalties, Within 10 days of the effective date of this Order, Respondent shall pay \$_____ [FROM COUNT IV, ABOVE] to the Department for costs and expenses. Payment shall be made by cashier's check or money order payable to the "State of Florida Department of Environmental Protection" and shall include thereon the OGC Case number assigned to this case and the notation

"Ecosystem Management and Restoration Trust Fund." The payment shall be sent to [INSERT DISTRICT ADDRESS].

NOTICE OF RIGHTS

Respondent's rights to negotiate, litigate or transfer this action are set forth below.

Right to Negotiate

29. This matter may be resolved if the Department and Respondents enter into a Consent Order, in accordance with Section 120.57(4), Fla. Stat., upon such terms and conditions as may be mutually agreeable.

Right to Request Hearing

30. Respondent has the right to a formal administrative hearing pursuant to Sections 120.569, 120.57(1) and 403.121(2), Fla. Stat., if Respondent disputes issues of material fact raised by this Notice of Violation and Orders for Corrective Action ("Notice"). At a formal hearing, Respondent will have the opportunity to be represented by counsel or other qualified representative, to present evidence and argument on all issues involved, and to conduct cross-examination and submit rebuttal evidence.

31. Respondent has the right to an informal administrative proceeding pursuant to Sections 120.569 and 120.57(2), Fla. Stat., if Respondent does not dispute issues of material fact raised by this Notice. If an informal proceeding is held, Respondent will have the opportunity to be represented by counsel or other qualified representative, to present to the agency written or oral evidence in opposition to the Department's proposed action, or to present a written statement challenging the grounds upon which the Department is justifying its proposed action.

32. If Respondent desires a formal hearing or an informal proceeding, Respondent must file a written responsive pleading entitled "Request for Administrative Proceeding" within 20 days of receipt of this Notice. The request must be in the form required by Fla. Admin. Code R. 28-106.2015 and include the following:

- (a) The Department's Notice identification number and the county in which the subject matter or activity is located;
- (b) The name, address, and telephone number, and facsimile number (if any) of each respondent;
- (c) The name, address, telephone number, and facsimile number of the attorney or qualified representative of respondent, if any, upon whom service of pleadings and other papers shall be made;
- (d) A statement of when respondent received the Notice; and
- (e) A statement requesting an administrative hearing identifying those material facts that are in dispute. If there are none, the request for hearing must so indicate.

A request for hearing is filed when it is received by the Department's Office of General Counsel, 3900 Commonwealth Boulevard, MS-35, Tallahassee, Florida 32399-3000.

Right to Mediation

33. If Respondent timely files a request for hearing challenging the Notice, the Respondent has the right to mediate the issues raised in the Notice. If requested, a mediator will be appointed to assist the Department and Respondent to reach a resolution of some or all of the issues. The mediator is chosen from a list of mediators provided by the FCRC Consensus Center ("FCRC"). The FCRC will provide up to 8 hours of free mediation services to the Respondent. A mediator cannot require the parties to settle the case. If mediation is unsuccessful, both parties retain their full rights to litigate the issues before an administrative law judge. The Respondent must

select the mediator and notify the FCRC within 15 days of receipt of the list of mediators. The mediation process does not interrupt the time frames of the administrative proceedings and the mediation must be completed at least 15 days before the date of the final hearing.

34. The written request to appoint a mediator must be made within 10 days after receipt of the Initial Order from the administrative law judge appointed to hear the case. The request must be received by the FCRC Consensus Center, Chris Pedersen, 2035 East Paul Dirac Drive, Room 236, Tallahassee, Florida, 32310, (850) 644-6320, cpedersen@fsu.edu. Once the request is timely received, the FCRC will provide the parties with a list of mediators and the necessary information.

Right to Opt Out of the Administrative Proceeding

35. If Respondent does not wish to contest the issues before an administrative law judge, Respondent may file a notice with the Department opting out of the administrative process. Respondent must file its written opt out notice within 20 days after service of the Notice. The written notice to opt out is filed when it is received by the Department's Office of General Counsel, 3900 Commonwealth Boulevard, MS-35, Tallahassee, Florida 32399-3000.

36. Once the Respondent opts out of the administrative process, the Department may sue the Respondent for injunctive relief, damages, costs and expenses and civil penalties. If the Respondent opts out of the administrative process, the Department may ask the judge to assess civil penalties in excess of the amounts in this Notice up to \$10,000.00 per day per violation. The election to opt out of the

administrative process is permanent and once the election is made the administrative process cannot be restarted.

Waivers

37. Respondent will waive the right to a formal hearing or an informal proceeding if either
- a. a request for a formal hearing or informal proceeding is not filed with the Department within 20 days of receipt of this Notice, or
 - b. a notice opting out of the administrative proceeding is not filed with the Department within 20 days of receipt of this Notice.

These time limits may be varied only by written consent of the Department.

General Provisions

38. The findings of fact and conclusions of law of this Notice together with the Orders for Corrective Action will be adopted by the Department in a Final Order if Respondent fails to timely file a request for a formal hearing or informal proceeding, pursuant to Section 403.121, Fla. Stat. A Final Order will constitute a full and final adjudication of the matters alleged in this Notice.

39. If Respondent fails to comply with the Final Order, the Department is authorized to file suit in circuit court seeking a mandatory injunction to compel compliance with the Order, pursuant to Sections 120.69, 403.121 and 403.131, Fla. Stat. The Department may also seek to recover damages, all costs of litigation including reasonable attorney's fees and expert witness fees, and civil penalties of not more than

\$10,000 per day for each day that Respondent has failed to comply with the Final Order.

40. Copies of Department rules referenced in this Notice may be examined at any Department Office or may be obtained by written request to the District Office.

DATED this _____ day of _____, 20__.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

District Director
_____ District

Copies furnished to:
Jack Chisolm, OGC Enforcement Section
Mail Station 35