THE SYSTEMATIC DISMANTLING
OF THE ASBESTOS PROGRAM IN FLORIDA

> *"Asbestos is a very harmful material and has been classified by EPA as a group A, known human carcinogen. Any attempt to de-emphasize the importance of the Asbestos Program or take it for granted may lead to a public health threat. Therefore, the Asbestos Program should be considered in the risk management-based air programs as a high risk and high impact program."*

Office of the Inspector General
Florida, Department of Environmental Protection
Final Report: "Review of Asbestos Program
Division of Air Resource Management"
April 2005, Page 6

Such is the conclusion of the Inspector General (IG) of the State of Florida, Department of Environmental Protection (FDEP) in a report, the stated purpose of which was "to help [the Division of Air Resource Management] clarify its responsibilities in regard to a strong and systematic statewide Asbestos Program within DEP."[1] Unfortunately, the report woefully fails to address one of the single biggest problems within the FDEP's Asbestos Program—a systematic, sustained effort by senior administration officials to gut the enforcement arm of the Asbestos Program to the point at which it has become largely ineffective as an oversight mechanism. Indeed, since 1999, when Governor Bush took office, the FDEP has committed to performing <u>one half</u> of the number of asbestos inspections that the agency had previously been obligated to perform. Furthermore, this decline in commitment has been allowed by the United States, Environmental Protection Agency (EPA), the agency that is ultimately responsible for the proper administration of federal environmental laws governing the Asbestos Program.

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[1] IG Report, Page 1.

And through all of this, FDEP continues to receive federal grant monies, i.e. taxpayers' money, to "administer" the Asbestos Program in Florida.

I. Asbestos and Associated Health Risks

The term, asbestos, is given to a group of fibrous silicate minerals that are small in size and identified only microscopically. These minerals occur naturally. They are separated into long fibers for use in construction. The fibers are particularly useful in thermal insulation since they are largely resistant to heat and fire. They are also very stable and strong. Consequently, asbestos containing materials (ACM) have been widely used in the construction of buildings around the world. Indeed, contrary to public perception, asbestos continues to be used in the manufacturing of certain construction materials.

The small bundles of fibers that comprise asbestos can become airborne if disturbed. Once airborne they can be inhaled into the lungs. The result can mean serious health problems for the person who has inhaled the materials. Two of the principal health risks are asbestosis, a lung disease, and mesothelioma, a form of lung cancer. Both diseases are insidious and typically only develop after a minimum of 25 years for asbestosis and 15 years for mesothelioma. As the IG Report states:

> "The potential for asbestos containing material to release fibers depends primarily on its condition. If the material crumbles by hand pressure, it is known as "friable" and it tends to break down into a dust of microscopic size fibers, which can become airborne. These tiny fibers remain suspended in the air for long periods of time and can easily penetrate body tissues after being inhaled or ingested. If inhaled, asbestos fibers can cause irreversible and mostly

> fatal diseases such as mesothelioma, (cancer of the chest and abdominal linings), lung cancer, and asbestosis (irreversible lung scarring). Symptoms of these diseases generally do not appear for many years after exposure."

IG Report, Page 1. For its part, the EPA has stated, in press releases that "…there is no safe level of exposure to asbestos."[2] Thus, with the significant health risks associated with asbestos, the material (and the handling of the material) has been regulated under federal law.

The risks associated with asbestos typically occur during demolition/removal activities and in conjunction with directly related phases of asbestos removal and disposal., such as the demolition of older buildings in which ACM was used throughout. When the demolition occurs it releases asbestos fibers into the air. Those who come in contact with the airborne material are then exposed to the often lethal diseases identified above.

II. Federal Law Governing the Handling of Asbestos

The federal government regulates the handling of Asbestos under Section 112 of the Clean Air Act. As the IG Report notes, in 1973, the EPA adopted regulations that implemented Section 112. These regulations are codified in 40 CFR, Part 61 and they are commonly referred to as National Emissions Standards for Hazardous Air Pollutants (NESHAP). 40 CFR, Part 61.145 covers the procedures to be used in demolishing and/or renovating buildings in which asbestos is present.

[2] For example, Press Release dated October 17, 2000, U.S. Department of Justice and EPA, Northern District of New York, announcing the conviction of Joseph P. Thorn for the illegal abatement of asbestos.

As noted in the IG Report, the administration of the NESHAP program was delegated by the EPA to the FDEP in November 1984. Therefore, for the past twenty years the FDEP has had the primary responsibility for administering this federal program. This has included enforcing NESHAP laws through a series of administrative rules adopted by the FDEP and codified in 62-204 and 62-701, Florida Administrative Code. These rules incorporate by reference the standards dictated by 40 CFR, Part 61.

Parts of these regulations address what is known as Workplace Standards. These are standards that are adopted by the EPA and apply whenever asbestos is found inside buildings that are undergoing renovation and/or demolition. An excellent recitation of these standards and their practical implications is found in the federal court case of *United States of America vs. Eric Kung-Shou Ho*, 311 F.3d 589; 2002 U.S. App. LEXIS 23492; 55 ERC (BNA) 1298; 33 ELR 20117 (5th Cir. 2002). The *Ho* court summarized these standards by saying:

> The asbestos work practice standard regulates, in minute detail, the handling of asbestos in building renovation sites. *40 C.F.R. § 61.145(c)*. For example, material containing asbestos must be wetted during removal, kept sufficiently wet after removal to prevent the release of asbestos fibers, and stored in leak-tight containers until properly disposed. A foreman or management-level officer, trained in complying with these work practice standards, must be present at any site before workers may handle material containing asbestos. We could give more details of the numerous requirements, but it is enough to say that Ho admits he did not comply with the asbestos work practice standard.
>
> Section 114(a), *42 U.S.C. § 7414*(a), also authorizes the EPA to adopt reporting requirements to ensure compliance with a work practice standard. Pursuant to § 114(a), the asbestos work practice standard therefore imposes an elaborate reporting requirement on owners or operators of a building renovation site. *40 C.F.R. §*

> *61.145(b)*. The heart of this requirement is that the owner or operator must give the EPA timely notice (usually [**15] ten days) of intent to begin asbestos removal. Again, we could continue with the details of this requirement, but Ho admits that he did not give notice.
>
> Section 113, *42 U.S.C. § 7413,* contains administrative, civil, and criminal enforcement mechanisms for the asbestos work practice standard and the notice requirement. Ho was convicted under two of these criminal enforcement provisions. Section 113(c)(1), *42 U.S.C. § 7413*(c)(1), imposes criminal penalties on "any person who knowingly violates any . . . requirement or prohibition of . . . section 7412 of this title, . . . including a requirement of any rule . . . promulgated or approved under such section[.]" Section 113(c)(2)(B), *42 U.S.C. § 7413*(c)(2)(B), imposes criminal penalties on any person who knowingly fails to notify or report as required under this chapter."

Ho, 311 F.3d at 596.

As can be seen from *Ho*, the removal of asbestos is not a simple matter. It must be done under tightly controlled circumstances. Regulatory agencies must be notified in advance of the owner/operator's intent to remove this hazardous substance from a building. The *overall* removal process itself is very costly *including the proper securing of certified/trained personnel*, *the set-up of proper containment for the hot-zone, the use of specialized asbestos safety equipment, as well as costs associated with a obtaining a full and comprehensive environmental survey of the building or work area of concern from a Certified Licensed Asbestos Consultant which includes lab analysis of samples taken from the proposed work zone* <u>*prior*</u> *to the commencement of work and lastly the proper transport, manifesting and disposal of this regulated substance in an approved landfill.*

These costs can cause an unscrupulous contractor to bypass any or all of these mandated and needed steps to compliant behavior when removing asbestos, a known carcinogen and hazardous regulated substance. The failure to follow these procedures can result in criminal as well as civil penalties being levied against the violator. Indeed, criminal penalties were sought by the EPA against Mr. Ho and he was ultimately sentenced to prison for his failure to abide by the NESHAP requirements. The same scenario was played out in a federal case arising out of Connecticut, *United States of America vs. Melvin Weintraub et al.*, 273 F.3d 139; 2001 U.S. App. LEXIS 24921; 32 ELR 20340 (2nd Cir. 2001). Weintraub, like Ho, received prison time for failing to properly notify Connecticut authorities of his and his co-conspirators' asbestos removal operation.

III. Florida's Administration of the NESHAP Program

The IG Report summarized the manner in which Florida has set up the NESHAP Program:

> "Regulatory responsibilities for asbestos programs in Florida are vested in several different state and federal agencies. The regulatory responsibilities in Florida for protecting workers in the asbestos industry by EPA fall under the federal Occupational Safety and Health Administration (OSHA). EPA is responsible for asbestos management in Florida schools under the Asbestos Hazard Emergency Response Act (AHERA). The Florida Department of Business and Professional Regulation (DBPR) has been delegated authority from EPA for enforcement of asbestos training and accreditation requirements under the Model Accreditation Plan (MAP). The Environmental Health & Safety Section of the Department of Management Services (DMS) provides asbestos materials management for DMS-owned facilities

> statewide and other public agency buildings since DEP does not have regulatory authority for public buildings. While DEP has the delegated authority over the Asbestos NESHAP Program, two divisions, DARM and Division of Waste Management, as well as six district offices and eight local programs are all involved in implementing the program.
>
> The fragmented program responsibilities and the multi-level structure of handling the Asbestos Program have created some confusion among the involved agencies regarding responsibilities and authority. Therefore, it is necessary to clarify the responsibilities and authorities for each party involved."

IG Report, Page 2.[3] Michael Cook is the Director of the Division of Air Resource Management. Mary Jean Yon is the Director of the Division of Waste Management. Ms. Yon is the former District Director of FDEP's Northwest District Office, headquartered in Pensacola.

The overall organizational structure is therefore akin to a pyramid in which the EPA is at the top, but has delegated its responsibilities to the FDEP which in turn has delegated a portion of its responsibilities to eight local programs. Ultimately the EPA is accountable for the overall success or failure of the program, but the day-to-day operation and management realistically falls upon the shoulders of FDEP. Within the FDEP, it is Mr. Cook's and Ms. Yon's Divisions which are responsible for implementing the policies that are expected to result in the success of the NESHAP program.

IV. NESHAP "Enforcement" under Governor Bush

On May 2, 2005, the FDEP issued a press release that proclaimed Florida's commitment to clean air. The press release began by saying:

[3] DARM is the Division of Air Resource Management within FDEP.

> "Governor Jeb Bush has proclaimed May as Clean Air Month. As a leader in adopting clean air technologies, Florida is one of just three states east of the Mississippi currently meeting all federal standards for clean air, and the only highly urbanized state."

FDEP Secretary, Colleen Castille, noted in the press release that, "[c]lean air is the cornerstone of a high quality of life." Apparently, Governor Bush and Secretary Castille forgot to evaluate Florida's NESHAP program. What they failed to explain to the public was that the FDEP has systematically been reducing the number and quality of inspections that the agency is obligated to make in order to determine whether or not NESHAP rules are being obeyed.

A. Reducing the Number of Inspections

Records provided to *Florida* PEER by the EPA under the Freedom of Information Act (FOIA) document Florida's lessening commitment to enforcing these rules that are designed to protect the health, safety and welfare of the public. These records are called Air Planning Agreements. These agreements are negotiated each year between the EPA and the FDEP. Such agreements are routinely entered into between the EPA and state governments that have assumed the responsibility of administering a federal program. The purpose of each agreement is to set forth each agency's obligations in the upcoming year in administering the relevant provisions of the Clean Air Act. The agreements include provisions dealing with NESHAP.

In April 1999, barely three months after Governor Bush took office, the EPA and the FDEP reached agreement on the 1999 Air Planning Agreement (APA). This

agreement, dealt with a host of air quality issues, including asbestos. With respect to asbestos enforcement the document states:

> "**Strategic Area: Enforcement Tools to Reduce Noncompliance**
> Inspect 50% of all NESHAP asbestos demolition/renovation projects. These should be selected so that all removal contractors are inspected at least once. Alternatively, lower inspection rates can be negotiated if an effective contractor certification program is in place. Please include the negotiated rate in your response to this grant agreement."
> Florida Response: CA – Florida agrees to inspecting 40% of demolition/renovation projects as we have a certification program and have inspected 40% for the last five years.
> EPA Review: Status ok"

Thus, at this point, the FDEP's commitment to inspecting asbestos demolition/removal sites was unchanged from previous years. The agency maintained this level of commitment in the APAs dated May 2000, January 2001, and January 2002. Over the past three years, however, this commitment has dropped substantially.

The 2003 APA stated the overall goal that the delegated agency, the FDEP, must adopt in order to carry out the requirements of the Clean Air Act. The stated goal was "A Credible Deterrent to Pollution and Greater Compliance with the Law." The objective for which the FDEP was to strive to meet was:

> "Enforcement tools to reduce noncompliance—Identify and reduce significant non-compliance in high priority areas, while maintaining a strong enforcement presence in all regulatory areas."

How was the FDEP to meet this lofty goal? According to the "Sub-Objective, the FDEP was to:

> "Achieve continuous improvements in compliance with environmental laws and regulations in high priority portions of the regulated community. Through improved targeting of enforcement and compliance resources, ensure

> that at least 50% of all civil and criminal investigations and other compliance monitoring activities are conducted at high risk, disproportionately exposed, and other high priority areas of noncompliance."

The high goals set by the EPA were then followed in the same document by a dramatic drop, not only in EPA's expectations, but also in FDEP's agreement to these inspections. The APA for that same year read:

> "4. Inspect **25%** of all NESHAP asbestos demolition/renovation projects. These should be selected so that all removal contractors are inspected at least once. Alternatively, lower inspection rates can be negotiated if an effective contractor certification program is in place."
> Response: C/A – Florida will inspect **20%** of asbestos projects. Florida has a contractor certification program.
> Last EPA Reviewer: pmcilvai – aa:21:24 on 10/08/02 - - - Status_OK
> Regional Staff Response: [This Section Was Left Blank]"

(Emphasis added) **In the space of one year, the EPA's target level of inspections was cut by 50%. FDEP's agreement likewise declined by 50%.** There is no explanation in the APA of how the FDEP was expected to maintain "a strong enforcement presence" when the number of inspections was to be cut in half. The APAs for 2004 and 2005 saw the same lowered expectations of the EPA and the same response from the FDEP with respect to the number of inspections the agency would aspire to conducting.

It must be remembered that the FDEP is bound to adhere to the EPA requirements only in the sense that the number of its inspections must meet the minimum EPA requirements. There is nothing, however, to prevent the FDEP from increasing the number of inspections that it conducts. Therefore, the agency could have responded to EPA's lowering expectations by indicating that Florida was committed to strong enforcement of the NESHAP program and thus would continue to inspect 40% (or more)

of the asbestos demolition/renovation projects. Florida did not do that. Instead, it acquiesced and lowered its expectations as well.

B. Reducing the Quality of FDEP's Inspections

The FDEP has had the responsibility for administering the NESHAP program since November 1984. That responsibility has included inspecting the asbestos demolition/renovation projects. But what actually comprises an "inspection?" The APAs governing the relationship between the EPA and the FDEP in the NESHAP program at least partially answer this question. As the 1999 APA stated:

> "**Strategic Area: Enforcement Tools to Reduce Noncompliance**
>
> Observe asbestos work practices in progress whenever possible to assess compliance. **This will require entering the active removal area at least four times by each qualified inspector per work year (unless otherwise approved in writing by EPA)**. Special priority will be given to entering a project of a contractor with work practice violation within the previous 12 month period according to NARS.
>
> Florida Response: CA – DEP will view asbestos work practices through a glass window and if violations are suspected within the work area, the DEP employee will enter and make the necessary determination provided they have been properly trained and have necessary protective equipment and clothing.
>
> EPA Review: Status ok"

(Emphasis added)

One year later, the EPA expectation was stated the same. However, Florida's response changed somewhat. The FDEP now put it this way: "CA Florida agrees to

observe asbestos work practices in progress whenever possible to assess compliance." The response is arguably more open-ended. The EPA did not require more details. The FDEP continued to give this response in 2001, 2002.

The EPA began to lower its expectations in 2003 when it "required" the FDEP to:

> "Observe asbestos work practices in progress whenever possible to assess compliance. Special priority will be given to entering a project of a contractor with a work practice violation within the previous 12 month period according to NARS."

Gone is the requirement that each inspector enter the work area at least four times per calendar year. The FDEP gave the same canned, vague response, which the EPA approved. This same "requirement" and "response" was included in the 2004 APA. 2005 was dramatically different, however.

The EPA requirement for 2005 was essentially the same as those in previous years. It required the FDEP to, "[o]bserve asbestos work practices in progress whenever possible to assess compliance. Special priority will be given to entering a project of a contractor with a work practice violation within the previous 12 month period." The only change was the use of the NARS[4] system as the benchmark for evaluating the FDEP's performance. But the FDEP's response was blunt:

> "Response: C/A: **Florida DEP recommends to its inspectors to not enter containment to observe work practices while in progress. There are many other avenues for assessing compliance where resources are better utilized and the risk to the inspector is minimized**."

(Emphasis added) The EPA completely acquiesced to the FDEP's response simply stating, "Status_OK."

[4] National Asbestos Registry System

What does this mean for the public? Simply stated, it is the equivalent of a fireman being rushed to the scene of a burning building and then not being allowed to enter the building to put out the fire. In order for an inspector to even know if asbestos is present at a demolition/renovation site he or she must actually enter the site (building) and take samples. Samples are typically taken based upon what the EPA calls a "Matrix System," i.e. taking multiple samples from each section of the building. Often there are in excess of one hundred samples per building. The samples must then be studied by a laboratory in order to confirm the presence of asbestos. Without the ability to enter these buildings the inspector is prevented from identifying the most egregious, health-compromising, violations that may be taking place. As a result, the agency is prevented from prosecuting these serious offenses.

But the problem is even deeper than that, because it is now common knowledge that inspectors in Florida are not allowed to take samples of suspected material even though the inspector comes in direct contact with the same! This means that even if friable asbestos is seen in areas other than in containment it will not be seized and sampled. Moreover, this practice increases the likelihood that the general public will be exposed to this harmful material, since the inspectors are not allowed to take samples for testing thereby removing it from public access. The bottom line is that, robbed of this most basic tool, the inspectors are reduced to identifying and prosecuting what are essentially paper cases.

The FDEP's position in 2005 is astounding. This agency has been in charge of administering the federal NESHAP program on behalf of the federal government for the past twenty (20) years. During that time the agency has been obligated to inspect asbestos

demolition/renovation sites throughout the entire state. Its inspectors have gone into containment during that time—it is part of doing the job. Yet, after twenty years the agency has now suddenly decided that such an approach is not necessary and unwise, because the health of its employees is at risk. This risk, it should be noted, would be avoided by the purchase of protective gear for the FDEP's inspectors. The gear is relatively inexpensive, approximately $100.00 per inspector. The agency must be able to afford such protective gear, since there is no indication in the APA that the FDEP sought additional federal grant money in order to purchase the same.

The "logic" of the agency's new position would lead to the conclusion that it unnecessarily and knowingly exposed its employees to the deadly effects of asbestos over the past twenty years. It is simply disingenuous for the agency's senior management to use the health of its employees in a crass maneuver to try and justify an effort to abandon its responsibilities to the residents of this state.

C. Worker Certification

As indicated above, part of the justification that the FDEP uses (and the EPA accepts) for reducing the number of inspections that are conducted is the claim that the FDEP has a certified contractor program in place. This is accurate. The certification process is actually administered by the Florida, Department of Business and Professional Regulation (DBPR).[5] The DBPR licenses are issued to licensed asbestos consultants, asbestos removal companies, i.e. contractors, training providers and transporters of asbestos containing materials.

[5] IG Report, Page 2.

The one significant fault with the Florida system is that there is no licensing of individual workers. Rather, Florida requires that these workers be "certified" by taking courses that are typically paid for by contractors and presented by licensed training providers. There is, however, no tracking of individual asbestos workers. No ID cards are issued, as other states such as Indiana and New York require. Thus, inspectors who may question the competency of an individual worker are left with little or no paper trail to confirm the worker's fitness to work with this hazardous material. Likewise, the history of the individual worker as it pertains to his or her education and/or safety record is unknown.

The failure to require and issue ID cards means that the system can be readily exploited. One example is the matter of the Steelfield Landfill in Bay County, Florida, a case that was raised by *Florida* PEER in 2004.[6] The FDEP has persistently refused to investigate this case, much less initiate enforcement. Just recently one of the former workers at the landfill, Danny Walker, claimed that certificates were issued for courses that were never given.[7] It is widely known in the industry that unscrupulous employers obtain false certificates showing that workers have attended training courses when, in fact, no such training was given. This is an ongoing problem not only in Florida but throughout the country.

Further problems arise when the workers are illegal immigrants who are being exploited in order to increase the owner's profits. Such happened in the *Ho* case, above. One of Mr. Ho's co-defendants had hired no fewer than ten illegal Mexican workers to perform the demolition/renovation aspect of the job. *Ho*, 311 F.3d at 591. Whether or not

[6] http://www.peer.org/news/news_id.php?row_id=368
[7] http://www.insider-magazine.com/AztecWalker.pdf

these individuals were "certified" is not indicated in the opinion, but the salient point is that this type of activity occurs. Danny Walker, in his interview with *Insider-Magazine's* John Caylor, also alluded to the fact that illegal immigrants were being utilized at the Steelfield Landfill.[8]

How would the issuance of ID cards improve the system? Such a system would require such items as birth certificates, social security numbers, driver's license numbers etc. as proof of identity. These systems, such as the system operated in New York, track the certifications issued to each worker in order to assure (to the extent possible) that each worker is qualified to work in asbestos removal projects. Further, these systems afford the agency inspectors the ability to almost instantly determine whether workers who are observed on a site are legally authorized to be there. It is not 100% effective; however, it is certainly better than requiring no ID, which is the case in Florida. And given the case that the system used by most states charges the worker for issuance of the ID, the system becomes essentially self-supporting.

D. Diversions

The modern trend within EPA's Region IV has been to encourage self-policing and auditing within the business community. Couched in the phrase "compliance assistance," the premise is that through education and a more stakeholder friendly attitude the public will see an increase in businesses complying with federal and state environmental regulations. This approach found its way into the APAs issued by the EPA to the FDEP and can be found in the APAs for 1999, 2000, and 2001.

[8] http://www.insider-magazine.com/AztecWalker.pdf

Beginning in 2002, the APAs became more specific with stated goals, objectives, and sub-objectives. The 2002 APA stated the matter as follows:

> "**Goal: A Credible Deterrent to Pollution and Greater Compliance with the Law**
> **Objective:** Increase use of auditing, self-policing-- Promote the regulated communities' voluntary compliance with environmental requirements through compliance incentives and assistance programs.
> **Sub-Objective:** By 2005, increase the numbers of violations reported and corrected through self-disclosure by the regulated community by 100% of the FY 1997 baseline. Increase understanding of environmental requirements in the private sector and at State, Tribal, Local, and Federal facilities through the use of compliance assistance tools."

The 2003 APA kept the same objectives and sub-objectives, while adding specific performance measures such as the "impact on environmental and human health problems," "self policing efforts by using compliance incentive policies," "improvements resulting from compliance assistance tools and initiatives," etc.

2004 saw some changes to the auditing and self-policing approach. Gone was the effort to "increase the numbers of violations reported and corrected through self-disclosure by the regulated community by 100% of the FY 1997 baseline." Instead, annual performance goals were implemented, said goals being to:

> "Increase opportunities through new targeted initiates for industries to voluntarily self-disclose and correct violations on a corporate-wide basis. Increase the regulated community's compliance with environmental requirements through their expanded use of compliance assistance. Continue to support small business compliance assistance centers and develop compliance assistance tools such as sector notebooks and compliance guides."

The performance measures that the EPA decided to utilize were whether "[f]acilities voluntarily self-disclose and correct violations with **reduces (sic) or no penalty** as a result of EPA self-disclosure policies." (Emphasis added) Also measured are the "[n]umber of facilities, states, technical assistance providers or other entities reached through targeted compliance assistance." Thus, the effort is to be one of asking corporations to voluntarily abide by the law, in exchange for administrative agencies agreeing not to assess monetary penalties should the corporations nevertheless fail to comply with the nation's environmental laws.

2005 has seen yet another evolution in the self-auditing, self-policing concept. The Objective is now to:

> **"Improve Compliance.** By 2008 maximize compliance to protect human health and the environment through compliance assistance, compliance incentives, and enforcement by achieving a 3 percent increase in the pounds of pollution reduced, treated, or eliminated, and achieving a 3 percent increase in the number of regulated entities making improvement in environmental management practices."

The Sub-Objective is:

> **"Monitoring and Enforcement.** By 2008, identify, correct, and deter noncompliance and reduce environmental risks through monitoring and enforcement by achieving: a 3 percent increase in complying actions taken during inspections; a 3 percentage point increase in the percent of enforcement actions requiring that pollutants be reduced, treated, or eliminated: and a 3 percentage point increase in the percent of enforcement actions requiring improvement of environmental management practices."

The irony of these new objectives is that in order to determine whether or not they are effective the delegated agency, in this case the FDEP, must actually <u>conduct</u>

inspections. Yet, as has been shown above, the very same APAs that have ushered in this kinder, gentler approach to environmental enforcement have also called for a decline in the number of inspections in areas that pose the greatest risk to human health.

V. Federal Grant Money

The FDEP receives federal grant money in exchange for administering the NESHAP program in Florida. This grant money is provided to the FDEP by the EPA and is commonly referred to as "Section 105" grant money. It is provided under the direction of the federal Clean Air Act which encompasses the NESHAP program.

On June 21, 2005, *Florida* PEER, submitted a request to the EPA's Region IV seeking to obtain public records under the Freedom of Information Act (FOIA). This request was made in an effort to determine the extent to which the EPA had funded the FDEP in order to enable the FDEP to administer the NESHAP program in Florida.

The EPA's response was relatively fast. On July 14, 2005, Russell L. Wright, Jr., the Assistant Regional Administrator for Region IV's Office of Policy Management formally responded on behalf of the agency by stating:

> **"The EPA provides grant money to the FLDEP to support their air pollution control program and does not specifically track money spent within its Section 105 (CAA) grants. Therefore, I wish to advise you that the EPA, Region 4 has no records responsive to your request."**

(Emphasis added)

Thus, the federal agency that funds the NESHAP program in Florida apparently has no idea just how much money it is pouring into the program! Therefore, the written

requirements of the APAs essentially mean nothing, since there are apparently no financial ramifications to the FDEP failing to live up to its responsibilities. As a practical matter, the EPA would be highly unlikely to revoke the FDEP's federal delegation absent the filing of a lawsuit by citizens demanding the same.

VI. Conclusion

A. The EPA

Governmental attitudes towards the importance of enforcing this country's environmental laws are shaped at the top. When the top environmental agency in the country advises a state agency that it can reduce its field inspections by fifty percent the public cannot but expect that there will be a lessening of standards. Such is the case with Florida's NESHAP program. This attitude of indifference towards enforcement was solidly reinforced this year, however, when the President appointed Granta Nakayama to head the EPA's enforcement division. Mr. Nakayama was a partner in Kirkland & Ellis LLP, a law firm in Chicago.[9] That law firm represented, among others, BP, Dow Chemical, DuPont, and W.R. Grace. At the time of Nakayama's appointment, the latter client, W.R. Grace, was under criminal indictment for violations of the NESHAP program in Libby, Montana. While the firm denied that Nakayama personally handled the asbestos litigation on behalf of W.R. Grace, Nakayama's appointment still sends a strong signal that the administration does not value strict enforcement of NESHAP laws. Despite numerous stated public concerns about Nakayama's nomination the White House

[9] http://seattlepi.nwsource.com/national/230047_epa25.html

sent the nomination to the Senate on June 23, 2005.[10] In light of this callous approach to enforcement it is difficult to see how the EPA can be expected to move the FDEP in the direction of stronger enforcement at the state level.

Finally, it is incredible that the EPA simply pours taxpayers' money into a federal program without tracking how that money is used. As previously stated, under these conditions it can hardly be expected that the FDEP would be concerned about the loss of federal grants should it fail to properly enforce NESHAP laws. Indeed, it would appear that the federal grant program is the proverbial "cash cow" that keeps on giving. It is not too much for taxpayers to demand accountability in the program.

B. The FDEP

Contractors are required to give advance notice to the FDEP to let the agency know when they are about to undertake asbestos removal at a site. It goes without saying that in the general sense a contractor who is conscientious enough to abide by the law and give the required notice is not likely to engage in serious violations at the site that would injure the workers or the public at large. Thus, when inspectors arrive at such sites they would not normally expect to find wholesale violations.

But it is not the contractors who routinely abide by the law who need the close supervision. Rather, it is those individuals who attempt to evade the law by undertaking asbestos removal without providing any advance notice to the FDEP. Such actions are typically accompanied by wholesale failures to provide necessary safeguards to protect the workers and the public. They are known in the trade as "rip and skip" operations,

[10] http://www.whitehouse.gov/news/releases/2005/06/20050623-11.html

typically undertaken in as much secrecy as possible. And law enforcement well knows that when an atmosphere exists in which inspectors "look the other way" on some violations, the violators, i.e. criminals, are more inclined to engage in other criminal behavior.

Once a demolition/renovation site is found it is incumbent upon the agency to confirm that the removal does or does not contain asbestos as well as the precise locations where the asbestos is located within the building or work area, what condition the asbestos is in (poor, fair marginal) and finally the content/ percentage of asbestos at hand as well as the type of asbestos. This requires going into the area that contains the asbestos, i.e. going into containment. Yet, as the most recent APA demonstrates, the FDEP's official position is that it will not allow its inspectors to enter containment. Without the ability to go into containment the inspector is left with no practical ability to collect samples of the materials being removed so that laboratory analysis can confirm that regulated asbestos containing material (RACM) is present. Without that analysis it is virtually impossible to build a significant case, criminal or civil, against the violator.

It cannot be overemphasized that inspectors must be allowed to take samples of suspect material, whether the material is found in containment or in areas outside of containment. Not only does the removal of such material help to protect the general public's health, safety and welfare, but it also aides the FDEP in identifying and prosecuting NESHAP violations.

If one has no samples of the RACM, the next and only realistic alternative is to obtain the "environmental survey" performed on the site prior to the demolition having been started, assuming that such a survey was performed. However, according to some

employees at the FDEP, the inspectors are no longer allowed to even ask for what is known as the "environmental survey" at the site. The rationale is that the administrative rules do not require such surveys, but instead require only "inspections."

What is the difference between an environmental survey and an inspection? The former is a survey conducted under the direction of a licensed asbestos consultant who is trained in the art of sampling for asbestos using the Matrix System. The samples are then tested and laboratory results are issued, thus giving the owner/contractor (and the agency inspector) a high degree of confidence that the building does or does not contain asbestos. A mere "inspection," by contrast can be performed by anyone and may or may not include actual sampling and testing.

The bottom line is that there is nothing prohibiting the FDEP from adopting regulations to require environmental surveys. It has yet to do so. Instead, it relies on the "good nature" of the contractor who has a financial incentive to conduct the demolition/renovation as cheaply as possible as well as avoid detection should violations, shortcuts or poor work practices be at hand.

<u>In this environment, therefore, the simple, practical affect of the FDEP's policies is that meaningful asbestos enforcement has been abandoned</u>. This is all being done under the auspices of protecting the health of the FDEP's inspectors. The agency's position raises a fundamental question: How is it that the agency was able to enforce these laws by sending its inspectors into containment for twenty years, but suddenly such activity is no longer safe? After all, the FDEP has had responsibility for the NESHAP program since 1984. The second question raised by the FDEP's position is: If these situations are so serious that agency inspectors are not allowed to go into containment, then where are the

notices and warnings to the innocent workers who have been working inside these conditions? And where are the notices and warnings to the public at large who are re-entering buildings that are supposedly safe and clear of asbestos after jobs have been completed, yet remain unverified by full environmental surveys and related sampling to assure quality controls were fully met prior to the initiation of the project, during the project and at the conclusion of these projects?

1. The IG Report

We began this White Paper with a brief look at the IG Report that was issued in April 2005. One section of that report is entitled "State and Local Program Personnel's Concerns" Numerous concerns are listed. They principally address the FDEP's delegation of the NESHAP program to local agencies and the lack of uniformity that results whenever such delegation takes place. However, the last noted concern is stated in this manner:[11]

> **"9. There is a concern about the possible de-emphasis, outsourcing, cut-backs or even elimination of the Asbestos Program by EPA."**

(Emphasis added)

After listing the above concern the IG Report fails to address, in any substantive way, the legitimacy (or lack thereof) of such concerns. The IG Report fails to address the FDEP's actual enforcement of the NESHAP regulations beyond the need for greater clarification and uniformity in the manner in which the program is administered at the

[11] IG Report, Page 3

state and local levels. No reason is offered. It would have been highly appropriate given the concerns voiced by the employees.

Perhaps the employees are concerned because of statements that routinely come from the White House about the need for "asbestos reform." On January 5, 2005, President Bush addressed a gathering in Collinsville, Illinois. Included in the President's speech were these remarks:

> "I look forward to working with both bodies and members of both parties to get good class-action reform out of the Congress this year. I'll also work with Congress to reform asbestos litigation. (Applause.) Asbestos lawsuits in Southern Illinois and elsewhere have led to the bankruptcy of dozens of companies, and cost tens of thousands of jobs. Many asbestos claims are filed on behalf of people who are not sick. The volume of asbestos lawsuits is beyond the capacity of our courts to handle, and it is growing. More than 100,000 new asbestos claims were filed last year alone. Congress has begun considering options to improve the current system for handling asbestos lawsuits. They need to act and get the job done. I look forward to signing an asbestos reform in 2005. (Applause.)"

One can only take the President at his word about wishing to see a decrease in frivolous lawsuits. <u>But the uneasy truth is that lawsuits also cannot be started if the presence of asbestos is never detected</u>. This jaded outcome becomes much more realistic if agency inspectors are no longer able to go into containment and thereby identify the existence of asbestos or the utilization of proper practices, such as wetting, that allow for the proper handling of disturbed asbestos.

The fact is that asbestos is a killer. As for health effects emanating from exposure the EPA says:[12]

[12] http://www.epa.gov/iaq/asbestos.html

> "No immediate symptoms, but long-term risk of chest and abdominal cancers and lung diseases. Smokers are at higher risk of developing asbestos-induced lung cancer. Integrated Risk Information System description on Asbestos - www.epa.gov/iris/subst/0371.htm#I.A. (Chemical Abstract Service Registry Number - 1332-21-4).
>
> The most dangerous asbestos fibers are too small to be visible. After they are inhaled, they can remain and accumulate in the lungs. Asbestos can cause lung cancer, mesothelioma (a cancer of the chest and abdominal linings), and asbestosis (irreversible lung scarring that can be fatal). Symptoms of these diseases do not show up until many years after exposure began. Most people with asbestos-related diseases were exposed to elevated concentrations on the job; some developed disease from exposure to clothing and equipment brought home from job sites."

Thus, according to the President's own EPA, the consequences from exposure to asbestos are lethal—and often take years, if not decades to detect. Most of the victims are workers who have been exposed, as well as people how have been exposed to asbestos while living in older housing.[13] Aggressive enforcement of NESHAAP regulations would help to prevent these individuals from experiencing the adverse health effects associated with asbestos exposure.

The President's emphasis on curtailing asbestos litigation is well known. It has been consistent and unrelenting. It has been shared by the President's brother, Jeb Bush. In an April 13, 2005, memo[14] to the Florida Legislature the Governor urged the Legislature to adopt so-called "tort reform." He stated, in pertinent part:

> **"3. End the Asbestos Lawsuit Free-for-All**
> Asbestos lawsuits have created a travesty of justice. Lawyers round up tens of thousands of "plaintiffs" who are

[13] http://www.epa.gov/iaq/asbestos.html
[14] http://www.aif.com/2005Articles/bushmemo.htm

> not even sick (who only have been determined to have been exposed to asbestos) to file suit while the truly sick get short-changed. According to the RAND Institute, by 2000 more than $54 billion had been paid out for asbestos litigation with approximately 65 percent being awarded to plaintiffs who were not even sick.
>
> We need asbestos lawsuit reform to make sure sick plaintiffs are made as whole as possible as quickly as possible. Without reform, runaway asbestos litigation will drive more and more employers into bankruptcy meaning truly sick people will be left uncompensated. Already, according to the National Association of Manufacturers, at least 70 companies have been forced into bankruptcy primarily due to asbestos litigation. Armstrong World Industries, Pittsburgh Corning and Owens Corning are just a few examples of companies that have filed for Chapter 11 bankruptcy largely due to asbestos litigation. And Towers-Perrin Tillinghast cites asbestos litigation as the fastest growing component of tort costs in America.
>
> Asbestos litigation is a unique problem in our tort system which calls for a unique solution. We cannot afford to wait for a federal solution to the asbestos litigation challenge. Ohio has established a policy for expediting payment to sick individuals and the Florida Legislature should do the same here."

It is hardly surprising under these circumstances that government employees would be concerned about the spillover effects into the EPA and the FDEP on the regulatory front—particularly when those employees see massive curtailments of NESHAP enforcement such as are exhibited in the EPA/FDEP agreements contained herein. The credibility of the IG Report would have been enhanced had it addressed those concerns.

2. <u>Hurricanes</u>

On August 13, 2004, Hurricane Charley struck the Southwest Florida coastline and inland communities. Fifteen counties were directly impacted by the storm. The next

day, Secretary Castille signed FDEP Emergency Order, OGC #04-1458[15] (Order) in order to facilitate the cleanup of the destruction left behind by this massive storm. Florida was then struck by yet three more powerful hurricanes, including Category 4 Hurricane Ivan, which struck the Panhandle on September 16, 2004. Already in 2005, the Panhandle has been struck by Hurricane Dennis, a powerful Category 3 storm.

The issuance of emergency orders following a hurricane's landfall is normal in Florida. An emergency order was issued by Secretary Castille after each hurricane in 2004 and after Hurricane Dennis in July 2005. The content of these orders is largely boilerplate, the principle changes being made to tailor the order to the specific counties affected by the storm. The orders typically allow for relaxed reporting requirements in order to facilitate cleanup, as well as the reconstruction process.

Emergency Order #04-1458 (Order) signed by Secretary Castille was typical of all of the orders issued by the Secretary following these storms. And this order, like those to follow, dealt with asbestos. Under Section 4 of the Order the FDEP specifically allowed the demolition/renovation of asbestos-containing material without the need for prior notification to the FDEP. The waiver was not complete, however, because each contractor was obligated under the Order to notify the FDEP of the demolition/removal work within one day of beginning the operation.[16] Except for the prior notification waiver, the FDEP required all other NESHAP requirements to be followed.

It should not be lost on anyone that the negotiations between the FDEP and the EPA that lead to the FDEP's refusal to allow its inspectors to enter containment were occurring around the same time that Florida was being struck by major hurricanes.

[15] http://www.dep.state.fl.us/legal/Final_Orders/2004/dep04-1509(2).pdf
[16] See, Order, Pages 6-7

Indeed, the final decision to forego inspecting sites occurred shortly after the four storms had caused the need for billions of dollars of demolitions throughout the peninsula and panhandle. The APA was issued by the EPA on December 14, 2004. These matters do not occur in a vacuum.

The drive to accelerate waste cleanup began this year in June. It was spearheaded by Mary Jean Yon,[17] the FDEP's Director of the Division of Waste Management, when she issued a statement accompanied by a press release on the issue of waste cleanup:

> "**The volume of debris following a hurricane can cause health and environmental hazards.** With these new plans in place, the State can better partner with city and county environmental agencies to address the timely removal of hurricane debris."
> ~ Mary Jean Yon
> DEP Division of Waste Management Director"

(Emphasis added) The accompanying press release announced new plans for dealing with waste disposal.

Each of the emergency orders issued by Secretary Castille has been accompanied by a press release. The same is true of the post-Dennis era when the Secretary issued this statement which, in pertinent part, says:[18]

> "Hurricane Dennis has come and gone. For some the hurricane is just a memory, but for many Floridians the effects will be felt for some time. To speed recovery and expedite rebuilding and restoration in the affected areas, the Department issued a 60-day Emergency Order on July 11, 2005, authorizing local governments, businesses and property owners to immediately begin certain activities,

[17] Ms. Yon is the former District Director of FDEP's NW District Office. She was in charge of the office during the time that the Steelfield Landfill (Big Wheel) asbestos violations were made public by PEER. Her office staunchly refused to prosecute the violators who were known supporters (through campaign contributions) of the Bush Administration. She was later promoted to the position that she now holds.
[18] http://www.dep.state.fl.us/secretary/post/2005/0722.htm

> such as debris removal and structural repairs, without the need for permits. . . ."

Secretary Castille is correct. Many Floridians will indeed feel the effects of Hurricane Dennis for some time. Unfortunately, however, some of the effects will be entirely unnecessary, such as the long-term health effects that will come from exposure to friable asbestos. Asbestos becomes practically harmless once it is wetted. However, if it is allowed to dry it can once again become "friable," i.e. lethal. The aftermath of a major hurricane includes the destruction of homes and businesses. It is older construction that is particularly vulnerable. It is older construction that also is most likely to contain asbestos. Thus, it is to be expected that demolition/renovation projects that occur in areas that have just been impacted by hurricanes will have a disproportionately high incidence of ACM. Once dried this ACM will become lethal. It is in this climate that the FDEP advised the EPA that it would no longer allow its inspectors to enter containment, i.e. come into close contact with ACM.

Thus, while the FDEP and Governor are touting the FDEP's relief efforts as contained in the emergency orders, the agency has very quietly unraveled the same rules that the orders are supposed to be re-emphasizing. The practical effect has been to subject the workers and the public to the whims of unscrupulous contractors who see the opportunity to make more money by circumventing the regulations that are in place.

C. Recommendations

PEER recommends the following action be taken:

- Inspections at demolition/removal sites should be increased to the 1999 levels, if not higher, i.e. to 50% of the projects.
- Asbestos workers should be licensed and their histories tracked by the DBPR.
- Asbestos inspectors need to be receiving mandated asbestos training courses and as well as receive related yearly refresher courses.
- Asbestos inspectors need to be certified yearly with the safety equipment provide to them.
- Asbestos inspectors need to be placed in yearly medical screening programs to assure they are capable of enduing the rigors of this job safely and that they have the ability to wear a respirator while working in hot confined areas under difficult circumstances.
- Florida needs to amend it rules/sop's to allow FDEP asbestos inspectors to secure and review copies of related environmental surveys upon visiting any asbestos site for inspection. Owners of buildings and/or abatement companies should be mandated to have this survey at the site at all times and that the inspector be allowed full access to it during his/her assessment of the project.
- Inspectors must be allowed into containment in order to identify and sample RACM. If the inspectors are not properly outfitted with protective gear, the same should be immediately provided by the FDEP.
- Inspectors must be allowed to sample suspected material in order to identify the presence of friable asbestos.

- Once identified, violations must be aggressively prosecuted.
- The EPA should immediately begin tracking the Section 105 grant monies paid to the FDEP for administering the NESHAP program. Issuance of grant monies should be contingent upon the FDEPs complete administration of the program, including aggressive enforcement.