

THE BIG WHEEL CONSTRUCTION AND DEBRIS LANDFILL IN BAY COUNTY

A TALE OF FDEP ENFORCEMENT

Over the course of the past year Florida PEER has repeatedly examined the issue of how the State of Florida, Department of Environmental Protection (“the FDEP”), exercises its authority to enforce Florida’s environmental laws. Florida PEER has issued several White Papers on the issue and has repeatedly warned that the FDEP is failing the residents of this State. Those White Papers may be viewed at PEER’s website, www.peer.org. The agency seldom requires polluters to enter into comprehensive agreements known as long-form consent orders that require site cleanup, increased monitoring and the payment of civil penalties. The FDEP is even less likely to file civil actions against polluters, preferring instead to “work with” the entities in order, it says, to achieve a better result for Florida’s environment and the residents and tourists who wish to enjoy Florida’s natural beauty. This policy is now encapsulated in the agency’s motto: “More Protection, Less Process.”

In light of the FDEP’s charges that enforcement at the agency is, in fact, swifter and stricter—thus yielding superior results—Florida PEER decided to look at an example of enforcement in the FDEP’s Northwest District. The Northwest District oversees a large portion of North Florida. Its headquarters is in Pensacola. It has two satellite offices, one located in Panama City and the other in Tallahassee.

The Northwest District has a colorful history with the FDEP. It may be remembered that it was once headed for a number of years by District Director, Bobby

Cooley. Mr. Cooley's tenure was consistently and repeatedly marred by allegations that the Northwest District was failing to enforce Florida's environmental laws under his watch. Employee morale under his tenure was terrible. Ultimately a Special Grand Jury was empanelled in Escambia County to investigate the functioning of the office. It's report was issued on June 10, 1999, and detailed significant problems in the Northwest District including lax enforcement. David Struhs, the FDEP Secretary at the time, initially refused to terminate Mr. Cooley. But Struhs later allowed a change in leadership and turned to Mary Jean Yon, the current District Director for the Northwest District. Ms. Yon oversees the operations of all three offices.

How then has the Northwest District Office changed since Cooley's departure and Yon's ascension? Given the Special Grand Jury's findings one may legitimately ask whether enforcement has improved in the area. Indeed, if there is any area in the State of Florida that should have seen an improvement in enforcement it is in the Northwest District, for it has had the most to prove.

This White Paper considers one facility located in Bay County, Florida. Bay County is, among other things, now known as one of Florida's emerging tourist destinations. It also has an ever-increasing residential population. Bay County draws thousands of young people each year for spring break. It is also home to some of Florida's most beautiful and pristine stretches of coastline. Finally, it is home to Tyndall Air Force Base, a major military installation.

The facility reviewed by Florida PEER is adjacent to Bay County's Steelfield Landfill. It is permitted by the FDEP and authorized to accept construction and demolition debris. Florida PEER's review of the facility's compliance with Florida's

environmental laws encompasses the recent period from 2002 to the present. What follows is an example of “More Protection, Less Process” in action.

1. Florida PEER Requests Documents

After being alerted to potential problems at the Facility, Florida PEER requested documents from FDEP pertaining to the compliance and enforcement history of the Facility. Florida PEER requested that FDEP produce, pursuant to § 119.07, Fla. Stat., all compliance and enforcement files concerning the Facility for calendar years 2001 to the present, i.e. April 2004. FDEP produced the records held in the Pensacola Branch Office on April 14, 2004, however, Sally Cooley, the Ombudsman for the Northwest District Office in Pensacola indicated that other records were housed at the Panama City Branch Office and that those records would be sent under separate cover. Florida PEER received the Pensacola files on Friday, April 16, 2004. The records from the Panama City Branch Office were received on April 23, 2004—they were mailed from the Pensacola Office.

2. The FDEP Permit

On May 31, 2001, Aztec Environmental, Inc. (“Aztec”), applied to the Florida Department of Environmental Protection for a permit to construct and operate what is commonly known as a Construction and Debris Facility on Steel Field Road, just to the west of the Bay County Steelfield Landfill. The site had been operational prior to the filing of this application; however, it was Aztec that was now going to take over its operation. According to the application, the property owner was Aztec Environmental, Inc. and the facility name was to be the Big Wheel C & D Disposal Facility (“the

Facility”). The application was signed by Debbie Livingston, as well as the engineer of record, Sean McNeil¹ of McNeil Engineering.

FDEP issued Permit Number 0161334-002-SO (“the Permit”) on August 2, 2001. The Permit is commonly referred to as a “C&D permit,” indicating that it is a permit authorizing construction and debris activities at the site. The Permittee is Big Wheel C & D Disposal Facility. Big Wheel C & D Disposal Facility is not listed with the Florida, Department of State as a corporation. Its name is not listed in the Department of State’s “Fictitious Name” registry. The permit authorizes the operation of the Facility as a landfill. The permit expires on August 2, 2006.

3. Aztec Environmental, Inc.’s Performance Under the FDEP Permit

A review of the files produced by FDEP demonstrates that Aztec’s environmental history is one of noncompliance with FDEP rules that are incorporated into its Permit. FDEP has documented the violations on a regular basis. However, just as Aztec has failed to comply with its Permit, FDEP has failed to exercise its regulatory authority to enforce the terms of its Permit. What has transpired is a series of inspections that have noted violations, followed by hollow assurances to correct the deficiencies.

- Some of the problems at the Facility were identified in a December 27, 2002, FDEP memo authored by Mr. Charlie Reyes. Mr. Reyes had concluded a review of Aztec’s March and September 2002, groundwater monitoring reports. These reports are required to be submitted to the FDEP by the permittee on a regular basis. Specific Condition 30 of the Permit grants a 50 foot Zone of Discharge (“ZOD”) to the Facility. This provision also states that, “[c]ompliance with water quality standards of

¹ Sean McNeil is also a member of the Bay County Planning Commission.

FAC Rule 62-520.420 and as contained in FAC Rules 62-550.310 and 62-550.320 shall be met at and beyond the edges of the ZOD.” In turn, F.A.C. Rule 62-520.420 sets standards for Classes G-I and G-II groundwaters, which are the classes entitled to the highest protections. Inside the ZOD, the provision requires that, “compliance with minimum groundwater criteria of FAC Rule 62-520.400 shall be met.” The standards addressed by F.A.C. 62-520.400 are general drinking water standards. But that does not mean that they allow wholesale contamination.² Mr. Reyes’ memo was dealing with the issue of groundwater contamination of the Facility’s monitoring wells that are located within the ZOD. As his memo states:

My review revealed that aluminum, sulfate and TDS were present in concentrations above groundwater monitoring standards during the March sampling event and aluminum concentrations exceeded state standards during the September sampling event (see chart below). However, it should be noted that the aluminum concentration in background well MW-1 was higher. I discussed this issue with Mr. Brad Hartshorn of the Department’s Cleanup Section. Mr. Hartshorn recommended that the facility redevelop background well MW-1.

Thus, Mr. Reyes’ memo identified violations of Permit Specific Condition 30. The findings³ identified in Mr. Reyes’ memo were memorialized in a letter from FDEP to Aztec on January 7, 2003. This letter was sent by Marshall S. Seymore, P.E., Solid Waste Section Supervisor. It documented the aluminum violations as well as other

² Indeed, F.A.C. 62-520.400(1)(d) & (e) state that, “[a]ll ground water shall at all places and at all times be free from domestic, industrial, agricultural, or other man-induced non-thermal components of discharges in concentrations which, alone or in combination with other substances, or components of discharges (whether thermal or non-thermal): Pose a serious danger to the public health, safety, or welfare, or (e) Create or constitute a nuisance; or ...”

³ As the quotation indicates, MW-1 is what is known as a “background well.” MWs-2, 3, & 4 are “compliance wells.”

permit violations that had been found on site. There was no indication that any formal legal action might be taken by the FDEP. Had such been the case the letter issued by Seymore would have borne the caption “Warning Letter,” and would have contained language telling the permittee that the letter was a precursor to likely agency action. Aztec responded on February 13, 2003, indicating that it was addressing the concerns and that MW-1 had been redeveloped.⁴

- The issue of the groundwater monitoring wells reappeared in a June 3, 2003, FDEP memo from Charlie Reyes to Marshall Seymore, P.E. Reyes had concluded his review of Aztec’s March 2003, “semiannual groundwater monitoring reports for the Big Wheel C&D Disposal Facility.” Reyes concluded,

“...that aluminum was present in concentrations above groundwater monitoring standards in all the monitoring wells (see chart). However, it should be noted that the aluminum concentration in background well MW-1 had the highest concentration at 10,140 ug/l.”

(Emphasis added). This was the same well in which Reyes had found unacceptable aluminum concentrations six months earlier. Further, the well, according to Livingston’s February 13, 2003, letter had just been redeveloped. Indeed, Reyes pointed out that MW-1 had been redeveloped since his last review, but that the reports indicated that it may not have been redeveloped properly. He further noted that two specific conditions (35 & 38) of the permit had likely been violated.

Seymore acted on the memo by sending a letter to Aztec on June 5, 2003, notifying

⁴ Permit Specific Condition 31 requires that “[any new or replacement wells shall be of an appropriate diameter so as to provide reliable and representative water quality results. . .”

them of the problems. No mention of potential legal action was made, i.e. no warning letter was sent. Three weeks later Aztec responded that it would redevelop the well on July 7, 2003. On August 18, 2003, Debbie K. Livingston, President of Aztec, wrote to FDEP and advised them of their belief that MW-1 should be replaced due to high turbidity. Thus, it was abundantly clear that reliable groundwater samples were not being obtained from this monitoring well.

- The aluminum issue would not go away. In a November 5, 2003, FDEP memo from Bonnie P. Whitlock to Marshall Seymore Ms. Whitlock noted that she had reviewed the “biennial groundwater monitoring report” for the Facility. Her conclusion was that

“[a]ll wells are reported to be in good condition and were locked with metal covers. There are also two piezometers on-site (PZ-1 and PZ-2). The consultant recommends maintaining the regular monitoring schedule for the next two years and would also like to abandon the two piezometers on-site. I concur with both recommendations.”

Whitlock’s report notes the aluminum exceedances, i.e. water quality violations, and concedes that they have been consistent. Also, other exceedances had been found over the past two years, but they were inconsistent.

- Five days later, Mr. Reyes issued his own memo summarizing his review of Aztec’s September 2003, semiannual groundwater monitoring report. He noted that his review

“ . . . revealed that aluminum was present in concentrations above groundwater monitoring standards in all the monitoring wells except MW-3 (see chart). However, it should be noted that the aluminum concentration in background well MW-1

was reported at 1,310 ug/l. Turbidity values were reported high in monitoring wells MW-1 (55.9 NTU) and in MW-2 (400 NTU).”

Reyes again pointed to permit specific conditions 35 and 38 as governing the issue.

He now recommended redevelopment of all wells. This memo was sent to Marshall Seymore. Seymore’s response was to send a letter to Aztec on December 4, 2003, in which he agreed to abandon the two piezometer wells (PZ-1 and PZ-2). He also indicated that the FDEP recommended the redevelopment of all wells. No warning letter was sent.

- On December 16, 2003, the FDEP again inspected the Facility following a complaint that FDEP had received pertaining to potable wells. The issue was whether any potable wells, i.e. drinking water wells, were located within 500 feet of the Facility. These drinking water wells would also have been outside of the Facility’s ZOD, and hence subject to the more rigorous Class G-I and G-II groundwater standards. Apparently the FDEP investigator documented the existence of the well(s), because a month later, on January 15, 2004, Charles Goddard sent a letter to Aztec advising the company that such wells may exist in violation of F.A.C. 62-701.300(2)(b), or 62-701.300(2)(h). The letter advised Aztec conduct a survey within 30 days formally addressing the issue. There was no indication that any legal action might be taken. Goddard then agreed to an extension of time to March 31, 2004, after Aztec requested the same.

4. Analysis

The above situation provides a clear example of the FDEP's use of "less process." For sixteen months documents provided to the FDEP by the Permittee have provided the FDEP with consistent evidence that the Permit is being consistently violated. The agency's response has been equally consistent in not forcing the Facility to remedy the problem. What is also troubling is the failure on the part of the agency to use its own devices in order to determine the full extent of the groundwater contamination, thus more quickly leading to a prompt resolution that protects the public.

Studies have shown that exposure to excessive concentrations of aluminum can cause, or contribute to, bone disease and renal problems in humans, both infants and adults.⁵ There are also conflicting suggestions that ingestion of increased levels of aluminum can contribute to Alzheimer's Disease.⁶ Regardless of the ultimate findings, however, the fact remains that aluminum concentrations such as found in the Facility's groundwater violate Florida's water quality standards.

As Mr. Reyes' memos demonstrate, the Facility is equipped with one background well and three compliance wells. The FDEP requires a background well to be installed at facilities such as this because background wells serve a very important purpose. They provide the FDEP, as well as the Permittee, with data that informs everyone of the nature of the groundwater before being subjected to the pollution that will be generated at the facility in question. Thus, if there are pre-existing natural (and hence unregulated) contaminants in the groundwater there will not be undue alarm when those natural contaminants are found in the other monitoring wells found on the site.

⁵ http://www.naspgan.org/sub/position_papers/aluminum.asp.

⁶ See, http://www.deptplanetearth.com/pub/jad3jansson_p4.html and <http://www.world-aluminium.org/news/montreal/lidsky.htm>.

Mr. Reyes' findings include evidence that the background well (MW-1) at the Facility is contaminated with several contaminants, the most numerous being aluminum. Aluminum is not a naturally occurring contaminate that one would expect to find in the region's groundwater—particularly not at the levels identified here. But what are the ramifications of having a background monitoring well such as this that is contaminated? The ramifications are serious. The contaminated background monitoring well undercuts the agency's ability to rely upon the results obtained in the three compliance wells found on the site—thus hindering the ability to monitor environmental compliance. So far, sixteen months have elapsed without this situation being settled. Meanwhile, the Facility continues to operate. And, it must be remembered, the agency's files reflect that potable water wells may exist within five hundred feet of the Facility.

In retrospect, this is a problem that the agency has brought upon itself. The fact that aluminum contamination exists in the groundwater under a landfill that had been in use for years presents the FDEP two likely scenarios: (1) the aluminum contamination may have pre-existed the issuance of the Permit, or (2) the contamination is being caused by the Permittee's actions. If one were to assume, for the sake of argument, that the aluminum contamination pre-existed the issuance of the Permit, then the wisdom of even issuing the Permit to allow what would likely be continued pollution of the groundwater has to be seriously questioned. Further, the Permit should have contained specific conditions to address this special situation. It did not.

If we assume the second scenario, i.e. that the FDEP issued the Permit at a time when there was no groundwater contamination, the issue becomes how long the FDEP is prepared to wait until the contamination is ceased and the area remediated. Every day that

goes by allowing the background well's status to go unresolved is another day in which the Permittee can pollute at will.

Faced with this situation, the agency's compliance and enforcement file is completely lacking of any indication that groundwater inspections were increased. Indeed, there are no inspection reports that reflect that even one additional inspection was conducted for the purpose of determining compliance. The files do not show any increased monitoring of the site in order to even determine what activities were taking place at the site that would have resulted in this contamination. Further, the presence of such activities at the site likely means that other violations were occurring as well; however, the FDEP seems to have been oblivious to the problem.

In conclusion, the FDEP has taken an approach with the groundwater issue at this Facility that is entirely consistent with part of the agency motto. There has been less process—considerably less. There has been so little process that the agency, (1) either issued a permit that allowed continued contamination of groundwater in an area in close proximity to drinking water wells, or (2) ignored the ongoing groundwater violations at the site in deference to assertions by the Permittee that it would eventually correct the problem. Less process, indeed. More protection? Most certainly not.