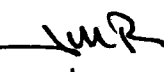


TO: Directors of District Management
Waste Program Administrators
District Waste Program Staff
Division of Waste Management Staff

From: John M. Ruddell, Director 
Division of Waste Management

Date: September 24, 2003

Subject: Implementation of "Global RBCA"

During the 2003 Regular Session, the Florida Legislature passed CS/HB 1123 (see Ch. 2003-173, Laws of Florida), commonly known as "Global RBCA". The Governor signed the bill into law on June 20, 2003, and the Bureau of Waste Cleanup has initiated the rulemaking required by the new law [proposed draft Chapter 62-780, Florida Administrative Code (F.A.C.), Contaminated Site Cleanup Criteria Rule]. We have merged this rule's adoption schedule with that of the other risk-based corrective action (RBCA) rules currently under revision (Chapters 62-770, Petroleum; 62-782, Drycleaning; 62-785, Brownfields; and 62-777, Contaminant Cleanup Target Levels). Although the details for implementation of Global RBCA will exist in the final rule, the authority for a consistent statewide approach to cleanup and the flexibility that RBCA provides are embodied in the statute and can be implemented now.

The bill language that passed was very similar to the RBCA language already in statute for the three program areas; and accordingly, the implementing rule will be very similar to the other program rules including a cross-reference to Chapter 62-777, F.A.C. This means that the default cleanup target levels (CTL's) provided in Chapter 62-777, F.A.C., will now be applicable statewide at all contaminated sites resulting from a discharge of pollutants or hazardous substances at which site rehabilitation is being conducted unless a grandfathering option is elected (see below) or site-specific alternative cleanup target levels (ACTL's) are established. Therefore, this guidance supersedes previous guidance memos dated September 29, 1995; January 19, 1996; September 22, 1999; and September 29, 2000.

The purpose of this memo is not only to notify you of the passage of this long-awaited legislation, but also to address several issues that made its passage so challenging. The Global RBCA provisions of CS/HB 1123 are codified in s. 376.30701, Florida Statutes (F.S.), and include very specific applicability and intent language within subsection (1) of the new law (see attached). The legislation does not create any new liability for site rehabilitation at contaminated sites or discharge reporting requirements. The new law describes the RBCA process and authorizes the Department to apply it to all contaminated sites resulting from a discharge of

pollutants or hazardous substances where legal responsibility for site rehabilitation already exists pursuant to other provisions of Chapters 376 or 403, F.S. The law also establishes that a person may elect to have RBCA apply to a site at which the person is not legally responsible for cleanup (e.g., voluntary cleanup). Of significance is the Legislature's direction to the Department to apply specific criteria in overseeing or managing contaminated site cleanup. The law directs the Department to apply the following, as appropriate, in establishing the applicable cleanup target levels: calculations using a lifetime cancer risk level of $1.0E-6$; a hazard index of 1 or less; the best achievable detection limit; and nuisance, organoleptic, and aesthetic considerations. However, the department shall not require site rehabilitation to achieve a cleanup target level for any individual contaminant that is more stringent than the site-specific, naturally occurring background concentration for that contaminant. Finally, we will have statewide consistency in the approach we take to cleaning up contaminated sites. We now also have the authority to exercise the flexibility that RBCA provides by using alternative cleanup target levels for groundwater and soil combined with engineering and/or institutional controls to achieve a cleanup that protects human health and the environment.

The law states that it shall apply retroactively to all existing contaminated sites; however, it also includes a grandfathering provision. If the Department has accepted proposed CTL's (sometimes called "Site Rehabilitation Levels" or SRL's) in an approved technical document, current permit, or other written agreement, then the person responsible for conducting site rehabilitation can choose to continue to clean up the site to those CTL's pursuant to the existing agreement; and Chapters 62-780 and 62-777, F.A.C., will not apply. Examples of approved technical documents include Remedial Action Plans, Risk Assessments, and Natural Attenuation with Monitoring Plans. The phrase "current permit" is referring to a permit associated with contaminated site cleanup, such as a HSWA corrective action permit. Examples of written agreements include Consent Orders and Voluntary Cleanup Agreements. The person responsible may choose, however, to forgo the grandfathering option and instead elect to have the new law and rule apply to the site in order to gain the flexibility that RBCA offers, including the possibility of using ACTL's and engineering and/or institutional controls, where appropriate. However, with this election, any existing written agreement must be amended.

The law also grandfathers sites that have received a "No Further Action" or "Site Rehabilitation Completion Order" (NFA/SRSCO). If an NFA/SRSCO has been issued for a "contaminated site" (statutorily defined as a contiguous area of contamination), then presumably the contamination addressed by the order was cleaned up to the satisfaction of the Department pursuant to the laws, rules, and guidance in effect at

the time. Such contaminated sites may be subject to specific reopener language contained in the NFA/SRSCO itself. If such a contaminated site is reopened, then the responsible party would have to choose to resume cleanup pursuant to any previously executed written agreement (e.g., a Consent Order) or opt into Global RBCA.

When issuing NFA/SRSCO's, it is important that these documents be worded carefully so that the context of the Department's action is clear. The terms "contaminated site", "site", "property" and "parcel" should not be used interchangeably. The NFA/SRSCO should specifically reference the "contaminated site" (i.e., the area of the contiguous contamination) being closed, which may or may not comprise an entire parcel.

Contaminated sites should not be reopened simply because the CTL's in Chapter 62-777, F.A.C., are different from those in effect at the time the NFA/SRSCO was issued. However, market forces such as third-party liability concerns or requirements of lending institutions may cause a responsible party to voluntarily reopen a site and conduct further cleanup.

The passage of Global RBCA did not create any new authority to reopen old contaminated sites. If, however, contamination is discovered on the same real property or parcel as the original contaminated site and it is the result of a new discharge or previously undiscovered contamination from an old discharge (i.e., separate and distinct from the first contaminant plume that had received the NFA/SRSCO), then this should be treated as a new case – a new contaminated site. The Districts should continue to exercise their enforcement discretion, just as they have in the past, to decide whether the potential threat to human health and the environment posed by the new discovery warrants enforcement action. Also, specific reopener language in the Consent Order may govern these cases; therefore, such a written agreement should be reviewed prior to initiating a new enforcement action at one of these sites. If the District establishes that a new contaminated site resulted from a discharge of pollutants or hazardous substances where legal responsibility for site rehabilitation exists pursuant to other provisions of Chapters 376 or 403, F.S., then the District can require site rehabilitation in accordance with the criteria in s. 376.30701, F.S. and, once adopted, Chapter 62-780, F.A.C.

The Department was not seeking, through the adoption of the Global RBCA legislation, any new or additional authority to require cleanup. The Department already has authority to require cleanup of contaminated air, water, and soil. A guidance memo was issued on November 20, 2001, about the Department's authority to require cleanup of contaminated soils (See

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http://www.dep.state.fl.us/waste/quick_topics/publications/documents/Guidance_Soils_Contamination.pdf). Accordingly, you should continue to cite existing provisions of Chapters 376 or 403, F.S., as authority to require site rehabilitation, rather than citing the newly created s. 376.30701, F.S., which merely describes the cleanup process that applies once liability has been established.

During the past several years' legislative sessions, one concern of the regulated community was that the Department was seeking new or additional authority to regulate soils and that Department inspectors would become "soil cops" requiring cleanups based on random soil samples. That was not the intent of the Department or the legislature. The passage of Global RBCA did not create soil quality standards similar to our state water quality standards for surface water and groundwater. The legislation did create the authority for the Department to apply specific criteria (listed on page two above) in overseeing or managing contaminated site cleanup. One expression of this authority is the use of the default CTL's in Chapter 62-777, F.A.C., for both water and soil that will now be applicable to cleanups being conducted at all contaminated sites in Florida (except where a grandfathering scenario exists, or where the person conducting cleanup is not legally liable pursuant to Chapters 376 or 403 and has not opted into RBCA).

Implementation of Global RBCA should be relatively smooth since we have been using RBCA at the majority of contaminated sites in the state for the past seven years. However, if you have any questions, please feel free to call Doug Jones at 850/245-8927.

JMR/Imd

cc: Allan Bedwell
Dotty Diltz
Doug Jones
Bill Hinkley
Mike Ashe
Lisa Duchene
Roger Register
Jack Chisolm
Larry Morgan

House Bill No. 1123

An act relating to site rehabilitation of contaminated sites; creating s. 376.30701, F.S.; extending application of risk-based corrective action principles to all contaminated sites resulting from a discharge of pollutants or hazardous substances; providing for contamination cleanup criteria that incorporate risk-based corrective action principles to be adopted by rule; providing clarification that cleanup criteria do not apply to offsite relocation or treatment; providing the conditions under which further rehabilitation may be required; amending s. 199.1055, F.S.; clarifying who may apply for tax credits; clarifying time period for use of tax credits; amending s. 220.1845, F.S.; clarifying who may apply for tax credits; clarifying time period for use of tax credits; allowing tax credit applicants to claim credit on a consolidated return up to the amount of the consolidated group's tax liability; amending s. 376.30781, F.S.; clarifying who may apply for tax credits; converting tax credit application time period to calendar year; moving application deadline to January 15; clarifying that placeholder applications are prohibited; amending s. 403.087, F.S.; limiting a hazardous waste corrective action permit fee; amending s. 403.722, F.S.; requiring a corrective action permit for certain actions affecting a hazardous waste disposal facility; conforming references governing transferability of tax credits; eliminating outdated language; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 376.30701, Florida Statutes, is created to read:

376.30701 Application of risk-based corrective action principles to contaminated sites; applicability; legislative intent; rulemaking authority; contamination cleanup criteria; limitations; reopeners.—

(1) APPLICABILITY.—

(a) This section shall not create or establish any new liability for site rehabilitation at contaminated sites. This section is intended to describe a risk-based corrective action process to be applied at sites where legal responsibility for site rehabilitation exists pursuant to other provisions of this chapter or chapter 403. An exceedance of any cleanup target level derived from the cleanup criteria established in subsection (2) shall not, at sites where legal responsibility for site rehabilitation does not exist pursuant to other provisions of this chapter or chapter 403, create liability for site rehabilitation. This section may also apply to other contaminated sites at which a person conducting site rehabilitation elects to have it apply, even where such person does not have legal responsibility for site rehabilitation pursuant to this chapter or chapter 403. This section and any rules adopted pursuant thereto, including the cleanup criteria described in subsection (2), shall not create additional authority to prohibit or limit the legal placement of materials or products on land.

(b) This section shall apply to all contaminated sites resulting from a discharge of pollutants or hazardous substances where legal responsibility for site rehabilitation exists pursuant to other provisions of this chapter or chapter 403, except for those contaminated sites subject to the risk-based corrective action cleanup criteria established for the petroleum, brownfields, and drycleaning programs pursuant to ss. 376.3071, 376.81, and 376.3078, respectively.

(c) This section shall apply to a variety of site rehabilitation scenarios including, but not limited to, site rehabilitation conducted voluntarily, site rehabilitation conducted pursuant to the department's enforcement authority, or site rehabilitation conducted as a state-managed cleanup by the department.

(d) This section, and any rules adopted pursuant thereto, shall apply retroactively to all existing contaminated sites where legal responsibility for site rehabilitation exists pursuant to other provisions of this chapter or chapter 403, except those sites for which cleanup target levels have been accepted by the department in an approved technical document, current permit, or other written agreement and except at those sites that have received a "No Further Action" order or a "Site Rehabilitation Completion" order from the department. However, the person responsible for site rehabilitation can elect to have the provisions of this section, including cleanup target levels established pursuant thereto, apply in lieu of those in an approved technical document, current permit, or other written agreement.

(e) Nothing in this section shall be construed to prohibit or delay actions to respond to a discharge of pollutants or hazardous substances prior to any contact with the department. The risk-based corrective action process contemplates appropriate emergency response action or initial remedial action prior to any formal application of the risk-based corrective action process involving site assessment and, if required, subsequent remedial action. Any emergency response actions or initial remedial actions must be conducted in accordance with all applicable federal, state, and local laws and regulations.

(2) INTENT; RULEMAKING AUTHORITY; CLEANUP CRITERIA.—It is the intent of the Legislature to protect the health of all people under actual circumstances of exposure. By July 1, 2004, the secretary of the department shall establish criteria by rule for the purpose of determining, on a site-specific basis, the rehabilitation program tasks that comprise a site rehabilitation program, including a voluntary site rehabilitation program, and the level at which a rehabilitation program task and a site rehabilitation program may be deemed completed. In establishing these rules, the department shall apply, to the maximum extent feasible, a risk-based corrective action process to achieve protection of human health and safety and the environment in a cost-effective manner based on the principles set forth in this subsection. These rules shall prescribe a phased risk-based corrective action process that is iterative and that tailors site rehabilitation tasks to site-specific conditions and risks. The department and the person responsible for site rehabilitation are encouraged to establish decision points at which risk management decisions will be made. The department shall pro-

vide an early decision, when requested, regarding applicable exposure factors and a risk management approach based on the current and future land use at the site. These rules shall also include protocols for the use of natural attenuation, the use of institutional and engineering controls, and the issuance of "No Further Action" orders. The criteria for determining what constitutes a rehabilitation program task or completion of a site rehabilitation program task or site rehabilitation program, including a voluntary site rehabilitation program, must:

(a) Consider the current exposure and potential risk of exposure to humans and the environment, including multiple pathways of exposure. The physical, chemical, and biological characteristics of each contaminant must be considered in order to determine the feasibility of a risk-based corrective action assessment.

(b) Establish the point of compliance at the source of the contamination. However, the department is authorized to temporarily move the point of compliance to the boundary of the property, or to the edge of the plume when the plume is within the property boundary, while cleanup, including cleanup through natural attenuation processes in conjunction with appropriate monitoring, is proceeding. The department also is authorized, pursuant to criteria provided in this section, to temporarily extend the point of compliance beyond the property boundary with appropriate monitoring, if such extension is needed to facilitate natural attenuation or to address the current conditions of the plume, provided human health, public safety, and the environment are protected. When temporarily extending the point of compliance beyond the property boundary, it cannot be extended further than the lateral extent of the plume, if known, at the time of execution of a cleanup agreement, if required, or the lateral extent of the plume as defined at the time of site assessment. Temporary extension of the point of compliance beyond the property boundary, as provided in this paragraph, must include actual notice by the person responsible for site rehabilitation to local governments and the owners of any property into which the point of compliance is allowed to extend and constructive notice to residents and business tenants of the property into which the point of compliance is allowed to extend. Persons receiving notice pursuant to this paragraph shall have the opportunity to comment within 30 days after receipt of the notice. Additional notice concerning the status of natural attenuation processes shall be similarly provided to persons receiving notice pursuant to this paragraph every 5 years.

(c) Ensure that the site-specific cleanup goal is that all contaminated sites being cleaned up pursuant to this section ultimately achieve the applicable cleanup target levels provided in this subsection. In the circumstances provided in this subsection, and after constructive notice and opportunity to comment within 30 days after receipt of the notice to local government, owners of any property into which the point of compliance is allowed to extend, and residents of any property into which the point of compliance is allowed to extend, the department may allow concentrations of contaminants to temporarily exceed the applicable cleanup target levels while cleanup, including cleanup through natural attenuation processes in con-

junction with appropriate monitoring, is proceeding, if human health, public safety, and the environment are protected.

(d) Allow the use of institutional or engineering controls at contaminated sites being cleaned up pursuant to this section, where appropriate, to eliminate or control the potential exposure to contaminants of humans or the environment. The use of controls must be preapproved by the department and only after constructive notice and opportunity to comment within 30 days after receipt of notice is provided to local governments, owners of any property into which the point of compliance is allowed to extend, and residents on any property into which the point of compliance is allowed to extend. When institutional or engineering controls are implemented to control exposure, the removal of the controls must have prior department approval and must be accompanied by the resumption of active cleanup, or other approved controls, unless cleanup target levels under this section have been achieved.

(e) Consider the additive effects of contaminants. The synergistic and antagonistic effects shall also be considered when the scientific data become available.

(f) Take into consideration individual site characteristics, which shall include, but not be limited to, the current and projected use of the affected groundwater and surface water in the vicinity of the site, current and projected land uses of the area affected by the contamination, the exposed population, the degree and extent of contamination, the rate of contaminant migration, the apparent or potential rate of contaminant degradation through natural attenuation processes, the location of the plume, and the potential for further migration in relation to site property boundaries.

(g) Apply state water quality standards as follows:

1. Cleanup target levels for each contaminant found in groundwater shall be the applicable state water quality standards. Where such standards do not exist, the cleanup target levels for groundwater shall be based on the minimum criteria specified in department rule. The department shall apply the following, as appropriate, in establishing the applicable cleanup target levels: calculations using a lifetime cancer risk level of 1.0E-6; a hazard index of 1 or less; the best achievable detection limit; and nuisance, organoleptic, and aesthetic considerations. However, the department shall not require site rehabilitation to achieve a cleanup target level for any individual contaminant that is more stringent than the site-specific, naturally occurring background concentration for that contaminant.

2. Where surface waters are exposed to contaminated groundwater, the cleanup target levels for the contaminants shall be based on the more protective of the groundwater or surface water standards as established by department rule. The point of measuring compliance with the surface water standards shall be in the groundwater immediately adjacent to the surface water body.

3. Using risk-based corrective action principles, the department shall approve alternative cleanup target levels in conjunction with institutional

and engineering controls, if needed, based upon an applicant's demonstration, using site-specific data, modeling results, risk assessment studies, risk reduction techniques, or a combination thereof, that human health, public safety, and the environment are protected to the same degree as provided in subparagraphs 1. and 2. Where a state water quality standard is applicable, a deviation may not result in the application of cleanup target levels more stringent than the standard. In determining whether it is appropriate to establish alternative cleanup target levels at a site, the department must consider the effectiveness of source removal, if any, that has been completed at the site and the practical likelihood of the use of low yield or poor quality groundwater, the use of groundwater near marine surface water bodies, the current and projected use of the affected groundwater in the vicinity of the site, or the use of groundwater in the immediate vicinity of the contaminated area, where it has been demonstrated that the groundwater contamination is not migrating away from such localized source, provided human health, public safety, and the environment are protected. Groundwater resource protection remains the ultimate goal of cleanup, particularly in light of the state's continued growth and consequent demands for drinking water resources. The Legislature recognizes the need for a protective yet flexible cleanup approach that risk-based corrective action provides. Only where it is appropriate on a site-specific basis, using the criteria in this paragraph and careful evaluation by the department, shall proposed alternative cleanup target levels be approved.

(h) Provide for the department to issue a "No Further Action" order, with conditions, including, but not limited to, the use of institutional or engineering controls where appropriate, when alternative cleanup target levels established pursuant to subparagraph (g)3. have been achieved or when the person responsible for site rehabilitation can demonstrate that the cleanup target level is unachievable with the use of available technologies. Prior to issuing such an order, the department shall consider the feasibility of an alternative site rehabilitation technology at the contaminated site.

(i) Establish appropriate cleanup target levels for soils. Although there are existing state water quality standards, there are no existing state soil quality standards. The Legislature does not intend, through the adoption of this section, to create such soil quality standards. The specific rulemaking authority granted pursuant to this section merely authorizes the department to establish appropriate soil cleanup target levels. These soil cleanup target levels shall be applicable at sites only after a determination as to legal responsibility for site rehabilitation has been made pursuant to other provisions of this chapter or chapter 403.

1. In establishing soil cleanup target levels for human exposure to each contaminant found in soils from the land surface to 2 feet below land surface, the department shall apply the following, as appropriate: calculations using a lifetime cancer risk level of 1.0E-6; a hazard index of 1 or less; and the best achievable detection limit. However, the department shall not require site rehabilitation to achieve a cleanup target level for an individual contaminant that is more stringent than the site-specific, naturally occurring background concentration for that contaminant. Institutional controls or other methods shall be used to prevent human exposure to contaminated soils

more than 2 feet below the land surface. Any removal of such institutional controls shall require such contaminated soils to be remediated.

2. Leachability-based soil cleanup target levels shall be based on protection of the groundwater cleanup target levels or the alternate cleanup target levels for groundwater established pursuant to this paragraph, as appropriate. Source removal and other cost-effective alternatives that are technologically feasible shall be considered in achieving the leachability soil cleanup target levels established by the department. The leachability goals shall not be applicable if the department determines, based upon individual site characteristics, and in conjunction with institutional and engineering controls, if needed, that contaminants will not leach into the groundwater at levels that pose a threat to human health, public safety, and the environment.

3. Using risk-based corrective action principles, the department shall approve alternative cleanup target levels in conjunction with institutional and engineering controls, if needed, based upon an applicant's demonstration, using site-specific data, modeling results, risk assessment studies, risk reduction techniques, or a combination thereof, that human health, public safety, and the environment are protected to the same degree as provided in subparagraphs 1. and 2.

The department shall require source removal as a risk reduction measure if warranted and cost-effective. Once source removal at a site is complete, the department shall reevaluate the site to determine the degree of active cleanup needed to continue. Further, the department shall determine if the reevaluated site qualifies for monitoring only or if no further action is required to rehabilitate the site. If additional site rehabilitation is necessary to reach "No Further Action" status, the department is encouraged to utilize natural attenuation and monitoring where site conditions warrant.

(3) LIMITATIONS.—The cleanup criteria established pursuant to this section govern only site rehabilitation activities occurring at the contaminated site. Removal of contaminated media from a site for offsite relocation or treatment must be in accordance with all applicable federal, state, and local laws and regulations.

(4) REOPENERS.—Upon completion of site rehabilitation in compliance with subsection (2), additional site rehabilitation is not required unless it is demonstrated that:

(a) Fraud was committed in demonstrating site conditions or completion of site rehabilitation;

(b) New information confirms the existence of an area of previously unknown contamination which exceeds the site-specific rehabilitation levels established in accordance with subsection (2), or which otherwise poses the threat of real and substantial harm to public health, safety, or the environment;

(c) The remediation efforts failed to achieve the site rehabilitation criteria established under this section;

(d) The level of risk is increased beyond the acceptable risk established under subsection (2) due to substantial changes in exposure conditions, such as a change in land use from nonresidential to residential use. Any person who changes the land use of the site, thereby causing the level of risk to increase beyond the acceptable risk level, may be required by the department to undertake additional remediation measures to ensure that human health, public safety, and the environment are protected consistent with this section; or

(e) A new discharge of pollutants or hazardous substances occurs at the site subsequent to the issuance of a "No Further Action" order or a "Site Rehabilitation Completion" order associated with the original contamination being addressed pursuant to this section.