

**BEFORE THE STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS**

Thomas R. White,
Petitioner,

vs.

Case No.:

The State of Florida,
Department of
Environmental Protection,
Respondent.

**COMPLAINT FOR RELIEF UNDER
THE FLORIDA WHISTLEBLOWER ACT,
SECTION 112.3187, FLORIDA STATUTES**

General Allegations

1. Petitioner, Thomas R. White (White), a citizen of the United States and a longtime resident of the State of Florida, has been employed continuously with the State of Florida, Department of Environmental Protection (FDEP or the Department), since April, 1987. He is an employee, as defined under §112.3187(3)(b), Fla. Stat.

2. Mr. White is a chemist and has been assigned to work in the FDEP's laboratory (Lab) in Port St. Lucie, Florida, since he began employment with the FDEP. Until January 2004, he held the position of Chemist III and Lab Manager. In January 2004, he was also given the responsibilities of Quality Assurance Officer. He is a career service employee. In his position with the FDEP he has performed audits of other FDEP laboratories, as well as private laboratories operating in the region.

3. The lab out of which Mr. White works is under the supervision of the FDEP's Southeast District Office (SED) in West Palm Beach, Florida.

4. On October 31, 2006, without advance notice or warning, Mr. White was placed on administrative leave with pay by the FDEP. He was given a written notice of this action, but was not advised of the specific basis for the action, only that the FDEP was undertaking an internal investigation.

5. On January 3, 2007, the FDEP, mailed a predetermination letter to his residence. In this letter the FDEP charged him with "data fraud" and negligence. The FDEP, in this letter, advised Mr. White that the Department intended to take adverse action against him, up to and including dismissal.

6. Mr. White received the FDEP's predetermination letter on January 4, 2007. A copy of the letter received by Mr. White is attached as Exhibit A, hereto.

7. The FDEP conducted a predetermination hearing with Mr. White on January 30, 2007. At this hearing Mr. White provided the FDEP with a written response to the charges against him. A copy of the response filed by Mr. White is attached as Exhibit B, hereto.

8. On February 15, 2007, the FDEP contacted Mr. White and advised him that a decision had been made in his case and that he was expected to report to FDEP's Acting District Director, Timothy Rach, in the SED office on February 16, 2007, at 4:30, P. M.

9. On February 16, 2007, Mr. White met with Mr. Rach and another supervisor, Ms. Mary Murphy in the Port St. Lucie conference room at which time Mr. White was formally notified that he was being terminated by the FDEP. The formal charges purportedly justifying the action were "Violation of Law or Agency Rules To Wit:

Falsification of Official Document(s) or Recording and Negligence.” A copy of the termination letter is attached as Exhibit C, hereto.

Jurisdiction

10. This complaint is filed pursuant to §112.3187, Fla. Stat.

11. The Florida Commission on Human Relations has jurisdiction over this matter pursuant to §112.3187(7), Fla. Stat.

Specific Allegations

Laboratory Functions

12. The Port St. Lucie Lab has many responsibilities. Historically the Lab has conducted water quality sampling and analysis as requested by the SED and Tallahassee office. This work has included sampling and analysis to determine compliance by industrial and wastewater permittees with FDEP issued permits. The Lab’s work has also assisted the FDEP in enforcement cases brought by the agency against said permittees.

13. The Lab is divided into two sections. The field operations section is responsible for conducting requested sampling of water bodies. The analysis section is responsible for conducting analyses on the samples that are brought to it by the field operations section.

14. For a majority of the time at issue in this case, Gregory Graves, in addition to other duties, was overseeing both sections of the Lab. Graves was a select exempt employee who had been employed with the FDEP in excess of twenty years. His long tenure has resulted in the FDEP’s significant investment in his issues and positions. He sat on seven committees for the FDEP and carried significant influence within the

FDEP's management structure, particularly in the SED. His primary role in the Lab was the development and overseeing of the field aspects of the Lab.

15. White worked in the analysis section and reported directly to Graves.

16. In or about 2000, the FDEP, in response to federal litigation in the 1990s requiring the same, formally intensified the process of identifying the state's impaired waters. The enabling statute involved is §403.067, Fla. Stat. ("Establishment and implementation of total maximum daily loads"), including subsections (2)-(4) thereof. This statute ostensibly is intended to set the framework for Florida's implementation of Section 303(d) of the Clean Water Act (CWA), 33 U.S.C. §§ 1251, et seq., which, along with implementing regulations promulgated by the United States Environmental Protection Agency (EPA) in 40 CFR, establishes the so-called TMDL program on the federal level. The FDEP is obligated to comply with this federal program. It receives federal grant money in order to carry out its responsibilities under federal law.

17. Once the impaired waters are identified, the FDEP is then required to set what is known as Total Maximum Daily Loads (TMDL(s)) for each impaired water body. A TMDL is simply a limitation on the amounts of specified pollutants that are allowed to be cumulatively discharged into each impaired water body by all dischargers having outfalls impacting each water body. The setting of a TMDL thus results in increased restrictions being placed upon said dischargers by the FDEP.

18. In or about 2000, the FDEP began the process of formally adopting an administrative rule that would eventually be adopted. This rule, 62-303, F.A.C., is known as the Impaired Waters Rule. The purpose of the rule is to provide a formal mechanism that the FDEP is to follow in identifying the Impaired Waters within its jurisdiction.

19. The Impaired Waters Rule was formally adopted in late 2002. Once formally adopted, the FDEP tasked each of its district labs, including the Port St. Lucie Lab, with the job of sampling all suspected impaired waters within each district's jurisdiction. The samples were to be collected, analyzed, and reported to the FDEP's offices in its headquarters in Tallahassee. If the test results indicated that a water body was impaired, the FDEP's obligation was to include said water body on what is known as the "303(d) List" that is filed, pursuant to federal law, with the EPA.

20. The FDEP's headquarters in Tallahassee adopted what is known as a "Basin Approach" to identifying Florida's impaired waters. Essentially, the agency wished to have the identification completed within a five (5) year period, i.e. by approximately 2007-2008.

21. The job of identifying all impaired waters within the SED was enormous, occupying a significant majority of the Lab's resources and time.

White's 2003 Disclosure To Management

22. White's job, as a chemist for the Department, necessarily meant that he would be called upon to analyze a significant number of the water samples that were conducted, as well as to conduct sampling on limited occasions where necessary to fill in for other absent employees, and finally to report his findings to his supervisor within the Port St. Lucie Lab.

23. During this time White was also in the process of acquiring certification for the Port St. Lucie Lab. The certification was to be obtained from the National

Environmental Laboratory Accreditation Conference (NELAC). NELAC accreditation dealt with the analytical aspects of the Lab's work.

24. On May 20, 2003, when the sampling process was in its early stages in the SED, White sent an email to his supervisor, Mr. Gregory Graves. This email, which is attached as Exhibit D hereto, formally advised Graves of White's concern that the Lab was not following proper protocols in carrying out its responsibilities. He was concerned that this issue would impact negatively upon the Lab's efforts to acquire NELAC accreditation. Such problems would also have negatively affected the TMDL Program.

25. In the May 20 email White further advised Graves that he had spoken with Ms. Silky Labie, an administrator in FDEP's main laboratory in Tallahassee about his concerns. White also advised Graves that he had requested an audit of the Lab. In her position as an administrator, Labie was in a position to correct the deficiencies that White brought to her attention.

26. Graves was the Quality Assurance Officer in charge of and responsible for the accuracy of the analyses that the Lab performed during this time. He was White's direct supervisor.

27. Graves responded to White's email by writing on the body of the email a note chastising him for having allegedly waited seven months to bring the matter to Graves' attention. See, Exhibit D.

28. Notwithstanding the problems encountered, as a result of the efforts of White and his colleagues the Lab received NELAC certification in or about January 2004. The NELAC audit that was performed prior to granting certification dealt primarily with the analytical functions of the Lab.

29. As a direct result of the NELAC auditor's concern that the QA Officer at the time, Graves, was also the manager of all Lab operations (a violation of NELAC standards), White was given the added title of QA Officer. This issue arose because the NELAC auditor was concerned that the QA Officer had not been following protocols. As a result of the NELAC audit, Graves was then removed from those responsibilities. FDEP still improperly allowed him, however, to supervise White's work in the Lab.

Alpizar's Complaint To The OIG Against Graves

30. Notwithstanding the NELAC certification, the working environment at the Lab was one of increasing tension exacerbated by Graves' management style and constant concern about what he perceived to be unnecessary meddling by the FDEP's main laboratory in Tallahassee (Central Lab) and the administration officials charged with overseeing the TMDL Program for the FDEP.

31. The tension increased to the point that in April 2006, Mirna Alpizar, an OPS Environmental Specialist I in the Lab went to White, as well as to Program Administrator, Anne McCarthy, in an effort to rein in Graves. Alpizar was extremely concerned about Graves' refusal to follow proper Lab protocols with respect to field/sampling issues, his refusal to allow White to correct any problems in the Lab, and his poor management style.

32. White also spoke with management in an effort to impress upon management the seriousness of Alpizar's complaints and to explain to them that Alpizar's complaints, in his opinion, were well founded.

33. On May 1, 2006, McCarthy was in communication with FDEP personnel in Tallahassee. In furtherance of her efforts to resolve Alpizar's, and the Lab's, situation, she sent an email to Vanessa Brown. Exhibit E, attached hereto. Brown is a Management Review Specialist who works in the FDEP's Employee Relations Section, Bureau of Personnel Services, in Tallahassee. The email sent to Brown states, in pertinent part:

“Vanessa – Please review this draft response to Mirna Alpizar and provide any suggestions if you have any. Thank you!

Mirna,

After reading your email, I can see these are very serious allegations against Greg. Are there others involved? It is my intention and responsibility to address this immediately but I need more specific information about these allegations. First, please provide me detailed information on what procedures/protocols/regulations you have been asked to 'break.' I need dates, time who asked you to break them, if there was a witness, and any other details surrounding this. . . .”

Brown responded that the email “looks good” but it is unclear whether it was ever sent to Alpizar. What is clear, however, is that it was sent by Brown to the FDEP's Office of Inspector General (OIG) two days later.

34. Management within FDEP refused to address her complaints in a straightforward fashion, because to do so would have meant taking serious disciplinary action against Graves.

35. Therefore, on May 2, 2006, Alpizar, who reported directly to White, formally charged Graves with directing her to violate lab regulations, verbally intimidating her and threatening to slander her professional reputation. This charge was forwarded to the OIG the following day by former District Director, Kevin Neal.

36. In an effort to assuage Alpizar's concerns over Graves' management style, FDEP then removed Graves from all supervisory responsibilities. The entire section was then put under the supervision of Anne McCarthy.

37. On June 1, 2006, White cooperated with the OIG's investigation. The OIG report that was later issued summarized White's claims, in pertinent part, as follows:

"White advised Graves had a history of being difficult and used the power of his position in a way he shouldn't. White advised he saw Graves as an abuser and that whenever there was trouble, Graves would comment that it needed to be kept *'in the family.'* White stated Graves had overridden his authority and described Graves as *'anti quality assurance'* as Graves thought it was a waste of time.

"White advised Graves did not need to supervise sampling protocols or lab protocols. White expressed he was concerned about the upcoming TMDL audit because of the *'Greg Methods'* Graves used to run the lab." (Emphasis in original)

38. The OIG investigator who conducted the interviews was Captain Amy Schmidt. White advised Schmidt, during his telephonic interview with her on June 1, 2006, of other specific examples of problems with Graves refusal to follow NELAC standards. Such examples included, but are not limited to: (1) White advised Schmidt that Graves' supervision of both field sampling and analysis personnel violated NELAC standards (5.4.1.4 and 5.4.1.5), inasmuch as it created a conflict of interest because the QA Officer should have reported directly to independent management and thus not be susceptible to pressures from the field sampling section, (2) the Laboratory Information Management System (LIMS) developed by Graves and used by the Lab to record and maintain data did not, and does not, have security to prevent breaches, (3) Graves consistently refused, over objection from White and Alpizar, to follow Standard

Operating Procedures (SOPs) developed by the Central Lab. Thus, at this point White had voiced concerns on at least two separate occasions about the manner in which the Lab was functioning.

39. The disclosures made by White to Schmidt were significant disclosures that dealt with the issue of whether or not the sampling procedures used by the Lab were consistent with Tallahassee's SOPs. A failure to abide by the SOPs would mean that the credibility of the samples was questionable. This, in turn, would jeopardize the usability of the samples in the TMDL Program. In his position as an analyst, White was in a position to witness Graves' failure to require strict adherence to protocol.

40. The second disclosure was equally significant in that the data base used for storage of data by the Lab was susceptible to being compromised because of a lack of security. The LIMS System was used by at least two other FDEP laboratories in the state. If the data's security is vulnerable the foundation of the entire TMDL Program could be undercut.

41. At this point the District Director, Kevin Neal, held a meeting with all Lab personnel at which point he advised that he had decided to maintain the field sampling section separate from the analyses section. Both sections were put under Mary Murphy's supervision. This meeting was held on the same day that the TMDL auditors concluded their audit of the Lab and had departed for Tallahassee.¹ White advised Neal that the auditors had found deficiencies, but that White had to wait for the TMDL audit report in order to know what the exact deficiencies were and how to respond to the same.

42. On June 21, 2006, Graves resigned his position with the FDEP. According to his letter of resignation, Graves' final day in the office was June 30, 2006.

¹ See, *The TMDL Audit*, below.

43. Prior to Graves' departure he sent a packet of material to the OIG. This material consisted of documents that he considered to be derogatory information about White. Included in the packet was the May 20, 2003, email that White had sent to him (Exhibit D) voicing concerns about the procedures used by the Lab.

44. The OIG sent a closure memorandum regarding its investigation on July 7, 2006. The memorandum was sent to the following individuals: Kevin Neal, District Director, SED, Marshall Wiseheart, Office of General Counsel and to Carol Prevat, FDEP Administrative Services, Bureau of Personnel Services. Wiseheart and Pevat work in Tallahassee.

45. July 7, 2006, was Graves final day as an FDEP employee.

46. On July 18, 2006, the OIG issued Investigations Report No. II-01-18-2006-028. (Graves Report) This report is attached as Exhibit F hereto. The OIG concluded, based upon advice from the Central Lab, that Alpizar's complaint about not following NELAC protocols was **not sustainable**. Notably absent from the Graves Report is any mention of specific allegations of misconduct by Graves with respect to laboratory procedures. Instead, the report treats the matter as if only one allegation was raised by Alpizar in that area. The balance of the Graves Report is directed at Alpizar's complaints of inappropriate conduct by Graves towards her. These complaints were likewise not sustained, however. The OIG's findings concluded with an ominous statement, to wit: "Any recommended program changes should be closely related to the pending outcome of the most recent TMDL audit."

47. Graves' packet of derogatory information about White was attached to the Graves Report. The report was signed by Captain Amy Schmidt and approved by Major

Roy Dickey. The report was submitted by the OIG to Kevin Neal, the then District Director of the SED.

48. The findings of the Graves Report allowed the FDEP to avoid the appearance that a central member of their management structure in the SED was in any way responsible for any misconduct alleged to have occurred.

The TMDL Audit

49. On June 1, 2006, during the Graves investigation, the FDEP's Division of Resource Assessment and Management, at the request of the Division of Water Resource Management, sent a memo to each FDEP District Office advising them that TMDL Program audits would be conducted for purposes of evaluating each laboratory's compliance with TMDL requirements.

50. In June 2006, the TMDL Program in Tallahassee dispatched an audit team from the FDEP's Tallahassee office to Port St. Lucie, the alleged purpose of which was to conduct the above-stated audit. The audit concentrated on the analytical aspects of the Lab's performance with only limited emphasis being placed on the field sampling section, which was closely controlled by Graves. There were a total of five auditors. One of the auditors was Environmental Manager, Tim Frick, who works in the TMDL Program in Tallahassee. Another auditor was Silky Labie.

51. The TMDL audit was completed in June 2006.²

52. On June 30, 2006, on his final day at the FDEP, Graves sent a memo to Captain Amy Schmidt. This Email is attached as Exhibit G, hereto. The email was copied

² White, through counsel, requested this information from the Department via a public records request on January 31, 2007. The Department has failed to provide this information in a timely fashion so as to be able to include the TMDL documents as part of this complaint, despite requests to the contrary.

to Timothy Rach, Assistant District Director. In his memo, Graves advised Captain Schmidt that the TMDL audit was completed and that another Lab employee, Carrie Kelly (Environmental Specialist II) had advised him that the majority of the problems had been found, not with the field/sampling section of the Lab, but rather, with the analytical section, i.e. the section in which White worked. Graves advised Schmidt that she could contact Tim Frick for the details. Graves stated in the memo, “I am sure they uncovered a number of problems.”

53. Graves memo was sent to Captain Schmidt eighteen (18) days prior to the Graves Report (Exhibit F) being finalized and issued.

54. Unlike Graves who had resigned his position, White was not advised of these results until the formal audit was completed.

55. The audit results were known to the OIG well in advance of the final issuance of the Graves Report. The audit results were not mentioned in the OIG’s Graves Report even though the deficiencies identified therein would have supported White’s (and Alpizar’s) complaints to management, particularly since a majority of the deficiencies occurred under the management of Graves. See, below.

56. The TMDL audit was formally issued in or about August 2006. It focused on the analytical side of the Lab’s work, as opposed to the field/sampling operations. The audit highlighted what the audit team believed was a lack of what is known as “data qualifiers” on the data created by the Lab.³ These data qualifiers are identified in 62-160.700, F.A.C., Table 1. A lack of data qualifiers has historically been characterized as what is known as a deficiency. Not until a Florida Society of Environmental Analysis

³ Data qualifiers are technical notations that are appended to data in order to assist in data interpretation. The qualifiers are appended only after the laboratory’s analysis of the sample is completed. They have no effect on data generation, validity, precision or accuracy.

seminar in October 2006 was the issue of data qualifiers raised as a significant issue by the FDEP Central Lab.

57. The data that the TMDL auditor used to reach the conclusion that data qualifiers had not been properly utilized was mostly data that predates January 1, 2004, the date that White became the QA Officer over the Lab. Prior to that time the QA Officer had been Graves. The QA Officer was the employee responsible for approving or disapproving the use of data qualifiers on data to be used by the Lab.

58. In response to the TMDL audit, White prepared and submitted a response that he forwarded to the FDEP's Central laboratory. In that response he addressed a number of issues. He advised the laboratory that his superiors had been well aware of the problems associated with the data qualifier issue and that they had done nothing about it. This was White's third effort to advise the FDEP that there were potential problems with the Lab's protocols.

59. The superiors who knew about the issue now raised by the TMDL audit were (1) White's former supervisor, Environmental Manager, Greg Graves, (2) the former District Director, Melissa Meeker, (3) the former Assistant District Director, John Moulton, (4) Program Administrator, Anne McCarthy, (6) former Program Administrator, Kim Shugar, (6) Environmental Administrator, Mary Murphy (7) Air Program Administrator, Darrell Graziani, (8) Kevin Neal, former District Director, (9) Timothy Rach, District Director.

60. White's assertion that the issue had been known by his superiors did not infer a belief on his part that the data analyses was inaccurate. To the contrary, the qualifiers

are appended after the analysis is completed, thus having no affect upon the fundamental analysis.

61. The Central Lab's manager, William Coppenger, had the authority to take corrective measures to address White's complaint. He used his authority, not to correct said measures, but rather, to complain to White's supervisor that White's assertion should not have been put in writing. White was therefore directed to rewrite the response in order to direct attention away from the superiors who had known about the alleged problem all along.

The OIG Investigation Of White

62. On October 30, 2006, District Director Kevin Neal sent a written complaint to the OIG in which he requested an investigation into what he termed "Falsification of Official Documents."

63. On October 31, 2006, while White was at work, he was suddenly confronted by Major Roy Dickey who informed him that he was being placed on administrative leave. Dickey provided White with a written notice signed by Kevin Neal advising him that an internal investigation was being initiated. A copy of this notice is attached as Exhibit H, hereto. He was ordered to turn over all Department property, which he did.

64. White was then immediately directed to speak with Dickey and Tim Frick. Dickey proceeded to take a sworn, recorded statement from White.

65. During the statement, White asked Dickey if he was being questioned in furtherance of the issues raised in the Graves investigation. Dickey advised him such was

not the case, that this was a “totally unrelated and independent investigation that was initiated in direct response to the audit results.”

66. During his recorded interview White informed Dickey that the FDEP does not require polluters to use data qualifiers when reporting their monthly discharges to the FDEP on Discharge Monitoring Reports. At that point Frick interjected and acknowledged that the FDEP discourages the use of data qualifiers on data submitted to the agency in the drinking water program. Frick tried to minimize this, however and directed the focus of the investigation back to White.

67. After White gave the statement he was directed to leave the premises. He was not given an opportunity to retrieve any of his personal belongings before leaving.

68. Dickey met with Graves the following day, November 1, 2006. Graves, now a state employee with the South Florida Water Management District, refused to give Dickey a recorded statement.

69. Based solely upon White’s statement and Graves’ alleged statement to Dickey, the FDEP OIG issued Investigation Report No. II-01-18-2006-066 (White Report). Dickey signed the White Report and his supervisor, Inspector General Pinky Hall approved it. A copy of the White Report is attached as Exhibit I, hereto. The White Report concluded that White had engaged in what Dickey termed “data fraud.” The report does not conclude that the FDEP’s OIG found any actual evidence of “data fraud.” Rather, it concludes that it is statistically likely that such fraud existed.

70. The White Report was issued on December 20, 2006, by the OIG. It does not mention White’s prior disclosures to Graves or to the OIG. It does not acknowledge Alpizar’s disclosures to management. It furthermore does not acknowledge that White’s

superiors had been advised of these issues by White, through the OIG's office. It does not acknowledge White's written disclosures in his response to the TMDL audit that FDEP superiors knew of the data qualifier problems. It also fails to point out that during the period in question Graves, not White, had final signature authority over data verification. It is entirely silent on these points.

71. The White Report, as do the disciplinary letters sent to White subsequent to the White Report's issuance, charges White with violating NELAC standards by not using data qualifiers. These standards were not, however, binding on the Lab prior to the Lab being certified in January 2004. Prior to that time the Lab used a Comprehensive Quality Assurance Management Plan created by the Lab and approved by the then Quality Assurance Section in FDEP's Tallahassee office.

FDEP's Retaliation In Response To White's Disclosures

The Timing of the FDEP's Personnel Action

72. White alleges, and the record supports the conclusion, that the FDEP was satisfied with his performance to the point that he was given supervisory authority over Alpizar.

73. The FDEP's personnel action against White was instituted only after White complained to superiors, including the OIG, that his superiors were not abiding by laboratory protocols, which were important to the success of the TMDL and other Department programs.

74. White's disclosures to his superiors began to occur in May 20, 2003, at the time that he provided written notice to Graves notifying him that he had informed the Central Lab in Tallahassee that problems existed that needed to be corrected. Some of

these issues were addressed. However, the situation was then allowed to deteriorate to the point that in May 2006, Mirna Alpizar, once she realized that FDEP district management did not intend to address the situation, filed a written complaint with the OIG. White willingly participated in the OIG's investigation assuming that the OIG's investigation was impartial and unbiased. When the investigation proved to be designed to protect Graves and management, White nevertheless raised his concerns through his September 2006, response to the TMDL audit in which he alleged that the FDEP's management had known of the problems.

75. The FDEP's response to White's disclosures was to initiate another OIG investigation designed to terminate White. The FDEP's actions against White were retaliatory and were designed to punish him for participating in the OIG action initiated by Alpizar, as well as for his allegations in response to the TMDL audit that the alleged problems raised by the audit were known to his superiors who had approved and encouraged the same.

76. The disclosure of these matters to management meant that the district managers and program administrators who had allowed the activities to continue unabated could have faced disciplinary actions by the Department.

77. The disclosure of these matters to management also meant that the FDEP's retention of another federal program, the National Pollutant Discharge Elimination System (NPDES), currently administered by the Department under a federal grant, could be jeopardized inasmuch as the Lab's water sampling was also used by that program.

Violations Presenting A Substantial And Specific Danger To The Public

78. The nature of White's three disclosures to his superiors and/or the OIG were both substantial and specific. See, §112.3187(5) (a), Fla. Stat. He alleges that he disclosed ongoing violations by the FDEP of their own rules, to wit: 62-160.110 et seq., F.A.C. and 62-303, F.A.C. These rules describe the manner in which sampling and analysis is to be undertaken, as well as use of the data for inclusion in the TMDL Program.

79. White alleged that there were problems with the protocols being used by the Lab. This was significant and substantial, because the Lab's primary function over the four years that this was occurring was to sample and analyze water samples for the water bodies in the SED. The federal Clean Water Act requires that, under the TMDL Program, these water bodies, once identified as impaired, would have been put on the 303(d) list for cleanup. The impact of such a designation results in restrictions on pollutant emissions/discharges that can cost industry millions of dollars.

80. The program in question was created by Congress. The stated purpose of this, and other programs is recognized in 33 U.S.C. §1252(a), which states, in pertinent part that:

“The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and

aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes.”

Thus, the TMDL Program, of which the identification of impaired waters is critical, is necessary in order to protect the health, safety and welfare of the public, as well as the environment. The importance of the protocols used in administering the TMDL Program is demonstrated in the fact that the FDEP receives federal grant funds in exchange for performing this work. Indeed, the FDEP’s position, in their case against White, maintains that the failure to follow said protocols justifies termination.

Violations Of Gross Mismanagement, Malfeasance and Misfeasance

81. In addition, however, White’s allegations dealt with gross mismanagement, malfeasance and misfeasance on the part of his superiors. See, §112.3187(5) (b), Fla. Stat. Had the FDEP heeded White’s warnings in 2003, when he first raised the issues with them, there would have been ample time to correct the problem before the water sampling for the TMDL Program got underway in earnest. Instead, FDEP upper management deliberately waited to act until late 2006, at a point when the sampling of these water bodies was all but completed. As such, they now claim that over 24,000 data points are at risk simply from a lack of data qualifiers. See, Exhibit A.

82. White’s allegations centered on repeated violations of Lab protocols by his supervisor, Greg Graves. Graves, who was improperly allowed by the Department to supervise White,⁴ used his position as White’s supervisor to request that the use of data qualifiers be limited, an act of misfeasance, at best. Other violations, e.g. the violations of

⁴ A violation of NELAC standards 5.4.1.4 & 5.4.1.5.

SOPs, violations constituting misfeasance, were occurring in the sampling section that was supervised by Graves. They were resulting in the creation of questionable data by the Lab. This data was then being uploaded into the EPA's data base called STORET. It was Graves' section that uploaded this data, which is used by both the FDEP and the EPA for purposes of evaluating the health of Florida's waters.

83. In actions that constitute gross mismanagement, Department senior management knew of these problems and allowed them to continue and worsen in order to protect Graves and to protect the Department's image with the public and other agencies.

Continuing Department Misconduct

84. The FDEP, after charging White with falsifying state records, has now announced that it nevertheless intends to use the data in question for purposes of placing water bodies on what is known as the Planning List for the TMDL Program. See, statement of FDEP spokesman, Stephen Webster, to the *Palm Beach Post*, January 30, 2007, attached as Exhibit J, hereto.

85. The Planning List is a list created in order to narrow the water bodies that the FDEP determines may well need to be put on the final list of impaired waters. The final list is called the Verified List. Both lists are governed by 62-303, F.A.C. In order for water bodies to be included on either list the data used much be credible. Thus, the FDEP is charging White with falsifying this data, yet the Department still intends to use the same data on official state lists. White is now asking this Commission to recognize yet

another act of gross misconduct on the part of this agency under §112.3187(5)(b), Fla. Stat.

Requested Relief

86. Pursuant to §112.3187(9)(a)-(c), Fla. Stat., White petitions the Commission for reinstatement to the same position held by him prior to the FDEP bringing the personnel action against him, along with payment of all lost wages and benefits associated with the FDEP's actions.

87. Pursuant to §112.31895(3) (e) 1., Fla. Stat., White petitions the Commission to request a stay of the personnel action against him.

88. Pursuant to §112.3187(9)(d), Fla. Stat., White petitions the Commission for an order awarding him reasonable attorney's fees and costs associated with bringing this action.

Verification

I, Thomas R. White, hereby affirm, under penalty of perjury, that the above-stated facts are true and correct to the best of my knowledge, information, and belief.

Thomas R. White

On Behalf of Petitioner,
Thomas R. White,

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