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REPORT ON  
HAZARDOUS WASTE ENFORCEMENT AT  
FLORIDA'S, DEPARTMENT OF ENVIRONMENTAL PROTECTION

January 2016

The release of hazardous pollutants can cause significant harm to the environment as well as to the health, safety and welfare of the public if not closely monitored and regulated by governmental agencies. And over the course of the past few years, particularly since Governor Rick Scott came to power, the Florida, Department of Environmental Protection has been telling the public that it is an agency that is worthy of being trusted with the responsibility of protecting the public and the environment from the harmful effects of inherent with the misuse of these pollutants. But given the continuously declining numbers of hazardous waste enforcement cases that we have been seeing since 2011 we felt it appropriate to take a deeper look into the program that oversees the use of these pollutants. It is hoped that through this the public will have a better understanding of how well they and their environment are protected in Florida by the agency and their Governor.

At the federal level the monitoring and regulation of these pollutants is governed by the Resource Conservation and Recovery Act (RCRA) of 1976.<sup>1</sup> The United States Environmental Protection Agency (EPA) is charged under RCRA with the responsibility of enforcing the body of regulations that have been adopted to enforce RCRA.<sup>2</sup> Therefore, any discussion of this issue must necessarily begin with RCRA and the EPA.

### **RCRA Regulation**

The first question to consider is how to define a hazardous waste. In its training for EPA inspectors, the EPA points out that RCRA defines hazardous wastes:

“RCRA §1004(5) defines hazardous waste as:

A solid waste, or combination of solid waste, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may (a) cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (b) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.”

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<sup>1</sup> 42 U.S.C. §6901 et seq. (1976)

<sup>2</sup> <http://www2.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act>

*Introduction to Hazardous Waste Identification (40 CFR Parts 261)*, page 3<sup>3</sup> EPA further points out in its training that RCRA categorizes hazardous wastes as having at least one of four properties: ignitability, corrosivity, reactivity and/or toxicity. Supra @ 13. See also, 40 CFR, § 261.20. The bottom line is that these types of solid wastes are so destructive that the failure to properly handle or dispose of them will cause significant harm to the environment or human health.

In determining compliance with RCRA requirements the law defines facilities that handle hazardous waste according to the amount of such waste that they handle. The categories are as follows:

- Large Quantity Generators (LQG) that handle in excess of 2,200 lbs. of such waste or an excess of 2.2 lbs. of acute waste or an excess of 100 kg of residue or contaminated soil from cleanup of acute hazardous waste spill;
- Small Quantity Generators (SQG) that handle between 100-1,000 kg/month (approximately 220-2200 lbs) of hazardous waste; or
- Conditionally Exempt Small Quantity Generators (CESQG) that handle less than 100 kg/month of hazardous waste, less than 1 kg of acute hazardous waste or less than of 100 kg of residue or contaminated soil from cleanup of acute hazardous waste spill.<sup>4</sup>

See, EPA's *Introduction to Generators (40 CFR Part 262)* (September 2005), page 4.<sup>5</sup> Not surprisingly, the facilities that handle larger volumes of hazardous waste are subject to more rigorous requirements. Supra.

In addition, EPA has issued copious amounts of guidance on how to handle RCRA enforcement. That guidance includes how to determine whether or not a RCRA facility is significantly out of compliance (or SNC). This is an important concept because more rigorous oversight and penalty determinations typically are given to such facilities. In a 2003 EPA document titled "*Civil Enforcement Response Policy*" the agency stated that:

- A. "Classifications of Non-Compliance: Violators are classified based on an analysis of their overall compliance with RCRA that includes prior recalcitrant behavior or a history of non-

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<sup>3</sup> <http://www2.epa.gov/sites/production/files/2015-09/documents/hwid05.pdf>

<sup>5</sup> <http://www2.epa.gov/sites/production/files/2014-12/documents/gen05.pdf>

compliance. This ERP establishes two categories of violators: Significant Non-Compliers (SNCs) and Secondary Violators (SV).

1. Significant Non-Compliers (SNCs) are those violators<sup>2</sup> that have caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement or from RCRA statutory or regulatory requirements. In evaluating whether there has been actual or likely exposure to hazardous waste or hazardous waste constituents, EPA and States should consider both environmental and human health concerns. Environmental impact or a substantial likelihood of impact alone is sufficient to cause a violator to be a SNC, particularly when the environmental media affected requires special protection (e.g., wetlands or underground sources of drinking water). Additionally, when deciding whether a violator meets this criterion, EPA and States should consider the potential exposure of workers to hazardous waste or hazardous waste constituents. Many of RCRA's hazardous waste requirements are designed to protect the individuals who work with or near hazardous waste. Therefore, the protection of these workers should be valued as highly as the protection of the general public.

Under this criterion, EPA or the State need not identify significant damage to the environment or human health to justify a SNC classification.

Rather, the mere fact of exposure or a substantial likelihood of exposure is sufficient to satisfy this criterion. Additionally, even in situations involving a minor release, the type of hazardous waste involved (e.g., mobility, exposure to air) or the location of the release (e.g., located in a populated area or in a building to which the public has access) may lead EPA or the State to conclude that this criterion has been met.

Fn 2: Violators are “persons” within the meaning of RCRA § 1004(15).”

See, *HAZARDOUS WASTE CIVIL ENFORCEMENT RESPONSE POLICY*, December 2003, page 4<sup>6</sup> (Emphasis added) In addition, the guidance states that “[a] SNC should be addressed through formal enforcement.” See, fn 6, at 9, *supra*.

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<sup>6</sup> <http://www2.epa.gov/sites/production/files/documents/finalerp1203.pdf>

While RCRA is a federal law, EPA has delegated much of its responsibilities under RCRA to the individual states. In Florida, those responsibilities were delegated by the EPA to Florida's, Department of Environmental Protection (FDEP) via a Performance Partnership Agreement, the most recent being executed on September 30, 2014.<sup>7</sup> The FDEP, in exchange for accepting these responsibilities, receives federal grant money to assist in the process. In 2015 alone the FDEP sought over \$ 5 million from the EPA in order to administer the program, with \$ 2.8 million being earmarked for compliance/enforcement operations.<sup>8</sup> Thus, the enforcement of these critical laws is primarily entrusted to the FDEP in exchange for which it receives significant taxpayer dollars.

For its part, in order to fully administer the federal program the FDEP has adopted numerous state regulations that essentially incorporate the federal requirements, i.e. the FDEP has taken the position that the federal requirements are part of Florida's regulatory requirements. Those requirements are found in § 62-730 of the Florida Administrative Code (F.A.C.) as well as being scattered throughout other sections of Chapter 62 of the F.A.C.

### **Enforcement and Compliance in the New FDEP**

Since Governor Rick Scott took office in January 2011 his administration has made no secret of its desire to curb environmental enforcement at Florida's Department of Environmental Protection (FDEP or Department). This attitude has now permeated the agency to the point that none of the FDEP District Offices even list an enforcement section on their individual webpages. Scott's first FDEP Secretary, Herschel Vinyard, clearly supported the idea, which was not surprising given his previous employment in the regulated industry.

The hazardous waste program, like the other programs that FDEP oversees, has taken serious hits in enforcement. It may be recalled that when the previous administration took office it announced a harsher enforcement approach, particularly in hazardous waste cases. And while we found problems with the policy (and correctly predicted it would not yield the results that were promised)<sup>9</sup> the fact is that during the first year of the Crist administration there were 215

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[http://www.dep.state.fl.us/waste/quick\\_topics/publications/shw/HWRRegulation/PerformancePartnershipAgreement\\_2015-2017.pdf](http://www.dep.state.fl.us/waste/quick_topics/publications/shw/HWRRegulation/PerformancePartnershipAgreement_2015-2017.pdf)

<sup>8</sup> [http://www.dep.state.fl.us/waste/quick\\_topics/publications/shw/HWRRegulation/FFY2015WorkPlan.pdf](http://www.dep.state.fl.us/waste/quick_topics/publications/shw/HWRRegulation/FFY2015WorkPlan.pdf)

<sup>9</sup> <http://www.peer.org/news/news-releases/2007/08/14/tough-new-florida-pollution-penalties-not-so-tough-after-all/>

enforcement cases in the hazardous waste program<sup>10</sup> compared to just 21 in 2014 (See, fn 9). As we noted in our latest report on the state of enforcement in 2014 at FDEP, the hazardous waste program has seen an 82% decline in the number of enforcement cases just since 2011.<sup>11</sup> The number of hazardous waste assessments has dropped 80% since 2010, see, fn 14 @ 41, supra— and even though there was an increase in dollar assessments in 2014, these levels are still 91% lower than in 2010, supra @ 42.

Former Secretary Vinyard and his managers no doubt knew that the public and the press would not sit idly by and watch the state’s largest environmental agency give polluters a free pass to violate Florida’s environmental laws. Consequently, they embarked upon a strategy that claimed that compliance was reaching all-time highs under the new FDEP leadership. Facilities that were not in compliance would be offered “compliance assistance.”

The compliance assistance strategy was formally initiated with a November 16, 2011, memo from Deputy Secretary Littlejohn to his regulatory directors.<sup>12</sup> Less than a year later Littlejohn was touting alleged significant results in an op-ed entitled “Compliance can protect environment” that he wrote for the *Tallahassee Democrat* in July 2012.<sup>13</sup> This op-ed specifically noted that hazardous waste non-compliance rates had dropped from an alleged 10% to just 2% under the new administration. When Florida PEER asked for the public records that supported his claims the agency was unable to produce anything other than a small spreadsheet that had been created after the article was written and that did not provide sufficient details to support the claim.<sup>14</sup> Nevertheless, the agency has continued to argue that compliance with environmental regulations is climbing to all-time highs since using the new approach.<sup>15</sup> During the last press release on this subject in March 2014 (see, footnote 9) the FDEP made two interesting statements. First, it claimed that compliance across all programs is now at an all-time high of 96% and that the remaining 4% of facilities were significantly out of compliance. As noted above, the term, “significant non-compliance” is commonly used in the regulatory field to denote

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<sup>10</sup> [http://www.peer.org/assets/docs/fl/08\\_16\\_6\\_flpeer\\_2007\\_enforcement\\_rpt.pdf](http://www.peer.org/assets/docs/fl/08_16_6_flpeer_2007_enforcement_rpt.pdf)

<sup>11</sup> See, *Report on Enforcement Efforts by the Florida, Department of Environmental Protection, Calendar Year 2014*, Page 22.

<sup>12</sup> [http://www.peer.org/assets/docs/fl/6\\_19\\_12\\_Littlejohn\\_memo\\_Re\\_Compliance-Enforcement.pdf](http://www.peer.org/assets/docs/fl/6_19_12_Littlejohn_memo_Re_Compliance-Enforcement.pdf)

<sup>13</sup> [http://www.peer.org/assets/docs/fl/9\\_19\\_12\\_Jeff\\_Littlejohn\\_Compliance\\_can\\_protect\\_environment.pdf](http://www.peer.org/assets/docs/fl/9_19_12_Jeff_Littlejohn_Compliance_can_protect_environment.pdf)

<sup>14</sup> <http://www.peer.org/news/news-releases/2012/09/19/florida-begins-dismantling-already-anemic-eco-program/>

<sup>15</sup> <http://content.govdelivery.com/accounts/FLDEP/bulletins/ad8180>

a facility that is chronically out of compliance, often for months. But the FDEP also stated that it now defines “significant compliance” as:

“Significant compliance is defined as facilities in full compliance and facilities that have minor violations that present no environmental harm, such as tardy or missing paperwork. The Department regulates roughly 75,000 facilities statewide.”

(See, footnote 9) The assertion that poor paperwork submission does not qualify a facility for SNC status is interesting. Not only is it usually a permit violation, but logically, if the Department doesn’t have the required paperwork that demonstrates the nature of discharges it cannot be said that the Department knows whether or not the offending facility is otherwise in compliance. Consider also that the Department has not inspected all 75,000 facilities that it claims it permits. This means that the Department does not actually know the compliance status of all of its permitted facilities—making the Department’s claim of rising compliance rates is specious at best.

Since the Department doesn’t have enough personnel to inspect all 75,000 facilities that it permits the submission of accurate, timely paperwork by each facility is all the more important. Yet, the Department’s current policy is one that tells the regulated community that reporting is unessential.<sup>16</sup> The long-term consequences to such a myopic policy are likely to lead to more lax reporting by facilities thus making accurate assessments of overall environmental compliance even more difficult on a statewide basis.

### **Examples of RCRA Enforcement at the FDEP**

With the above considerations in mind we reviewed a selection of hazardous waste files that are available on the FDEP’s website known as Oculus.<sup>17</sup> What we found were repeated instances in which facilities were found to have been violating various RCRA regulations, yet there was no enforcement being taken against them even though the violations were of a nature that called for thousands of dollars in fines along with more aggressive monitoring of the facilities themselves. In order to ensure that enforcement is avoided the Department has now put in place a system in which the inspectors (a/k/a environmental specialists) report finding

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<sup>16</sup> It also ignores the FDEP’s own actions in reporting to EPA when facilities are not reporting in a timely manner and thus not considered to be in compliance.

<sup>17</sup> <http://depdms.dep.state.fl.us/Oculus/servlet/login>

violations to managers whose job it is to work with the facility directly, or to give orders to the inspectors to correct the violations thereby justifying, in the Department's mind, closing the case without enforcement. It is these latter individuals who appear to hold the authority to prevent enforcement, regardless of the recommendations made by the inspectors who were actually at the site and conducted the investigations.

In the event that the Department decides to take enforcement the personnel are guided by a policy memo known as Civil Penalty Directive 923 (DEP 923). This Directive is amended from time to time, frequently after a change in administrations. The most current Directive is found at [http://www.dep.state.fl.us/legal/penalty/files/dep\\_923\\_civil\\_penalty\\_directive.pdf](http://www.dep.state.fl.us/legal/penalty/files/dep_923_civil_penalty_directive.pdf). If civil penalties are to be assessed the inspectors first need to characterize each violation. Once characterized the inspector then applies a civil penalty that is deemed appropriate by the guidelines. Various factors apply to the overall civil penalty assessment, some of which are the extent to which the polluter exercised bad or good faith in the process, whether or not there was a past history of non-compliance, whether or not an economic benefit was derived from the violation(s) and whether or not the violations occurred on multiple days.<sup>18</sup> The guidelines for hazardous waste violations are found at [http://www.dep.state.fl.us/legal/Enforcement/appendix/guidelines/Hazardous\\_Waste.pdf](http://www.dep.state.fl.us/legal/Enforcement/appendix/guidelines/Hazardous_Waste.pdf) and were amended under former Secretary Vinyard. All of this is supposed to be conducted in a manner that satisfies § 403.727, Fla. Stat.,<sup>19</sup> and § 403.161(6), Fla. Stat., which states that “[i]t is **the legislative intent that the civil penalties and criminal fines imposed by the court be of such amount as to ensure immediate and continued compliance with this section.**” (Emphasis added)

Whenever an inspector believes that a penalty assessment is in order he or she must complete a worksheet that identifies the various violations and applies a matrix to guide the inspector in determining the overall penalty. The matrix breaks down the violations by the extent of harm caused and the extent of deviation from the relevant regulation or permit requirement.

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<sup>18</sup> § 403.161 (3), Fla. Stat., notes that a separate offense occurs each day that willful violations are committed. [http://archive.flsenate.gov/Statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=0400-0499/0403/Sections/0403.161.html](http://archive.flsenate.gov/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0400-0499/0403/Sections/0403.161.html)

<sup>19</sup> §403.727, Fla. Stat., is the primary statute setting for penalties that are applicable to hazardous waste facilities. [http://archive.flsenate.gov/Statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=0400-0499/0403/Sections/0403.727.html](http://archive.flsenate.gov/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0400-0499/0403/Sections/0403.727.html)

Once the penalty is calculated it can then be adjusted up or down based on a number of “adjustment factors” in order to arrive at a final penalty. The guidelines, matrices and adjustment factors are found in DEP 923 and every FDEP Secretary typically issues a new DEP 923 that tinkers with the penalty structure.

To his credit, Secretary Vinyard’s new DEP 923 (issued on February 14, 2013) actually increased the amount of fines that could be levied against the worst hazardous waste offenders, but at the same time they allowed for “environmental education” to be used as a penalty for more minor offenses. Equally importantly, however, Vinyard required (DEP 923, page 11) that approval from a Deputy Secretary be obtained before applying an adjustment factor seeking to increase the penalty because of increased profits or revenues derived from violating the regulations or permit requirements.<sup>20</sup> This factor, known as “economic benefit of non-compliance” is an adjustment factor that has been used by EPA for years and is one that EPA has required agencies administering RCRA to apply in cases where it can be proven.<sup>21</sup> The intent is to discourage facilities from violating the law in order to increase their profit margins. But under FDEP’s new approach, if a facility were able to double its profits by violating the law, the Department would not be able to recoup that ill-gotten gain unless a Deputy Secretary approved it. The reason for the change is not stated in DEP 923, but one can safely assume that it was not made in order to increase the number of times that the adjustment factor is applied. The bottom line is that while the penalty guidelines have been amended to allow for higher penalties in serious cases they also now prevent the Department from really punishing the facilities in those cases in which the facility’s violations resulted in increased profits.

The following cases demonstrate how the Department now handles hazardous waste violations:<sup>22</sup>

Florida Hospital—Orlando—Central District

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<sup>20</sup> Previously the District Directors had the authority to approve such adjustments.

<sup>21</sup> The EPA, on page 28, of its penalty guidelines does not list economic benefit as an adjustment factor. Rather, its policy “mandates the recapture of any significant economic benefit of noncompliance. . .” The guidelines may be found at <http://www.epa.gov/sites/production/files/documents/rcpp2003-fnl.pdf>. An while Florida’s Chapter 403, Florida Statutes, does not specifically allow recovery of economic benefit, it does not prevent the Department from using it as an adjustment factor to increase the penalty assessment up to the maximum daily amount.

<sup>22</sup> Based upon records reviewed on the FDEP’s Oculus site.

Inspections on 3 occasions at Florida Hospital revealed RCRA violations. In November 2001, 10 violations were identified for which enforcement was initiated. At this point the facility was a SQG.<sup>23</sup> A consent order was entered into and the facility was fined \$14, 863.00. The facility was again inspected in September 2006 at which time 14 violations were documented, some of which were repeated from the prior inspection. In addition, the facility had now become a LQG. Another consent order was issued a year later and the facility was fined \$68, 958.00, due in part to its now developing history of noncompliance. Three days prior to entry of that consent order in 2007 the facility wrote to EPA and self-disclosed violations in exchange for which the EPA, on September 30, 2008, elected to forego formal enforcement (and penalties).

Florida Hospital was again inspected on May 10, 2012. During this inspection 10 violations were identified, including: failure to conduct a waste determination, failure to mark a container hazardous waste with an accumulation start date, failure to dispose of hazardous waste within 90 days of accumulation, failure to ensure satellite accumulation occurs at or near the point of generation, failure to provide annual training, failure to provide complete job descriptions, failure to keep containers of hazardous waste closed, failure to provide a complete contingency plan, failure to properly manage universal waste lamps, failure to properly store universal pharmaceutical waste, and failure to submit its Biennial Report by March 1, 2012. As a result of this inspection a warning letter, which is the initial step towards the Department taking formal enforcement, was sent to the facility on July 3, 2012. This letter notified the facility that enforcement may be pursued as a result of the violations and asked the facility to contact the Department.

The inspector prepared a penalty computation worksheet along with a short-form consent order proposing that civil penalties of \$21,897 be assessed as a result of the above violations.<sup>24</sup> The documents were sent to the inspector's supervisor who apparently approved the assessment. However, a higher level manager declined to approve the penalties because they included a 75% assessment for the facility's history of non-compliance and a \$3,700 penalty for failing to submit a biennial report until the FDEP asked for it. FDEP guidelines disallow consideration of a history of non-compliance if the prior violations were more than five years old. In this case the prior violations were 6 years old, although the facility had disclosed additional violations to EPA in

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<sup>23</sup> See, definitions of SQG and LQG at page 3, supra.

<sup>24</sup> Neither document is on the FDEP Oculus website. The penalty amount is mentioned in an October 15, 2012 email questioning a supervisor's demand to reduce it.

2007 and thus was arguably eligible for the higher assessment. Regardless, the inspector was directed to revise the overall assessment, which was done, but not before a lower level manager questioned the reduction on October 15, 2012. On December 4, 2012 another senior manager, Lisa Kelley, directed staff to further lower the penalties and to remove any penalties for a history of non-compliance. Kelley stated:

“I ask that you revise the worksheet by 1) removing minor/minor violations and any others that are no longer appropriate, 2) use the low end of the matrix range for violations that should remain, and 3) remove all penalties for history of non-compliance.”

Kelley did not say what the alleged inappropriate penalties were. The “matrix” to which she referred is the Department’s penalty matrix that sets up ranges in penalty amounts for each violation. Kelley also indicated that the Department would see if the facility would agree to offsets via a penalty prevention project. This was followed the next day by a response from an environmental manager who reported to Kelley. That manager indicated that the facility had already performed a penalty prevention project in the past and that historically the Department only allowed a facility to do one such project. The manager stated that the facility should be required to “do something good for their industry.” Further, the manager stated that the penalty had already been reduced to \$5,680 and a project would further reduce that to just \$1,136.00, i.e. just 20% of the lower amount. The case then appears to have languished in the office for several months before it was unceremoniously closed on June 20, 2013 without any formal enforcement being taken. The closure memo was issued by Aaron Watkins, an environmental manager. It incorrectly states that the facility had four violations (it had 10). In support of his decision to close the file, Watkins stated:

“The Department had calculated an estimated penalty for the violations of \$5,680.00 on December 5, 2012. Subsequently penalty guidance has been revised and Directive 923 updated accordingly. Based upon retroactive application of Directive 923, penalties are no longer warranted in this case. As such, though a Consent Order was initially drafted by staff, it is no longer warranted due to lack of penalty and at this time an enforcement mechanism is not required to facilitate the products and initiatives that are expected to come from the partnership program.”

At the time that this memo was issued monthly reports from the facility showed that the facility was still not in complete compliance. Moreover, Florida Hospital facilities at Apopka, Altamonte, Celebration and Kissimmee were also out of compliance.

Bostwick Laboratories—Orlando—Central District

On June 25, 2009 the Department inspected Bostwick Laboratories and concluded that it was a SQG. The Department identified two violations (failure to properly label containers and failure to post contingency plans), but chose to call them “areas of concern” (AOC) instead of violations. The Department’s inspection cautioned that Bostwick would be considered a LQG if it stored more than 1,000 kg of hazardous waste per month. Three years later, on November 29, 2012, the facility was inspected again at which time it was found to be a LQG of hazardous waste some of which was ignitable hazardous waste.

The 2012 inspection found multiple violations at the facility. Those violations<sup>25</sup> included:

1. Failure to conduct a proper waste determination
2. Exceeding limit of stored hazardous waste
3. Failure to properly mark hazardous waste containers
4. Failure to retain copies of manifests
5. Failure to conduct proper classroom instruction in handling of hazardous waste
6. Failure to have documents identifying persons trained in hazardous waste handling and their job descriptions
7. Storing incompatible wastes in same container
8. Failure to keep hazardous waste containers closed during storage
9. Failure to properly document inspections of hazardous waste accumulation
10. Failure to store ignitable hazardous waste further than 50 feet from the property line
11. Failure to provide an alarm, emergency communication device, or voice contact with another employee at the hazardous waste storage area
12. Failure to create a contingency plan to be followed in the event of a hazardous waste emergency
13. Failure to maintain a contingency plan on-site to be followed in the event of a hazardous waste emergency
14. Failure to make arrangements with local authorities of the procedures to follow in the event of a hazardous waste emergency

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<sup>25</sup> This time the violations were actually labeled as violations, in contrast to the inspection in 2009 in which two of the same violations were only marked as AOCs.

The Department's response to this situation was telling. The violations were serious. They included combining and storing incompatible hazardous wastes and improper storage of ignitable hazardous wastes. The Department's inspectors had also noted that the facility was in significant non-compliance. Yet, despite this situation a warning letter (the first step in formal enforcement) was not submitted for approval until January 23, 2013, almost 2 months later. But even then nothing was decided until 6 days later when Lisa Kelley wrote to the inspector and denied the request to send a warning letter. Kelley's alternative was to send a compliance assistance offer. Kelley's reasoning was that the site inspection had occurred more than 8 weeks prior to the suggested enforcement action! Then, when personnel asked for the document(s) that supported the decision she stated:

“Janine, Thanks for asking but the decision was not based on any specific document. The decision to send a compliance assistance offer in lieu of a warning letter is simply one that supports the mission of the Central District. I fully expect there may be questions, concerns, or maybe even uncertainty while we transition into our new structure and as we change our approach for resolving violations.”

The facility responded on March 13, 2013 by submitting documents designed to show that it had corrected the violations identified in the November 29, 2012 inspection. However, when Department personnel re-inspected the facility on April 16, 2013 the facility was still out of compliance because the contingency plan was incorrect. Also, by this time the facility had moved many of its operations to its other locations (Bostwick has multiple offices in multiple states) thus changing its Orlando status back to that of a SQG. A letter from the Department to the facility on May 6, 2013, attached a copy of the latest inspection report and thanked the facility for operating in compliance. No enforcement has been taken for the violations that were previously identified.

#### Gate Precast Company—Kissimmee—Central District

Gate Precast is a manufacturer of concrete structural panels, a process that may include what is known as acid-etching. It is currently a LQG facility. The regulatory history of this company shows that in February 2000 a former employee complained to FDEP that the company's sandblaster was leaking roughly 3 gallons of hydraulic fuel onto the ground every

day. 8 months later the FDEP inspected the facility and found other violations. There was no mention of the sandblaster, although there was mention that the forklift was new and was not leaking.

The facility was again inspected on November 9, 2010 by FDEP's industrial waste section and that section notified the FDEP's hazardous waste section that it should look into the facility. The latter section then inspected the facility on December 6, 2010. At this point the facility was a CESQG and the inspection found no violations, but the Department also was unclear about the chemicals that were being used and how the waste was "generated and managed." In March 2011 the facility responded by stating that the acid-etching process was used only infrequently and that there was no discharge to the soil or water.

On June 14, 2012 the hazardous waste section again inspected the facility after the FDEP's wastewater section asked for the inspection. By this time the facility was now a LQG facility. The inspection noted that the process from the acid-etching process discharges hazardous wastewater to the ground and ultimately to a stormwater ditch, a violation of its industrial wastewater permit. The facility was also found to be in violation of RCRA violations inasmuch as (a) it was not determining if the wastewater was hazardous, (b) it was not being maintained and operated to minimize the possibility of a "fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment," and (c) it was not in compliance with its industrial wastewater permit. The Department sent the facility a warning letter on August 22, 2012 and subsequently calculated a penalty of \$33,910.00,<sup>26</sup> but offered in a settlement agreement to offset the penalties with a penalty prevention project. Eventually the penalty was reduced to \$20,920.00 and the Department allowed the facility to offset 100% of this amount with a penalty prevention project, a move that at least one employee questioned by noting that it had not been done in the past. The facility thereupon completed the project by removing the infrastructure and components of the acid-etching solution. The file was marked closed in February 2014.

7 months later, on September 4, 2014 the facility was again inspected by FDEP. This time 13 separate violations were observed. They were:

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<sup>26</sup> Multi-day penalties were not included in the amount.

1. Failure to make hazardous waste determinations
2. Failure to determine the dates on which the hazardous waste accumulated
3. Failure to properly mark hazardous waste containers
4. Accumulating hazardous waste for more than 90 days without approval
5. Failure to submit a biennial report in 2013
6. Failure to conduct proper classroom instruction in handling of hazardous waste
7. Failure to have documents identifying persons trained in hazardous waste handling and their job descriptions
8. Failure to keep hazardous waste containers closed during storage
9. Failure to properly document inspections of hazardous waste accumulation
10. Failure to properly mark hazardous waste containers
11. Failure to comply with its industrial waste permit. The facility was illegally discharging hazardous wastewater.
12. Improper disposal of used oil filters in a landfill
13. Failure to make arrangements with local authorities of the procedures to follow in the event of a hazardous waste emergency

One of the issues surrounding this episode was the facility's discharge of waste, whether hazardous or not, in violation of its industrial wastewater permit. In an email to FDEP from the facility's engineering firm, the firm pressed FDEP to temporarily allow these unpermitted discharges until a permit modification could be accomplished. The engineer also asked for a meeting with FDEP to resolve the characteristics of its industrial waste "... since submittal of the application is very important to Gate in keeping their operations up and running." In other words the inference was that it would be too costly to abide by the hazardous waste rules, thus indicating that prior violations had been undertaken for economic benefit—something that the Department's penalty guidelines indicate should be included in penalty assessments.

While the Department eventually accepted the facility's argument that the discharged waste was not hazardous it did not mean that the violations never happened. Indeed, a peer review memo issued by the Department on January 12, 2015 sought approval for issuance of a warning letter and long-form consent order and indicated that assessments for economic benefit may need to be included. Ultimately a long-form consent order was signed on May 11, 2015 and the facility agreed to pay a penalty of \$15,640.00. But this penalty did not include multi-day penalties, apparently because the Department felt that it would be difficult to calculate them. Penalty computation worksheets also indicate that the history of non-compliance was used to increase the penalty and was calculated at 25%. The facility was not penalized for economic benefit because the Department deemed it "not appropriate at this time." This worksheet also indicates that one violation was rolled into another, thus eliminating that assessment. Except for

one, in all other areas the Department used the low end of the penalty matrix to calculate the assessment—even though the facility was a significant non-complier. The consent order also required the facility to come into full compliance, something that it was supposed to have done after the 2012 inspection.

Loomis Executive Jet Refinishing, Inc.—Okeechobee—Southeast District

According to FDEP records, the agency received a complaint on March 9, 2012 that alleged that the facility, a SQG, was improperly managing hazardous wastes. The facility uses these materials as part of its operations that strip and repaint aircraft. The Department inspected the facility 4 months later, on July 17, 2012 whereupon it identified 17 separate violations, some of which were SNC. The violations included:

1. Failure to conduct a proper waste determination
2. Failure to obtain an EPA ID number
3. Improperly disposing of hazardous waste, in this case into regular trash dumpsters
4. Failure to mark containers with the beginning date of hazardous waste accumulation
5. Failure to properly mark hazardous waste containers
6. Failure to mark and keep hazardous waste containers at satellite locations closed
7. Retention of hazardous waste beyond 180 days
8. Failure to designate an Emergency Coordinator
9. Failure to post required emergency response near at least one telephone
10. Failure to conduct proper classroom instruction in handling of hazardous waste
11. Failure to inspect hazardous waste containers at least weekly
12. Failure to document inspection of 1,000 gallon tank and sump pump
13. Improper release of hazardous waste into the environment
14. Exceeding limit of stored hazardous waste
15. Failure to keep hazardous waste containers closed during storage
16. Failure to properly document inspections of hazardous waste accumulation
17. Failure to create a contingency plan to be followed in the event of a hazardous waste emergency

It took 4 months, but on November 19, 2012 the Department issued a noncompliance letter to the facility formally advising it of the violations identified in the July inspection. The Department demanded a response within 10 days. The facility responded 7 days later and promised to correct the violations.

The Department conducted a follow-up inspection on February 13, 2013. That inspection indicates that 6 of the original violations were still present, despite the facility's assurances that it

would correct all of them. In addition, other, new, violations were observed. The list of violations found at this inspection is:

1. Failure to conduct a proper waste determination
2. Improperly disposing of hazardous waste
3. Failure to document inspection of 1,000 gallon tank and sump pump
4. Failure to mark and keep hazardous waste containers at satellite locations closed
5. Retention of hazardous waste beyond 180 days
6. Storage of hazardous waste longer than 180 without a permit
7. Failure to maintain records of test results
8. Failure to maintain container records
9. Failure to inspect hazardous waste containers at least weekly
10. Improper release of hazardous waste into the environment
11. Exceeding limit of stored hazardous waste

Once again the facility responded with promises to correct the violations and to come into compliance. But when the Department inspected the facility yet again, this time on August 19, 2013, 7 violations were identified. According to a Department email they were:

1. “Failure to provide hazardous waste determination information for paint stripper/paint chip waste (40 CFR 262.11).
2. Failure to provide personnel training to Zack Doris (40 CFR 262.34).
3. Unlabeled containers of hazardous waste (40 CFR 262.34).
4. Undated containers of hazardous waste (40 CFR 262.34).
5. Open containers of hazardous waste (40 CFR 265.173).
6. Facility exceeded the 180 day time limit for the accumulation of hazardous waste (40 CFR 262.34). No storage permit.
7. No inspection records of the hazardous waste containers and tanks were available at the time of the inspection (62-730.160 F.A.C.)”

The Department’s records on Oculus end with this inspection. There is no indication of any formal enforcement being taken to date.

#### Montco Research Products—Hollister—Northeast District

This facility is a LQG generator of specialty chemicals including chloromethyl-naphthalene (CMN), ethylbenzylchloride (EBC) and alphanaphthaldehyde (ANA). A byproduct of the process is hydrochloric acid (HCL). The facility was inspected by the Department on May 24, 1995 and found to be out of compliance due to failing to mark hazardous waste containers, failing to note the accumulation start dates on those containers, failing to keep the containers closed, failing to file proper change of status forms and failing to include hazardous waste codes on manifests.

Beginning in August 1996 the facility began conducting natural attenuation monitoring, apparently as a result of litigation filed against the facility by the Department in 1983. This monitoring was an ongoing process that was not completed until February 2009. At the conclusion of the monitoring it was determined that a remedial action plan was needed in order to address groundwater contamination. This plan was submitted to the Department and subsequently approved on February 24, 2011. Then, on July 29, 2013 the parties submitted a consent final judgment to the circuit court<sup>27</sup> in Putnam County in which Montco agreed to pay \$5,000 in costs and natural resource damages to the Department arising out of the violations.

But the violations did not stop after the 1995 inspection. Thirteen years passed before the Department inspected the facility again on April 25, 2008. The facility was again found to be out of compliance and due to the nature of the violations it was in significant non-compliance. The 6 violations included:

1. Failure to conduct a proper waste determination
2. Failure to properly mark hazardous waste containers
3. Failure to properly label satellite hazardous waste accumulation containers
4. Failure to properly manifest hazardous waste
5. Failure to clean up released vacuum pump oil waste and 3 areas of spilled materials in the Drum Storage Building
6. Failure to conduct weekly inspections of the hazardous waste containers that were retained for 90 days

As a result of this inspection a warning letter was sent to the facility on July 30, 2008 and gave the facility 15 days to respond to the issues addressed in the inspection. A penalty computation worksheet was prepared shortly thereafter and set the penalty as \$14,800.00. The facility responded by challenging the amount of the penalty. After negotiations the facility signed a short-form consent order agreeing to pay a reduced penalty of \$5,050.00.<sup>28</sup>

The Department inspected the facility again on November 27, 2012. Once again the facility was found to be in non-compliance. The violations were:

1. Failure to conduct a proper waste determination on waste absorbents contaminated with EBC that may contain benzene

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<sup>27</sup> Case No.: 83-840-CA-M, Circuit Court in and for Putnam County, Florida. The court approved the settlement on August 16, 2013.

<sup>28</sup> This lower penalty, it should be noted, was agreed upon less than a year after then-Secretary Sole had emphasized the Department's intention to take harsh enforcement, particularly in hazardous waste cases. The inspection in this case took place 12 days after Sole announced the new standards.

2. Failure to submit a tank closure plan for a tank system that was accumulating hazardous waste
3. Improper discharge of hazardous waste
4. Failure to properly label drums containing used oil
5. Failure to have proper hazardous waste codes on manifests
6. Failure to properly document inspections of hazardous waste accumulation
7. Failure to properly maintain a contingency plan to be followed in the event of a hazardous waste emergency
8. Failure to make arrangements with local authorities of the procedures to follow in the event of a hazardous waste emergency

In addition, the Department listed as “Areas of Concern” the facility’s failure to determine or document whether or not underlying hazardous constituents (UHCs) from HCL, zinc chloride and lab waste were in its land disposal. Finally, the facility’s documents indicated that its waste streams from HCL and zinc chloride were being managed as wastewater, and did not indicate whether or not the waste streams met treatment standards as required by 40 CFR 268.7 (a)(2). Both of these were violations, but the Department instead chose to characterize them as Areas of Concern.

The Department addressed the November 2012 violations on March 28, 2013, not with formal enforcement (even though the facility was in significant non-compliance) but with an offer of compliance assistance. This assistance meant that the case would be resolved by one of three things, including a simple explanation from the facility about how the facility had corrected the violations. The two other options were to either show the FDEP that the violations were not violations at all, or to allow FDEP inspectors to come to the facility to show the facility how to return to compliance. On May 30, 2013 the facility sent a response to the Department showing what it had done to correct the violations. Thus, the case was presumably dropped.

The facility’s return to compliance didn’t last long. On March 5, 2015 it was inspected again—this time by two inspectors, one from FDEP and the other from EPA. This inspection revealed 5 violations:

1. Failure to conduct a hazardous waste determination
2. Failure to maintain a facility in a manner that “. . . minimizes the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment.”
3. Failure to properly label drums containing used oil
4. Improper discharge of used oil in 2 separate locations
5. Failure to have proper hazardous waste codes on manifests

FDEP's records on Oculus do not reflect any enforcement being taken against the facility for the above violations, even though the facility is a significant non-complier.

Palm Beach Plating, Inc.—West Palm Beach—Southeast District

This company is a metal electroplater, polisher and restoration company that has been operating in West Palm Beach since approximately 1994. At that time it was operating as a SQG. It was inspected on February 10, 1998 and found to be in significant non-compliance with 8 separate violations including the failure to determine whether or not spent sand blasting material was hazardous, a violation that, in turn, allowed hazardous waste to be improperly disposed of in a landfill. A civil penalty computation worksheet was completed and shows that the penalties totaled \$53,100. It is not known whether or not they were actually assessed against the facility. It was again inspected on April 23, 1999 by both EPA and FDEP and was once again found to be in violation.

The facility was next inspected on February 7, 2012, apparently as a result of a complaint from the City of West Palm Beach, Public Utilities Department. That local agency had complained that there were numerous unlabeled and open containers that were discovered during its monthly inspection. At the time of the FDEP's February 7, 2012 inspection the facility was still a SQG, although it had failed to submit proper documentation to the Department to notify it of that current status. Several violations were identified during this inspection:

1. Manifests were filled out with an improper EPA identification number
2. Manifests were missing
3. Contingency plan information in case of emergency was not posted near a telephone
4. Failure to conduct weekly hazardous waste container inspections
5. Improper handling of mercury-containing waste lamps which were discarded in the trash.
6. Improper storage of mercury-containing waste lamps
7. Failure to provide disposal records to account for the proper disposal of wastes
8. Failure to provide documentation of duration of storage of hazardous wastes
9. Failure to properly mark hazardous waste containers
10. Failure to conduct proper classroom instruction in handling of hazardous waste
11. Failure to keep hazardous waste containers closed during storage
12. Failure to make arrangements with local authorities of the procedures to follow in the event of a hazardous waste emergency

13. Failure to notify Department that the facility is generating small quantities of hazardous waste for “at least the past six years.”

At the conclusion of the inspection the facility was provided with a notice of non-compliance and given 30 days to respond to the same. According to a later inspection on November 27, 2012, the facility claimed that it was a conditionally exempt small quantity generator (CESQG), but it was unable to provide documents substantiating its claims. There is no indication that formal enforcement was taken as a result of this inspection.

Nine months later the facility was again inspected by FDEP. This inspection on November 27, 2012, again found violations, every one of which was repeated from the prior inspection:

1. Contingency plan information in case of emergency was not posted near a telephone
2. Failure to conduct and/or document weekly hazardous waste container inspections
3. Failure to provide disposal records to account for the proper disposal of wastes
4. Failure to provide documentation of duration of storage of hazardous wastes
5. Failure to conduct proper classroom instruction in handling of hazardous waste
6. Failure to make arrangements with local authorities of the procedures to follow in the event of a hazardous waste emergency

At the conclusion of the inspection the facility was provided with a notice of non-compliance and given 14 days to respond. Yet once again, no formal enforcement was initiated.

Another 9 months passed before the Department again inspected the facility, this time on August 21, 2013, and this time accompanied by the EPA. The FDEP inspector was not the same inspector either. Violations were found:

1. Failure to conduct a proper waste determination
2. Failure to mark containers with the beginning date of hazardous waste accumulation
3. Failure to properly mark hazardous waste containers
4. Failure to keep hazardous waste containers at satellite locations closed
5. Retention of hazardous waste beyond 180 days
6. Failure to post required emergency response near at least one telephone
7. Failure to inspect hazardous waste containers at least weekly
8. Storage of incompatible wastes and materials without separation or protection
9. Inadequate aisle space to allow for full inspection of containers and labels

The inspection noted that the facility was in significant non-compliance. As a result of this inspection a warning letter was sent to the facility, but it was almost 10 months later, on June 10,

2014.<sup>29</sup> This letter gave the facility 15 days to respond. A meeting was held with the facility representative 8 days later. This was followed the next day by an email that reiterated the items needed by the Department to confirm that the facility had returned to compliance.

One year later, on July 22, 2014, the facility<sup>30</sup> was again inspected by FDEP and the inspector was the same inspector who had conducted the inspection in August 2013. The report indicates that a formal enforcement action was initiated against the facility after the August 2013 inspection and states that the July 2014 inspection was being conducted “to provide compliance assistance to the new facility operator...” The report also includes a section on the facility’s compliance history. It omits the inspections that were conducted in 2012 and 2013, both of which found the facility to be in non-compliance.

The July 2014 inspection report is abbreviated in nature. The inspector found no violations but one Area of Concern. This AOC notes that the facility had disposed of “. . . **some** of the accumulated hazardous wastes observed during the 2013 EPA-FDEP inspection on November 13, 2013.” (Emphasis added) The date of the 2013 inspection is wrong—it was August 21, 2013, not November 13, 2013 (unless the author intended to relate that the partial disposal was conducted on November 13, 2013). More importantly, the report’s narrative indicates that at the time of the 2014 inspection there was still hazardous waste being stored on the premises dating back to the August 2013 inspection. This is a violation under 40 CFR 262.34(f). There is no indication that formal enforcement is pending.

Patrick Air Force Base—Patrick AFB, Brevard County—Central District

According to inspection reports, the primary mission of Patrick AFB is to provide mission support and facilities for missile testing and AF training squadrons. It is the host unit for the 45<sup>th</sup> Space Wing. This facility has been inspected many times dating back to 1986 by the FDEP for compliance with RCRA regulations. It is a LQG facility.

The facility was inspected on July 10, 1986, May 19, 1989, June 20, 1990, September 23, 1992, May 2, 1994, July 20, 1995. Of those inspections, only 1 (September 23, 1992) found the facility to be in compliance. Enforcement was taken in two of the remaining five cases (May 2,

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<sup>29</sup> Interestingly, the inspection report was not signed by the inspector until May 19, 2014, nine months after the inspection.

<sup>30</sup> The report indicates that the facility’s name had been changed to Palm Beach Plating, Inc.

1994 and July 20, 1995). The facility was then inspected annually in calendar years 2000 through 2006 and found to be in compliance each time.

As for more recent cases, the facility was inspected on August 7, 2008, at which time it was found to be in non-compliance. Four violations were found: failure to identify hazardous waste accumulation start date; failure to keep waste lamp containers closed; failure to mark used oil filter containers; and failure to label waste fluorescent lamps appropriately. No enforcement was taken other than sending a noncompliance letter to the facility on December 31, 2008.

The facility was again inspected on March 23, 2009 by both FDEP and EPA and found to be in significant non-compliance. The violations were:

1. Unlawful discharge of hazardous waste into a sewer system connected to a publicly owned treatment works
2. Failure to make a hazardous waste determination on barium sulfate solution; and
3. Storing universal waste lamps in open and unlabeled containers

EPA notified FDEP on April 7, 2010 that it intended to take formal enforcement action, including the imposition of civil penalties, against the facility. EPA subsequently entered into a consent order with the facility on May 7, 2010 at which time \$3,100 in civil penalties were assessed against the facility. The final order was issued on May 27, 2010.

The facility was inspected again on March 22, 2011. 2 violations were found during this inspection. The facility failed to maintain a closed hazardous waste container and it also failed to document required weekly inspections of accumulated hazardous waste. The facility allegedly returned to compliance. No enforcement was taken.

On February 22, 2012 the facility was again inspected. No violations were found during this inspection.

The next inspection was conducted on March 18, 2013. This time the facility was again out of compliance. Most of the violations were occurring at the facility's pharmacy clinic that dispenses medications to military personnel, both active and retired. The facility places unused and/or expired medication in a closed container. In addition, however, the facility may have empty medication bottles. During this inspection it was observed that empty warfarin bottles were being disposed of as non-hazardous waste when, in fact, they *were* hazardous waste because of either their size or the dosage level of warfarin that was being contained in them (the higher levels of warfarin would trigger hazardous waste requirements). The facility was also

sending unused pharmaceutical waste to a “reverse distributor” whether the waste was hazardous or not. In sum, the facility was failing: (a) to make proper waste determinations on waste pharmaceuticals, (b) to properly document required weekly inspections of accumulated hazardous waste and (c) to use a manifest for off-site shipments of hazardous waste pharmaceuticals.

Both FDEP and EPA inspected the facility on July 15 and 16, 2014. Once again the facility was out of compliance. The violations were:

1. Failure to conduct a proper waste determination
2. Exceeding limit of stored hazardous waste
3. Failure to properly mark hazardous waste containers
4. Improper storage of spent blast media exhibiting a hazardous waste characteristic of toxicity for cadmium for a period of at least one year
5. Failing to determine if hazardous waste needed to be treated before land disposing in landfill
6. Failure to properly label used oil containers
7. Failure to properly label used oil filter containers
8. Management of hazardous waste at facility without a hazardous waste permit
9. Disposal of acutely toxic warfarin containers in the trash. No manifests were created and the waste was transported to a local landfill

Given the nature of the violations, as well as the facility’s history of non-compliance it was classified as a significant non-complier by the EPA as indicated in correspondence from the EPA to the facility on January 16, 2015. EPA apparently elected to initiate enforcement against the facility as a result of this inspection, though the FDEP records on Oculus do not reflect the nature of the enforcement action.

On July 22, 2015 FDEP inspectors again went to the facility to conduct an inspection. This time the facility would not allow the inspectors access to the facility grounds in order to conduct the inspection. The facility was found to be in violation of its permit as a result of this refusal. This matter was closed without formal enforcement according to the notes in the following inspection that was conducted on September 23, 2015. As a result of the latter inspection the facility was found to be back in compliance.

Southeastern Construction & Maintenance, Inc.—Mulberry—Southwest District

This company is a structural steel fabricator. This is a process that utilizes copious amounts of paint and underlying supplies such as thinner, solvents, oil and antifreeze. The

company also conducts sandblasting operations. The company's facility thus generates significant amounts of hazardous waste in its operations. The company supplies mining and power plant companies. It first notified FDEP that it was a SQG in 1991. It was not inspected by the Department until February 14, 2013, 22 years later.

The FDEP found numerous violations at the facility during the February 2013 inspection. Those violations included:

1. Failure to conduct proper waste determinations
2. Exceeding limit of stored hazardous waste
3. Failure to properly mark hazardous waste containers
4. Failure to conduct proper classroom instruction in handling of hazardous waste
5. Failure to maintain and operate the facility in a manner that would minimize the potential for a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste constituents to the air, soil, or surface water which could threaten human health or the environment
6. Failure to keep hazardous waste containers closed during storage
7. Failure to properly document weekly inspections of hazardous waste storage containers
8. Failure to label used oil containers
9. Improper storage of used oil
10. Improper discharge of used oil to industrial wastewater sump in diesel shop
11. Failure to create a contingency plan to be followed in the event of a hazardous waste emergency and failure to have a designated emergency coordinator
12. Failure to make arrangements with local authorities of the procedures to follow in the event of a hazardous waste emergency

In addition to the above violations, the Department's inspection report noted that the facility was operating without an air permit. On March 8, 2013, the Department advised the facility that it would address the violations by way of an offer of compliance assistance. Essentially, if the facility would notify the Department of what it had done to correct the violations the Department was prepared to forgive the violations.

The facility responded on March 22, 2013 by telling the Department that it was working to correct the violations and that it would apply for an industrial waste permit, an NPDES permit and an air permit. The need for the industrial waste and NPDES permits was not highlighted in the Department's February 2013 report. It appears from email correspondence that the facility may have been working on the permit issues, but that it had not formally applied for any of the permits as of December 2013, 10 months after the inspection.

EPA stepped into this issue on December 4, 2014 by issuing a Notice of Opportunity to Show Cause to the facility for violations arising out of the FDEP's February 2013 inspection. The facility immediately contacted FDEP and expressed surprise over the EPA's action because the facility had accepted the FDEP's offer of compliance assistance. 3 weeks later the facility's attorneys responded to the EPA by alleging that none of the violations actually existed, even though correspondence from the facility to FDEP appears to concede the violations.

Documents on the Department's Oculus site show that the facility did not even apply for an air permit until April 17, 2014, over a year after the Department discovered that it had been operating without a permit. Even so, on June 12, 2014 the Department issued an "after-the-fact" air construction permit to the facility, apparently deciding to forego any enforcement for the extended period that the facility had been operating with an air permit.<sup>31</sup>

The facility was also issued an industrial waste permit on March 20, 2014. There is no indication that any enforcement has been taken as a result of the unlawful operation without a permit until that time.

On April 1, 2015 the EPA again inspected the facility. Though much improved, the EPA was concerned that the facility may be using an improper methodology for determining whether overspray and/or sand on site was hazardous.

To date it appears that no enforcement has been taken against this facility by the FDEP.

#### Southeastern Rack Co.—Vero Beach—Southeast District

The Southeastern Rack Company in Vero Beach is branch of the national company, Associated Rack Corporation in Chicago. According to a FDEP inspection report, the Vero Beach branch "fabricates and restores custom equipment for the Plating, Powder Coating, Circuit Board, and other surface finishing industries." It has been operating in Vero Beach at its present location for roughly 40 years and had notified the FDEP that it was a SQG in 1988. Yet, it had never been inspected by the FDEP until 2013.

The facility was first inspected by the FDEP on January 10, 2013. Several violations were found during the inspection:

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<sup>31</sup> Operation without an air, industrial waste, wastewater or other such FDEP permit would normally be considered a major violation that would justify judicial action to shut down the facility's operations.

1. Failure to conduct a proper waste determination. “The facility didn't have documentation that a waste determination had ever been performed from their blast room bag filters or ash from the burn-off oven nor did they have documentation of proper disposal.”
2. Failure to mark containers with start date of accumulation
3. Failure to properly mark hazardous waste containers
4. A 55-gallon drum of ash was “observed outside in front of the burn-off oven. Ash was also observed outdoors on the concrete surface in front of the oven.”
5. Six unboxed mercury lamps were behind the burn-off oven. One broken lamp was on the floor.
6. Failure to post required emergency response near at least one telephone
7. Failure to conduct proper classroom instruction in handling of hazardous waste
8. Failure to keep hazardous waste containers closed during storage
9. Failure to properly document inspections of hazardous waste accumulation
10. Failure to document disposal of universal waste mercury lamps
11. Failure to make arrangements with local authorities of the procedures to follow in the event of a hazardous waste emergency

Given the above violations the facility met the criteria of a significant non-complier. At the conclusion of the inspection the FDEP gave the facility a Notice of Potential Hazardous Waste Non-Compliance and instructed it to advise the Department within 14 days of its efforts to correct the deficiencies.

The January inspection apparently caught the facility by surprise. In an email sent to the Department on the same day as the inspection the manager admitted to part of the noncompliance and advised the Department’s inspector that:

“I talked with our corporate guy who also does our Safety and environmental things, and he said it has been over 10 years since any of our plants have been asked to test any materials being disposed of so we do not have any current test data.”

The facility sent a written notice to the Department on July 15, 2013 advising the Department of the steps that it had taken to correct the deficiencies found during the January inspection.

A few weeks after the facility’s response an internal process began within FDEP in order to determine the Department’s response to the violations. This process apparently got underway with the completion of a *Warning Letter Peer Review Checklist—Hazardous Waste*. Four months later the Assistant Director of the Southeast District contacted the Department’s Office of District and Business Support for their review of acceptability of merely sending a warning letter to the facility. Apparently, the penalty computation worksheet that had been completed at the district level was also unacceptable to the Division of Waste Management, so it was also

requested that it be revised to “incorporate the updates to the HW Harm Ranking System.” This revision actually resulted in an increased penalty amount.

It took three more months, but on February 13, 2014 the warning letter was eventually sent to the facility. By now it had been over a year since the original inspection. A penalty calculation worksheet was prepared on the same day. Penalties were set at \$31,550.00. This amount ignored multi-day penalties for all violations except for the failure to make waste determinations (something that the facility had admitted that it had not done for at least 10 years), which was a violation that presented a moderate risk of environmental harm and was considered a major deviation from Department rules. The multi-day penalties added a minimal \$1,140.00 to the overall penalty. Economic benefit was not pursued because it was considered to be small enough to warrant a waiver.

The Department met with the facility a few weeks later to discuss resolution of the case. The notes to this meeting indicate that the original FDEP inspector and case manager had left the Department since the inspection—a development that likely made it somewhat more difficult for the Department to effectively argue its position. Regardless, the outcome of the meeting was stated thusly:

"Based on the inspection and the subsequent discussion at the meeting, it has been established that the facility is a CESQG, and the Department offered a rescind on the solvent primer portion of the waste determination violation (blast media and oven ash were determined to be HW, so those portions remain), and on the requirements applicable to SQGs (training, contingency planning, emergency preparedness, container management). The Department requested a photograph of the posting of the facility's contingency plan, which the facility has opted to keep in place, demonstrating above-and-beyond compliance. An approved proposed penalty of \$31,050 was presented during the meeting; however, based on the above, the Department was able to offer reductions that yield a proposed settlement offer of \$3,265."

The \$28,425.00 reduction of penalties was communicated to the facility with a settlement offer that is incorrectly dated May 29, 2013. This settlement offer set the penalty even lower-- \$3,125.00, which the facility accepted. However, the offer also allowed the facility to offset the entire penalty if it performed a pollution prevention project (P2 Project). In this case, the project involved the removal and replacement of outdated fluorescent lighting fixtures with high efficiency LED light fixtures, thus reducing energy consumption. The facility elected to

undertake the project and the records reflect that it completed the project on October 28, 2014 giving it a savings of \$685 per year in energy rates.

The FDEP's generosity towards the facility was repaid 3 months later when, on September 14, 2015, an inspection was conducted which again found hazardous waste violations.<sup>32</sup> This time the following violations were observed and were communicated to the facility with a warning letter:

1. Failure to conduct a proper waste determination. "SRC failed to determine if the bag house blast dust was a hazardous waste. This waste was being disposed of in regular trash"
2. Failure to mark satellite containers as hazardous waste
3. Failure to properly manage satellite hazardous waste containers
4. Improper release of hazardous waste constituents into the environment

The Department instructed the facility to correct the deficiencies, which required taking steps to analyze the materials in the facility's waste stream to determine what wastes were present and to determine the identity of the solvent that had been located in a 55-gallon drum. In a report dated September 23, 2015, the facility was advised by its lab that the waste stream contained excessive levels of barium, chromium, lead and cadmium. Thus far, the records do not reflect a response to the question of the solvent found on the premises. Given the nature of the violations the facility continues to be a significant non-complier.

A warning letter was finally issued by the Department on December 7, 2015.

#### Another Example of FDEP Enforcement From The Wastewater Program

The manner in which RCRA cases are handled is not unique to that program. A wastewater case in the Central District provides an ample example, as well as a possible explanation, as to why more severe sanctions were not imposed by the FDEP in RCRA cases that could have justified pursuit of criminal prosecutions.

The Mill Creek RV Park owns and operates a wastewater treatment facility (WWTF) in Kissimmee. The WWTF discharges wastewater to a rapid infiltration basin system that consists of a percolation pond and a clay-lined polishing pond. The facility has been inspected by the

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<sup>32</sup> This inspection lists the facility as a SQG, contrary to the statement in the March 2014 that the facility was actually a CESQG.

FDEP on numerous occasions. Department records show that violations were found during an inspection that resulted in a warning letter being sent to the facility on April 17, 2003. This action resulted in a short-form consent order being executed on July 22, 2004 assessing \$3,250.00 in penalties.<sup>33</sup> Violations were also identified in another inspection for which a warning letter was issued on April 22, 2004 and a separate short-form consent order was issued on July 19, 2004 assessing civil penalties of \$850.00 (\$100.00 of which was for Department expenses).

Subsequent inspections on December 20, 2004, January 25, 2006, May 10, 2007, May 16, 2008 & April 15, 2009, also found violations, yet the Department's only action was to send non-compliance letters to the facility each time advising it to explain the basis for the violations. All of these violations occurred while the facility was operating under a FDEP wastewater permit issued in 2004.

The permit was renewed in October 2009 in spite of its history of noncompliance. It was not accompanied by an administrative order that would have provided for increased monitoring and greater environmental protections. The permit was accompanied by a "Statement of Basis" on October 21, 2009 that was supposed to provide the public with key information that guided the Department's decision to renew the permit. While the form properly notes that the facility had no history of enforcement during the previous permit, it is silent to the repeated violations that were found at the site over the course of the life of that permit. Therefore, the public would have had no reason to suspect that there were any problems with the facility.

The WWTF was next inspected on February 3, 2010. There were multiple violations including high fecal coliform discharges, improper total residual chlorine levels, as well as maintenance and faulty reporting issues. The Department sent a non-compliance letter on March 3, 2010.

When the facility was next inspected on March 3, 2011 the Department identified both effluent quality and disposal violations, as well as operational problems. The problems were much the same as the previous inspection, but in addition it was found that the laboratory's certification wasn't available and there were several errors in reporting of effluent values by the laboratory. The annual nitrate sample had not been reported since June 2009. The discharge monitoring reports (DMRs) which are used by the facility to report effluent results to FDEP

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<sup>33</sup> \$250.00 of this amount was actually for reimbursement of Department costs.

showed discrepancies with the signatures, i.e. the physical DMRs at the facility bore laboratory signatures dated after the DMR had already been sent to the Department. The date of the signature on the August 2009 DMR had also been changed by using correction fluid. Not surprisingly, the facility was labeled as significantly out-of-compliance by the FDEP.

The Department next inspected the facility on July 15, 2011 and found the facility to be out-of-compliance because of operational problems. The problems centered around an operator whose license had expired and who was not fulfilling minimum site requirements as required by the permit. And even though the last inspection had identified serious problems with the facility's reporting of effluent test results, the Department chose not to evaluate the effluent quality or the laboratory during this inspection.

On August 18, 2011 the FDEP sent the facility a non-compliance letter. In the letter the FDEP cited the numerous violations identified during the previous 2 inspections and advised the facility to respond within 14 days. The facility responded on August 30 and indicated it would correct the errors, but also alleged that some of the violations were non-existent.

In spite of the serious nature of the violations, the Department waited until July 30, 2012 to re-inspect the facility. The facility was again marked as significantly out-of-compliance. There were recurring laboratory issues of certification as well as DMR problems. In addition the inspection report indicated that,

“[a]t the time of inspection effluent was discharging out the overflow pipe due to the water level in the rapid infiltration basis (RIB) was so high. According to Department records of this overflow pipe it discharges to the southwest side of the property. This discharge location could not be verified due to the heavy vegetation in this area. The overflow pipe appeared to have holes drilled into the side and the pipe cap was off. This is a unauthorized discharge that must cease immediately.”

In other words, the facility was using a discharge pipe to bypass proper treatment of the influent. Predictably, the Department's approach was to send a non-compliance letter (this time dated August 15, 2012) and to request a response within 14 days.

The pattern continued when, on October 3, 2012, the Department inspected the facility and found it to again be out-of-compliance. And once again the Department failed to inspect all but one of the parameters that are normally part of a site inspection. The violation that was found consisted of an improper amount of freeboard in the RIB which was close to overflowing. A

non-compliance letter was sent on October 3, 2012, but this time the facility was given 15 days to respond.

The next inspection was conducted a year later, on October 10, 2013. The facility was found to be in significant non-compliance because of, among other things, serious problems found with its DMRs. The data found on the DMRs that were sent to the FDEP did not match the data in the operator's logbook. In addition, the Department learned after the visit that "untreated wastewater was flowing on the ground between two basins and running into the clay-lined polishing pond." This problem, the Department learned, had been ongoing for months. Yet, the Department marked this as "minor out-of-compliance." On March 13, 2014, the Department sent an email to the facility asking it to explain its performance issues.

On March 17, 2014, the facility applied for its wastewater permit renewal. The application avers that the facility was ". . . generally operated in conformance with the limits of permitted flows and other conditions specified in the permit." It also notes that there was no enforcement action pending against it.

Shortly after the renewal application was received there began a discussion within the Department about whether or not the Department should refer the issues concerning the false DMRs mentioned above to the Florida, Fish & Wildlife Conservation Commission (FFWCC) for investigation. Not only did the data in the operator's log book fail to match the data that was reported to the FDEP, but it appeared that some of the data was being selectively repeated for subsequent days (suggesting that the subsequent testing was not even done). While some people believed that a referral to the FFWCC was warranted<sup>34</sup> it was the opinion of senior staff that such was not the case. The Program Administrator for the Certification and Restoration Program within FDEP stated

"I read through the email below and I do not understand why the case is being referred either. This appears to be a basic case of an operator falsifying her logs and or reports. Typically (unless this operator has been a bad actor for some time) this is simply handled by the district by placing the operator on Probation for a period of two years and requiring the

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<sup>34</sup> Each DMR submitted by the facility was signed by the responsible party. Each DMR included the following statement: "**Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment for knowing violations.**" (Emphasis added)

operator to complete an additional 1.0 ceus”

Another senior official stated that she was “not comfortable” with such a referral. With that it appears as though a referral to FFWCC was abandoned.

The laboratory technician whose job it was to report data to the Department wrote to the Department on April 17, 2014 and advised the Department the technician had serious health problems, including cancer and a fall, that were allegedly causing problems with reporting to the FDEP.<sup>35</sup> This letter was followed 3 weeks later by an email from the technician to the Department advising the Department that the facility was now in compliance.

This entire saga following the October 10, 2013 inspection was apparently brought to a close 8 months later with a letter to the facility. That letter tells the facility that “[b]ased on the information provided during and following the inspection, the facility was determined to be in compliance with the Department’s rules and regulations.” The letter closes by thanking the facility for its efforts to comply with the prevailing regulations. No inspection was conducted to confirm that the facility was in compliance as the letter states.

The Department issued the renewal permit to the facility on October 21, 2014. Just as in 2009, the permit was accompanied by a “Statement of Basis.” Once again the form noted that the facility had no history of enforcement during its previous permit and was silent to the repeated violations that were found at the site over the course of the life of that permit.

### **Lessons to be Learned**

As we noted above, Governor Crist’s administration very publically moved to strengthen enforcement in Florida, particularly in hazardous waste cases. Former Secretary Mike Sole announced that he wanted to change things at FDEP so that the idea that paying civil penalties would no longer be thought of as a cost of doing business. Unfortunately, reality did not bear out the rhetoric; however, there was at least some semblance of acknowledgment that enforcement was a necessity if environmental protection was to be achieved. The current administration has effectively discarded that acknowledgment and opted for an approach that morphs the FDEP into nothing more than another section of each corporation, thus making enforcement all but

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<sup>35</sup> It should be noted that inspections prior to 2010 found the facility’s records to be out-of-compliance and that DNR issues, e.g. “transcription errors, were noted therein. This appears to be well prior to the operator’s health issues becoming a factor.

impossible. It is now abundantly clear that any protection afforded to the environment will come in spite of the FDEP, not because of it.

The cases cited in this report reflect this profound change in philosophy that apparently has an ultimate goal of the wholesale elimination of enforcement, not just the weakening of it. In pursuing this goal the agency now displays a complete lack of understanding and/or concern of the dangers faced by the environment and the public when environmental laws, particularly hazardous waste laws, are violated. These laws were adopted in order to protect the environment the public and facility employees from risks associated with coming into contact with some of the worst contaminants produced and/or used by businesses.

Caught in the middle of this new reality created by the Governor and his minions are the FDEP employees, most of whom went to work for the agency expecting that they could play a part in improving and protecting Florida's environment. The employees who conduct inspections on hazardous waste facilities no doubt wonder what they are supposed to do when they find wholesale violations of law for which enforcement was once the option, only to now be told that it is their job to help the violator through this difficult time. If the subject matter were different, i.e. if they were charged with identifying drunk drivers and then told to do everything possible to ensure that no punishment followed the arrest the odds are that the public would not stand for it. Yet, the Department's employees are perpetually faced with enforcing laws that they know are viewed by their senior management as largely unnecessary and get in the way of profits. It is little wonder that morale in the agency is low.

The Department will surely claim that it takes the hazardous waste laws seriously. But actions speak louder than words. As the above cases demonstrate, violations are all too often simply ignored except for writing an inspection report that documents them. Let's look at the examples found in the above cases:

§ 403.161(1)(b), Fla. Stat., prohibits operation of a facility without the required FDEP permits. This type of blatantly illegal operation was found in the above cases. See, e.g. Gate Precast, Southeastern Construction & Maintenance, Inc., supra. Such situations are serious. Not only should they result in fines, but, they constitute criminal conduct in those cases in which the operation was "willful." § 403.161(5) Fla. Stat., states that "[a]ny person who willfully commits a violation specified in paragraph (1)(b) or paragraph (1)(c) is guilty of a misdemeanor of the first degree punishable as provided in ss. [775.082\(4\)\(a\)](#) and [775.083\(1\)\(g\)](#) by a fine of not more

than \$10,000 or by 6 months in jail, or by both for each offense.” Yet, what were the consequences to those facilities that had been operating for years without the required permits? The practical effect was that the permits were still issued after-the-fact.

If the Department took these cases seriously it would not simply act as if no violations had occurred, as it did in the cases of Loomis Executive Jet Refinishing and Palm Beach Plating, Inc. These companies were responsible for a host of various violations including the failure to mark their hazardous waste containers (which made them more susceptible to improper handling), failure to routinely inspect their hazardous waste containers, failure to properly train their employees in how to handle hazardous waste and failure to notify emergency authorities that they handled hazardous wastes. Some of the violations were again found on follow-up inspections by the FDEP suggesting a careless disregard for environmental laws that were adopted to protect both the environment and the employees who worked for the facilities.

As the above cases also illustrate, the path to initiating enforcement against violators has been lengthened to the point that swift, meaningful enforcement is all but impossible. The Department has created a management structure that causes lengthy delays (sometimes as much as a year after the inspection) in simply issuing warning letters<sup>36</sup> or otherwise taking enforcement. Deputy Secretarial approval must now be obtained in order to recapture economic benefit derived from violating RCRA—a step that means more time spent convincing senior management to do what EPA mandates that they do.<sup>37</sup> These built-in delays do not suggest that this is an agency that cares about the public’s safety. Instead, they suggest that the Department will consider enforcement only after multiple senior managers have reviewed the file and exhausted every other option for avoiding the use of such mechanisms as long-form consent orders, notices of violation or circuit court action. Such is the level of aversion to enforcement that dominates the FDEP under the current administration.

While these delays are occurring the facilities are essentially free to continue their non-compliance. And we now see that actual enforcement does not necessarily take place even when a warning letter is issued. Oftentimes months pass between the time of the inspection and the

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<sup>36</sup> A warning letter is a letter sent to the violator when the Department has determined that formal enforcement is warranted under its rules. They typically give the violator a set period of time, e.g. 14 days, to advise the Department of the steps being taken to correct the violations. They also often result in a formal meeting with the facility at which time the noncompliance issues and the case resolution are openly discussed.

<sup>37</sup> In two of the above cases, Southeastern Rack Co. and Gate Precast, FDEP personnel simply abandoned the idea of attempting to recoup economic benefit derived from noncompliance.

written notice to the violator that the Department found the facility to be out of compliance and may be the subject of an enforcement action. See, e.g. Bostwick Laboratories. Yet even when enforcement is “pursued” it is likely to result in an offer of compliance assistance rather than actual, meaningful action. See, e.g. Bostwick Laboratories, Montco Research Products, Palm Beach Plating, Southeastern Construction & Maintenance, Inc. Bostwick, for example, was offered compliance assistance after the FDEP found that it was exceeding its limit for storing hazardous waste, that it was improperly storing ignitable hazardous waste and that it was storing it within 50 feet of the premises, a clear danger to the employees and public.

The effectiveness of compliance assistance is questionable given the subsequent violations found at Bostwick and Montco, both of which saw repeated violations not long after the original violations were “resolved” through compliance assistance. So eager was it to please that the Department thanked Bostwick for operating “in compliance” even though it had just been through 2 back-to-back inspections that demonstrated that it was not in compliance. Mill Creek RV Park was likewise thanked for its actions in supposedly coming into compliance, even though its history was arguably one of criminal misconduct.

The fact is that when facilities such as these repeatedly violate the law a case can be made that their actions are criminal in nature. After all, more often than not these facilities are either staffed with (or have on retainer) environmental engineers and attorneys to advise them on how to comply with hazardous waste and other environmental laws. It is not as though they have no idea how to comply. And it is not as though they have no responsibility to proactively contact the Department in advance when they have questions about what they should do. When the violations continue year after year the logical inference is that they simply do not care. With respect to non-hazardous waste violations, e.g. violation of industrial waste and/or air and/or wastewater regulations § 403.161(4), Fla. Stat., states that “[a]ny person who commits a violation specified in paragraph (1)(a) due to reckless indifference or gross careless disregard is guilty of a misdemeanor of the second degree, punishable as provided in ss. [775.082](#)(4)(b) and [775.083](#)(1)(g) by a fine of not more than \$5,000 or by 60 days in jail, or by both, for each offense.”<sup>38</sup> And as noted above, § 403.161(5), Fla. Stat., elevates the violation of permits or regulations to a first degree misdemeanor whenever the violation is willful. In similar manner,

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<sup>38</sup> Paragraph (1)(a) states that it is a violation of law “To cause pollution, except as otherwise provided in this chapter, so as to harm or injure human health or welfare, animal, plant, or aquatic life or property.”

the polluter has committed a third degree felony when it intentionally causes pollution that harms people, the environment or property. See, § 403.161(3), Fla. Stat. But hazardous waste violations subject the violator to much higher penalties. § 403.727(3)(a), Fla. Stat., makes the increases RCRA violations from \$10,000 to \$50,000 per day per violation. And § 403.727(3)(b), Fla. Stat., makes willful (criminal) violations a 3<sup>rd</sup> degree felony with a penalty of \$50,000 for each day of violation and/or imprisonment not to exceed 5 years. The penalties are doubled for subsequent violations.<sup>39</sup> The fact is that the Legislature has told the Department that it is supposed to take these violations seriously. But the Department ignores its mandate routinely, particularly under the present administration.

The Department's actions in ignoring violations is also unfair to those businesses and other permit holders who day after day strive to follow these laws. Make no mistake, it takes a certain amount of time and effort to comply with these laws. We would hope that the majority of regulated entities take those necessary steps to comply. But we must also acknowledge that because of the Department's complacency we are now at a point in which that compliance puts them at a distinct disadvantage to those bad actors who, with the Department's assistance, thumb their nose at the law, knowing that in the long run it will cost them nothing.

Finally, as we noted in the beginning of this report, repeated violations of these laws results in a facility being designated as a significant non-complier. The guidelines state that formal enforcement is to be pursued in such cases. All of the facilities identified above met the criteria for SNC designation. Yet, despite EPA guidelines formal enforcement is, as we have seen, something that the Department will do its best to avoid. In some cases the EPA is stepping up, but in others it is allowing the Department to neglect its responsibilities while also allowing the offenders to avoid punishment.

The sad reality is that the public, through its tax dollars, is paying the Department to abuse its discretion in these cases. It continues to collect taxpayer dollars by way of federal grant money every year to do a job that it doesn't want to do. Unfortunately the environment and the public will continue to pay until the public decides that enough is enough. History does not suggest that change is likely to occur any time soon.

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<sup>39</sup> It should also be noted that the limitations on upward adjustment of penalties for history of noncompliance found in § 403.121(7), Fla. Stat., are not found in § 403.727, Fla. Stat. The same lack of restrictions is noted with respect to multi-day penalties found in §403.121(6), Fla. Stat., as well as economic benefit adjustments which are limited in § 403.121(8), Fla. Stat.