

**Florida Department of
Memorandum Environmental Protection**

**WRM/OWM-02
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Program Guidance Memorandum

**OWM-00-02
PWS-00-03**

To: Water Facilities Administrators
Delegated Local Programs

From: Mimi Drew, Director
Division of Water Resource Management

Date: November __, 2008

Subject: Procedures for Disciplinary Actions under the Drinking Water and Domestic Wastewater Operator Certification Program (OCP)

I. Background

The purpose for this memo is to provide guidance when pursuing disciplinary actions under Chapter 62-602, Florida Administrative Code (F.A.C.), "Drinking Water and Domestic Wastewater Treatment Plant and Distribution System Operators." These procedures are specific to operator certification disciplinary actions and supplement the Department's general enforcement procedures found in the Enforcement Manual.

The purposes of these guidelines are to assist Department staff investigating allegations of certified operator misconduct and preparing disciplinary actions based on those investigations, and to promote consistency throughout the Department in the application of these rules. In order to ensure consistency, all formal enforcement actions (excluding short form consent orders) must be sent to OGC for review prior to issuance. All Domestic Wastewater formal actions must also be sent to the Wastewater Compliance Evaluation Section for review prior to issuance. Copies of all finally issued formal enforcement actions must be sent to OGC, Operator Certification Program (OCP), and in the case of Domestic Wastewater actions, the Wastewater Compliance Evaluation Section.

II. Applicability

Operator certification disciplinary actions are different from most other enforcement actions taken by the Department. Because these disciplinary actions may adversely affect a license and the operator's livelihood, the Department must meet a "clear and convincing" standard in proving its case. This standard of proof is stricter than the usual "preponderance of the evidence" standard the Department must meet in most enforcement cases. This standard of proof falls somewhere between the preponderance standard and the "beyond a reasonable doubt"

standard used in criminal cases. This means there is a greater burden on the Department in substantiating its allegations of certified operator misconduct.

Grounds for operator discipline must fall in one or more of the eight grounds for disciplinary actions found in Rule 62-602.800, F.A.C. These are the only grounds for taking disciplinary action and Department Staff must be sure the grounds we are alleging are one of these eight. The recommended guidelines for determining appropriate disciplinary actions are summarized in Table I. The disciplinary sanctions (penalties, probation, suspension, and revocation) are found in Rule 62-602.870, F.A.C. While most of those grounds are straightforward, additional case preparation will be required if Rule 62-602.800(4) is cited as grounds for discipline:

62-602.800(4): An operator performing treatment plant or water distribution system operation in a manner that is not consistent with standard operating practices.

The provisions for suspension or revocation based upon failure to perform to standard operating practices are:

62-602.870(1)(c): Incompetence in the performance of duties of an operator that results in a treatment plant or water distribution system, under the direct charge of the operator, being operated in a manner inconsistent with standard operating practice.

62-602.870(2)(c): A finding by the Department that negligence in the performance of duties as an operator has resulted in harm to public health or safety or to the environment.

Key to the implementation of these rules is the definition of “standard operating practice:”

62-602.200(17): “Standard operating practice” means effective and competent treatment plant or water distribution system operation that is consistent with the existing treatment plant or water distribution system design, the existing treatment plant operation and maintenance manual(s), manufacturers’ equipment manuals, professionally accepted operation procedures as contained in the technical manuals listed in Rule 62-602.660, F.A.C., and applicable Department rules. This definition applies to functions that directly affect treatment plant or water distribution system operation and that can be reasonably controlled by the operator.

For example, if an operator is cited for poor wastewater treatment plant operation, the investigator must locate and review the plant design and operations manual and/or the manufacturer’s equipment manuals, or be prepared to explain how the acts of the operator fail to meet professionally accepted treatment plant operation procedures in the manuals listed in Rule 62-602.660 or other Department rules. It is not sufficient to merely allege that the treatment plant operation is poor without referring specifically to one of the documents or rules listed in the definition of 62-602.200(17). “Common sense” is not a basis on which to proceed with enforcement on the grounds that the operator did not operate within the boundaries of “standard operating practices.” It is also crucial that the alleged act of incompetence be one that could be reasonably controlled by the operator. For example, an operator cannot be expected to fix holes in a hydropneumatic tank because it is not reasonable to expect him to undertake that responsibility. However, the operator is expected to notify the owner of such a problem.

While some of the operator's responsibilities are his alone, much of the operation of a wastewater or drinking water plant is the shared responsibility of both the operator and owner or may be the sole responsibility of the owner. Sometimes this allocation of responsibility is set by rule or permit but it may also be allocated through the contract between the operator and owner. It is important to remember that a contract cannot change the responsibilities of either the owner or operator if those responsibilities are set by rule or permit. In cases where there is a shared responsibility, you must review the operator's contract. Contact your enforcement attorney if there are questions about the interpretation of the contract.

In most cases, it may be more effective for the Department to pursue enforcement and/or corrective actions directly with the treatment facility owner. However, in some cases it may be appropriate to pursue enforcement action against both the operator and the owner of the treatment plant. For example, sludge in the bottom of the chlorine contact chamber may be a violation for the operator if he has not notified the owner of the problem. If the operator notified the owner of the problem and the owner has not taken the necessary steps to remove the sludge, the owner but not the operator will be liable. If the operator did not notify the owner but the owner knew or should have known about the problem then they both may be liable. In order to determine who is liable for the violation, the inspector must determine whether the operator notified the owner of the problem and when the notification occurred. It is not sufficient to allege the operator is liable merely because there is sludge in the bottom of the chlorine contact chamber. However, the operator is expected to notify both the owner and the Department of such a problem, in accordance with Rule 62-602.650(3), F.A.C.

III. Enforcement Options

Generally, the procedures in the Enforcement Manual should be followed, but there are additional enforcement options available for operator discipline cases.

A. Preliminary Actions:

Non-compliance Letter – The non-compliance letter is appropriate if the operator has violated one or more standards but the violations do not warrant a sanction (fine, probation, revocation or suspension) pursuant to Rules 62-602.850 and 62-602.870, F.A.C. The non-compliance letter should notify the operator of the problem and set a time for the remedy. An example of a non-compliance letter is in the Enforcement Manual.

Warning Letter – The Warning Letter is appropriate if the operator has violated one or more standards that require a sanction under Rules 62-602.850 and 62-602.870, F.A.C., and the Department wants to attempt settlement. The Warning Letter notifies the operator of the alleged violation and requests a meeting. An example of a Warning Letter can be found in the enforcement manual. A copy of the final letter should be sent to OCP. In addition, for Domestic Wastewater warning letters, a copy of the final letter should be sent to the Wastewater Compliance Evaluation Section.

B. Sanctions:

Sanctions (suspension, revocation, penalties, probation or other remedies) can only be imposed through one of the following procedures.

Consent Order – Any disciplinary action can be settled by consent order. Since a consent order is a settlement, the Department has broader latitude in fashioning relief. For example, Rule 62-602.870 provides for suspensions of up to two years but a longer suspension could be negotiated in a consent order. The procedure for drafting and approving standard consent orders is set forth in the Enforcement Manual and must be followed.

Probation Letter – A probation letter is specifically authorized by statute and is explained in Rule 62-602.200(15), F.A.C. It should be used in cases where the certified operator has committed acts that do not warrant a monetary fine, suspension or revocation as outlined in Rules 62-602.850 and 62-602.870, F.A.C. A probation letter places the operator on two years of probation during which he must complete one additional CEU. Any further occurrences of a similar nature will result in license suspension. (A model Probation Letter with the Notice of Rights is available in the Enforcement Manual).

All draft probation letters, like all consent orders and administrative complaints, must be sent to OGC for review and approval. The probation letter can be signed by either the Director of District Management or the Director of the Water Resource Management Division. The certified operator has the right to challenge the probation letter. A Notice of Rights must be included with the probation letter.

An additional violation of a similar nature or failure to complete the additional CEU *shall*, by rule, result in the suspension of the license for two years. *See* Rule 62-602.200(15), F.A.C.

Administrative Complaint and Orders for Corrective Action – The administrative complaint is used when suspension, revocation, or penalties is appropriate. Non-compliance letters, warning letters, and probation letters are not required prior to issuing an administrative complaint. The administrative complaint may be the first document used in the enforcement process when the violation is serious enough to bypass earlier steps. Administrative complaints may be issued by either the District Director or the Director of the Division of Water Resource Management. (A model Administrative Complaint is available in the Enforcement Manual.)

Penalty assessment or license suspension or revocation can only be done through an administrative complaint (or consent order). Only operators with revoked licenses are required to retake the license examination. Reexamination is not required to reactivate a suspended license. *See* Rule 62-602.870(6), F.A.C.

Pursuant to Rule 62-602.870(4), F.A.C., operators may file a petition within 21 days of receiving the administrative complaint challenging the allegations or proposed corrective actions. If no petition is filed, the Director of District Management or the Director of the Water Resource Management Division may issue a default Final Order. A draft of the default Final Order must be sent to OGC for review and approval. A form for the default Final Order is in the Enforcement Manual.

C. Other actions:

Petition for Enforcement – A petition for enforcement is a civil complaint filed by the Department to enforce consent orders or final orders. If the operator is not in compliance with a consent order or final order, then a petition for enforcement may be appropriate. The procedures set forth in the Enforcement Manual concerning petitions for enforcement should be followed.

Civil Lawsuit – In some cases a civil lawsuit may be appropriate to address serious violations by certified operators. All of the actions listed in the Sanctions section of this memo are actions taken against the operator as an operator. That does not mean that an operator is not also subject to sanctions under sections 403.141 or 403.161, Florida Statutes. For example, if the operator has purposefully discharged wastes from a treatment plant it may be appropriate to sue him under traditional theories of “causing pollution” in addition to suspending or revoking his license. A civil lawsuit may be filed concurrently with any of the actions listed in the Sanctions section, but actions directly affecting the operator’s license (suspension, revocation, probation or penalties under Rule 62-602.850, F.A.C.) may only be taken through an administrative complaint as described above.

Criminal Referral – Criminal referrals of certified operators should be handled as any other Department criminal referral. In cases where referrals will result in an ongoing criminal investigation, it is essential that water and wastewater staff coordinate their activities so that these will not jeopardize the criminal investigation. The Department may want to focus its limited resources and pursue either a criminal case or an administrative action to resolve the specific violations. However, in other cases, the particular situation may warrant a parallel or follow-up administrative action. The choice among appropriate remedies will need to be determined on a case by case basis. Misdemeanor criminal charges may be recommended for a violation of one of the seven prohibitions listed in section 403.875, Florida Statutes.

IV. Enforcement Actions by Delegated Wastewater Local Programs and Delegated County Health Units

The operator certification program in the Department issues licenses for these operators, using the requirements in Chapter 62-602, F.A.C., and by the authority of sections 403.865 – 403.88, Florida Statutes. Enforcement against an operator's license may ONLY be undertaken by the Department. However, if the operator's actions or inactions have taken place in a county with an approved local program for wastewater or an approved county health department for drinking water, the Department may need those local inspectors to assist in the preparation of the warning letter and subsequent actions or to testify at an administrative hearing when necessary.

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Attachments:

Table I: Recommended guidelines for determining the appropriate action
Attachment I: Sample Warning Letter

cc: Directors of District Management
DEP District Domestic Wastewater Program Managers
DEP Branch Office Managers
Office of General Counsel
Operator Certification Program

Domestic Wastewater Program Manual Keywords:
Operators
Enforcement

Table I

Recommended guidelines for determining the appropriate action are summarized below. The table generally presents a recommended range of options for Disciplinary Actions for each of the grounds for Disciplinary Proceedings. Staff should evaluate both aggravating and mitigating circumstances and document those and the rationale used in selecting a recommended Disciplinary Action.

| Grounds for Disciplinary Proceedings | Disciplinary Guidelines |
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| <p>Practicing as a licensed operator on a revoked, suspended, or inactive license. [62-602.800(1), F.A.C.]</p> | <p>Using or attempting to use a license that has been suspended, revoked, or placed on inactive status.</p> <p>The recommended penalty for practicing on an inactive license is a fine of \$100 for each month of practice up to \$1000.</p> <p>The recommended penalty for practicing on a suspended license is from a minimum of a \$1000 fine, up to a maximum of an additional 1 year suspension.</p> <p>The recommended penalty for practicing on a revoked license is denial of application for license for a minimum of 3 years, up to a maximum of 5 years, and a referral to the state attorney for criminal sanctions. [62-602.850(5), F.A.C.]</p> |
| <p>Any operator of a public water system or domestic wastewater treatment plant, licensed operator, supplier of water, or permittee of a domestic wastewater treatment plant who employs any person to perform the duties of an operator who is not licensed. [62-602.800(2), F.A.C.]</p> <p style="text-align: center;">-Or-</p> <p>Any person fulfilling operator staffing requirements under chapter 62-699 without an active license of the appropriate level and type. [62-602.800(3), F.A.C.]</p> | <p>Employing unlicensed persons to perform the duties of an operator or fulfilling, or employing persons to fulfill, operator staffing requirements without an active license of the appropriate type and appropriate class or level.</p> <p>The recommended penalty is an administrative fine of a minimum of \$500, up to a maximum of \$1000. [62-602.850(6), F.A.C.]</p> <p>Refer to the <u>Guidelines for Characterizing Domestic Wastewater Violations</u> if calculating a penalty against the permitted wastewater facility.</p> |

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| <p>An operator performing treatment plant or water distribution system operation in a manner that is not consistent with standard operating practices [62-602.800(4), F.A.C.] Refer to 62-602.200(17), F.A.C., for definition of Standard operating practices.”</p> | <p>The recommended penalty for failure to perform treatment plant or water distribution system operation in a manner consistent with standard operating practices, or failure to comply with any other provision of Rule 62-602.650, F.A.C., is from a minimum administrative fine of \$100 per day of the occurrence up to a maximum of \$1,000 for the offense. [62-602.850(8), F.A.C.]</p> |
| <p>Failure to comply with an order of the Department previously entered in a disciplinary action. [62-602.800(8), F.A.C.]</p> | <p>Escalate action as appropriate according to this guidance and to the aggravating circumstances specified in the rule.</p> |
| <p>An additional violation of a similar nature to one that resulted in a probation or failure to complete the additional CEU required during a probationary period. [62-602.200(15), F.A.C.]</p> | <p>Shall result in a suspension of the license for two years.</p> |
| <p>Failure to maintain required reports or records required to be maintained by operators by the Department. [62-602.800(6), F.A.C.]</p> | <p>The recommended penalty for a domestic wastewater treatment plant operator’s failure to submit reports in a timely manner <i>to the permittee</i>, or to maintain operation and maintenance logs, as required by Rule 62-602.650, F.A.C., is from a minimum issuance of a probation letter to a maximum administrative fine of \$100 per day of the occurrence up to a maximum of \$1,000 for the offense.</p> <p>The recommended penalty for a water treatment plant operator’s failure to submit reports in a timely manner <i>to the supplier of water</i>, or to maintain operation and maintenance logs, as required by Rule 62-602.650, F.A.C., is from a minimum issuance of a probation letter to a maximum administrative fine of \$100 per day of the occurrence up to a maximum of \$1,000 for the offense.</p> <p>The recommended penalty for failure to report unpermitted discharges, interruption of service, plant upsets, or the failure to report the production of drinking water that does not meet the applicable requirements is from a minimum of a suspension of license of 1 year, up to a maximum of revocation of license. [62-602.850(8), F.A.C.]</p> <p>The actual penalty imposed depends upon the severity of the violation to cause harm to the environment, or to endanger the public’s or plant employee’s health or safety.</p> |
| <p>Failure to comply with any</p> | <p>Performing the duties of an operator without an active</p> |

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| <p>provision of Sections 403.865 through 403.876, F.S., this chapter, or Department rules pertaining to water or domestic wastewater treatment plants or water distribution systems. [62-602.800(7), F.A.C.]</p> | <p>license. The recommended penalty is an administrative fine of a minimum of \$100 for each month of performance, up to a maximum of \$1000. [62-602.850(1), F.A.C.]</p> <p>The recommended penalty for failure to submit reports in a timely manner <i>to the permittee</i>, or to maintain operation and maintenance logs, as required by Rule 62-602.650, F.A.C., is from a minimum issuance of a probation letter to a maximum administrative fine of \$100 per day of the occurrence up to a maximum of \$1,000 for the offense. The recommended penalty for failure to report unpermitted discharges, interruption of service, plant upsets, or the failure to report the production of drinking water that does not meet the applicable requirements is from a minimum of a suspension of license of 1 year, up to a maximum of revocation of license. The actual penalty imposed depends upon the severity of the violation to cause harm to the environment, or to endanger the public's or plant employee's health or safety. [62-602.850(8), F.A.C.]</p> <p>Other violations of this rule that amount to incompetence may be punishable by up to 2 years suspension. [62-602.870(1)(c), F.A.C.]</p> <p>Other violations of this rule that amount to negligence that has resulted in a threat to public health or safety or harm to the environment may be punishable by revocation. [62-602.870(2)(c), F.A.C.]</p> |
| <p>Implying or indicating that they are licensed when they are not.</p> <p>Using someone else's license or allowing someone else to use their license.</p> <p>Bounced checks.</p> | <p>Use of the name or title "water treatment plant operator," "domestic wastewater treatment plant operator," or "water distribution system operator," or any other words, letters, abbreviations, or insignia indicating or implying that a person is a licensed operator, or otherwise holds himself out as an operator, unless the person is a holder of a valid license. The recommended penalty is an administrative fine of a minimum of \$250, up to a maximum of \$1000. [62-602.850(2), F.A.C.]</p> <p>Knowingly allowing the use or failing to report the use of his or her own license, as the license of another. The recommended penalty is from a minimum of a 1 year suspension, up to a maximum of revocation of the operator's license. [62-602.850(3), F.A.C.]</p> <p>Checks for licensure, license renewal, examination returned for insufficient funds. The recommended penalty is suspension of license until the full fees are received, including the charge for insufficient funds. [62-602.850(9), F.A.C.]</p> |

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| <p>Providing misleading information on an application or cheating on the examination.</p> <p>Fraud or intentional misleading.</p> | <p>The Department shall, depending on aggravating and mitigating circumstances, in addition to a fine, suspend a license for a period not to exceed 2 years for submission of false or misleading information in an application for license or for renewal of a license, cheating on an examination, or incompetence in the performance of duties of an operator that results in a treatment plant or water distribution system, under the direct charge of the operator, being operated in a manner inconsistent with standard operating practice. [62-602.870(1), F.A.C.]</p> <p>The Department shall permanently revoke a license for fraud in the submission of applications or documentation for license or renewal; a determination by the Department that an operator falsified or intentionally misrepresented, or finds persistent inaccuracy or incompleteness of, data or information contained in documents or reports required to be submitted to the Department or an approved local regulatory agency, including the operation, laboratory or maintenance reports or logs required to be maintained, signed, or submitted by an operator; a finding by the Department that negligence in the performance of duties as an operator has resulted in harm to public health or safety or to the environment; or the suspension of license more than twice. [62-602.870(2), F.A.C.]</p> |
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Aggravating circumstances are circumstances that justify deviating from the above disciplinary guidelines and cause the increase of a penalty beyond the maximum level of discipline in the guidelines. These are:

1. History of previous violations of these rules.
2. For negligence, the magnitude and scope of the damage inflicted upon the environment, plant, plant employees, or public by the operator's misfeasance.

Mitigating circumstances are circumstances that justify deviating from the above disciplinary guidelines and cause the reduction of a penalty in accordance with this guidance. These are:

1. For negligence, the nature of the plant in question and lack of danger to the environment or public health, safety and welfare resulting from the operator's misfeasance.
2. Lack of previous disciplinary history in this or any other jurisdiction wherein the operator practices his profession.
3. Restitution of any damages suffered by the operator's client.
4. Steps taken by the operator to ensure that similar violations will not occur.