



FLORIDA PEER

**REPORT ON ENFORCEMENT EFFORTS
BY THE FLORIDA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION**

A HISTORICAL PERSPECTIVE

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PRELIMINARY STATEMENT

This report addresses the enforcement results of the State of Florida, Department of Environmental Protection (FDEP or the Department) from calendar year 1987 through 2007. The information provided herein was obtained from raw data provided to Florida PEER by the FDEP in response to multiple public records requests made to the FDEP by Florida PEER under Chapter 119, Florida Statutes.

INTRODUCTION

The FDEP has cumulative enforcement data dating back to 1987. This data provides details about the formal mechanisms used by the agency to bring enforcement against violators. In addition, the data provides details about the amount of money charged by the agency in civil penalties on each case, as well as the amount of money actually collected by the agency. Given that we now have twenty years of data at our disposal *Florida* PEER felt that it would be beneficial to review and report on this data in order that the public would have a better understanding as to how the FDEP has progressed over the course of these past twenty years. This report is the result of an exhaustive review of said data.

In this report we examine the performance of the FDEP as a whole, i.e. we have not broken the results down on a district-by-district level. This report, unlike the annual reports that we have produced in the past, concentrates on two broad categories. First, we examine the performance of the FDEP as a whole. Then we look at the performance of each of program the areas, e.g. the air program, the dredge and fill program, the domestic waste program etc. By approaching the task in this fashion we hope to provide information that the reviewer can use to reach informed conclusions about multiple facets of the agency's operation.

With each of our past annual reports we have included a description of the various types of enforcement that the Department is capable of initiating. We have included this section in Appendix—A the end of this report wherein the reader will find the descriptions of various enforcement tools.

It cannot be stressed enough that the findings in this report are not meant to cast doubt on the effectiveness or motives of the many front-line employees, environmental specialists in particular, who go to work each day with a strong desire to help to improve Florida's environment. In point of fact these employees can only do their jobs to the extent that they are given the tools, including the authority, needed to enable them to be effective. To the extent that any shortcomings are identified herein we submit that they belong to those in senior management who have consistently ensured that their policies of non-enforcement are followed.

EXECUTIVE SUMMARY

As expected, the number of enforcement cases that the FDEP initiates each year has steadily increased from 1987 until the present. Enforcement generally decreased significantly in 1995 when Governor Chiles and the Florida Legislature merged the Department of Natural Resources with the Department of Environmental Regulation, thus creating the FDEP. It has taken the better part of a decade for the Department to recover to the same level (in terms of the number of enforcement cases that it opens each year) that it was at before the merger.

There has been a major shift in the Department's enforcement philosophy over the course of its history. Early in the period, i.e. in the early 1990s, the agency was aggressive in ensuring that enforcement included additional oversight and restoration so that the public knew that



violations would not be tolerated. This posture is easily seen in the number of case reports, long-form and model consent orders and notices of violation (NOVs) that were used to resolve cases. By their very nature these enforcement tools require more action on the part of the violator, as well as more oversight by the Department.

The aggressive nature of environmental enforcement

changed over time to the point that short-form consent orders now constitute the primary enforcement tool that the Department uses to resolve cases. This change has been more pronounced since 2000. The increased usage of these types of consent orders has coincided with an equally gradual decrease in the use of the other, more involved, means of case resolution.

Civil penalty assessments have increased on an annual basis during the period; however, as with the number of cases, a sharp decline occurred in the mid-1990s at the time of the merger. In the last two years assessments have been at an all-time high.

The FDEP has three fundamental means of assessing penalties. First, it will assess a monetary penalty. Second, it sometimes couples the monetary penalty with an opportunity for the violator to engage in environmental restoration through what is known as an "in-kind" project. Third, monetary penalties are sometimes coupled with a mechanism that allows the violator to enter into a "pollution prevention project" that is designed to bring about better compliance through educational programs and/or systems changes that will decrease pollutant discharges. The Department's penalty policy requires that the dollar value of in-kind and/or pollution prevention projects must be greater than the amount of a monetary civil penalty were the latter assessed. Significantly, the use of in-kind and pollution prevention projects as an overall percentage of case resolution has declined since the turn of the millennium.

The median of civil penalty assessments on an annual basis has steadily risen since 2002 and is now at a historical high. *However, when current and median civil penalty assessments are compared to assessments in 1988 that have been adjusted for inflation it turns out that the FDEP's assessments are now less than those that were assessed when the agency first began. A very disturbing finding.*

As a percentage of monetary assessments the collection of civil penalties has generally declined over the period. Thus, the Department has now moved from more aggressive enforcement to a system in which it primarily uses basic civil penalty assessments to resolve its cases while at the same time collecting fewer of the fines actually levied.

The number of new cases (with some exceptions) has steadily declined in the beaches and coastal systems program as well as in waste cleanup. Dredge & fill, i.e. wetland, cases have declined in volume from the 1990s and the same is generally true of industrial and solid waste cases. All other program areas, most notably the hazardous waste program, have generally seen increases in the number of cases brought each year.

It is generally true across the board that each program area now relies primarily on the use of short-form consent orders to resolve enforcement cases. This is particularly true of the domestic waste, hazardous waste, industrial waste and solid waste programs.

When comparing the historical and current performance to the first year results adjusted for inflation, the asbestos, air, aquatic weed, waste cleanup, collections, dredge and fill, hazardous waste, industrial waste, phospho-gypsum, stormwater runoff, and underground injection control programs are all assessing civil penalties at rates lower than what were assessed in their first year of operation. There are some bright spots, however, e.g. the solid waste program.

We strongly believe that the results reached in this report should be evaluated, not only on their own, but also in light of the changes that Florida has seen over the past twenty years. For example, Florida's population has grown significantly during that period of time. Thus, it is fair to consider whether or not the FDEP's performance has kept up with this growth. In addition, when one is considering penalties assessed against violators it bears consideration of whether or not those penalties mean as much today as they did when the agency was first charged with protecting Florida's fragile environment. The findings in this report show that, in fact, they do not.

Simply stated, the agency's data points to a conclusion that the agency has progressed little in effective environmental enforcement and, if anything, has become markedly less effective than it was in its infancy. We will discuss the reasons for such a conclusion later in the report.

STATEWIDE ENFORCEMENT RESULTS

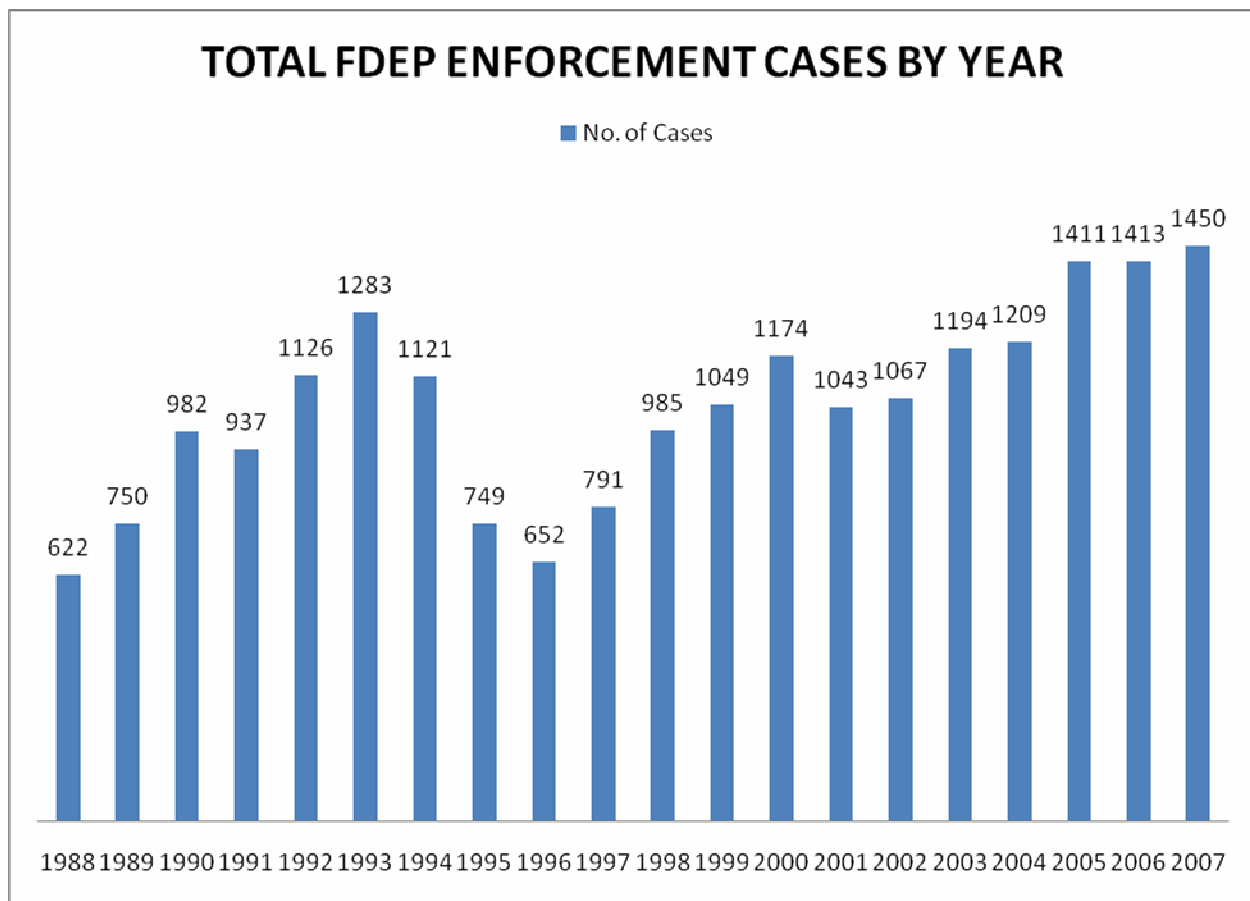
In this section we examine the results on an agency-wide basis, first looking at the enforcement tools available to the agency and then the results of the implementation of these tools in the assessment and collection of civil penalties.

A. The Enforcement Mechanisms

The following sections provide a breakdown on the actual number and types of enforcement cases brought by the FDEP from 1988 through 2007, a twenty year period.¹ In this report we present the data associated with the major enforcement tools, i.e. case reports, notices of violation and consent orders.

As the first chart indicates, the agency began this period by taking formal enforcement in 622 cases. It quickly doubled this performance within five years and maintained this high performance in 1994. It was at this point that the agency, which was then known as the Department of Environmental Regulation (FDER), merged with the Department of Natural Resources (FDNR) to become the FDEP. As soon as the merger occurred there was a significant downturn in overall enforcement, as the numbers more than aptly demonstrate. In fact, from a historical perspective, the period from 1995 through 1999 appears to be the period when the agency turned in its weakest overall performance. While it might be tempting to believe that it was the merger itself that caused the downturn, anecdotal evidence strongly supports the conclusion that the change in senior management, including the Secretary, brought about the dismal performance during this time. Simply stated, it was no secret that enforcement was actively frowned upon. It has taken the agency ten years to recover to the level of enforcement that it reached in 1993.

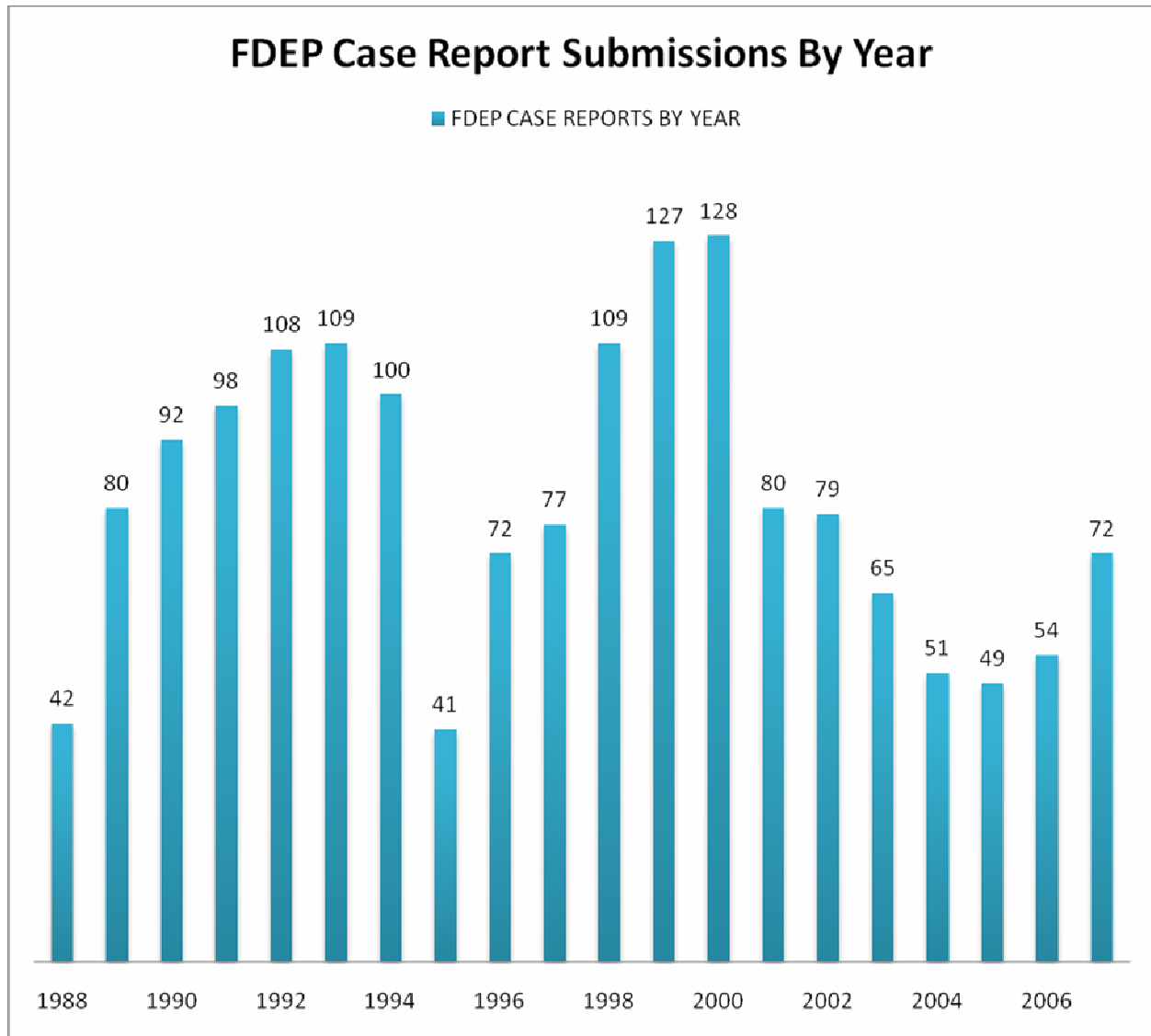
¹ Though the FDEP has data from 1987 the total number of cases, 11 department-wide, is miniscule to the point of being irrelevant when compared against all other years. Therefore, the numbers reported on in this section begin in 1988.



1. Case Reports

The issuance of a case report signifies the intent of Department personnel to take more forceful enforcement against a violator. Typically, case reports originate in the District offices and are forwarded to the Office of General Counsel (OGC) whose responsibility it is to review each file and to then file a lawsuit in circuit court, if warranted.

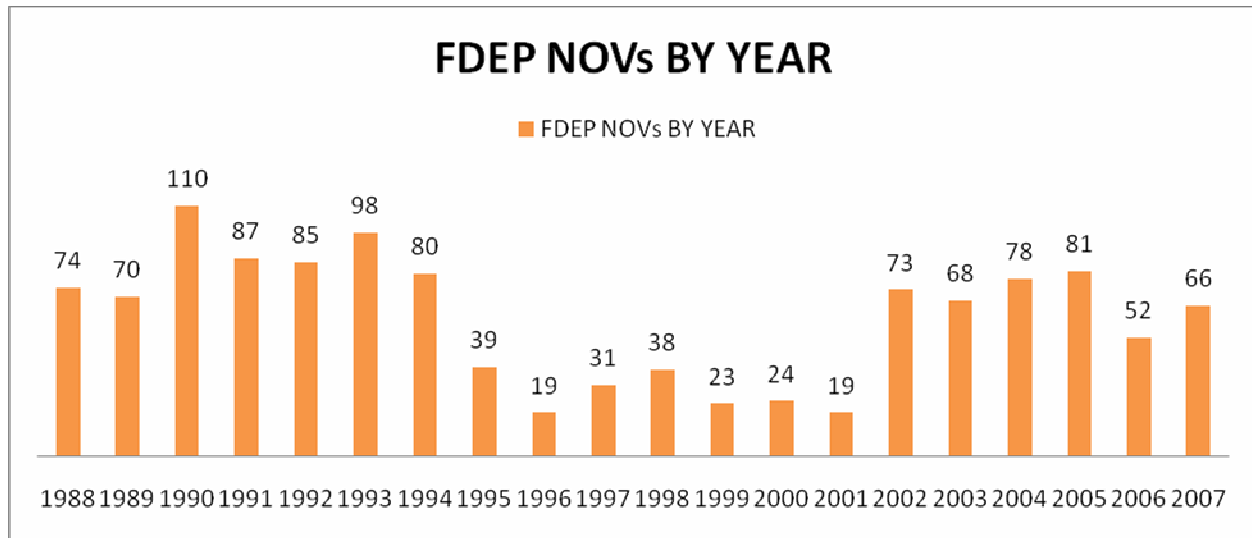
The data quite clearly shows an initial, almost immediate, tendency on the part of the FDEP to initiate litigation against serious violators. This approach was maintained until the merger of the two agencies at which time performance plummeted before rebounding briefly in 1999 and 2000. At that point, however, the decision to litigate was made more and more seldom, something which is not surprising given the public pronouncements by the FDEP that it viewed litigation as a less desirable tool in the enforcement arsenal. The data clearly shows a downward trend in this area with a bit of a rise occurring in 2007.



2. NOVs

Notices of Violation have been in wide use by the Department over the course of its history. They were used rather often from 1988 through 1994 and then plummeted in use until 2002. Their use has been consistent from that point forward, though it is still not up to the pre-1994 levels.

It should be noted that the FDEP lobbied the Legislature heavily to pass legislative amendments that would give the agency the power to levy civil penalties against wrongdoers—something that the Department otherwise had to secure only via litigating in circuit court. The Legislature therefore amended the law in 2001 and gave the agency this authority. See, § 403.121(2), Fla. Stat. However, even with this new authority, the agency is still underperforming when compared with the six year period beginning in 1988.

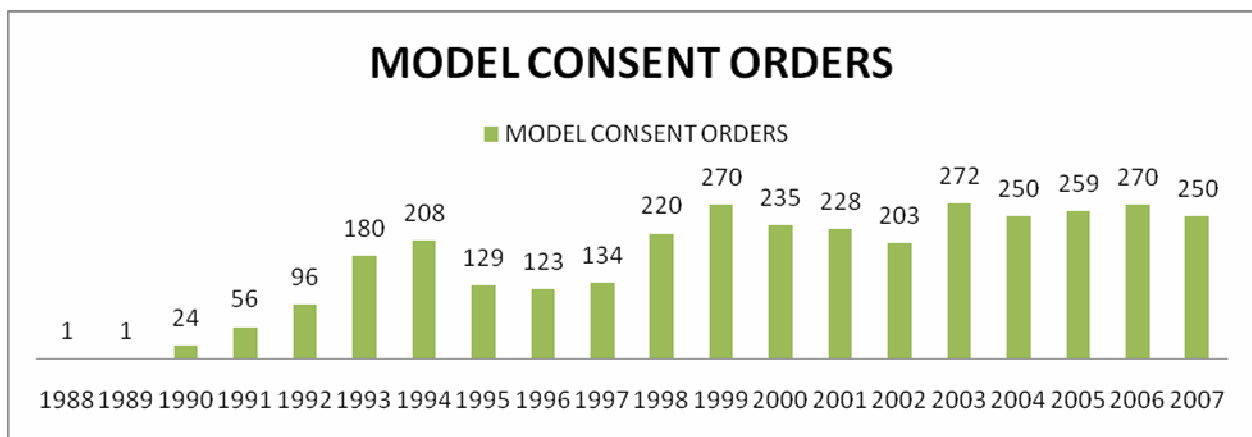


3. Consent Orders

a. Model Consent Orders

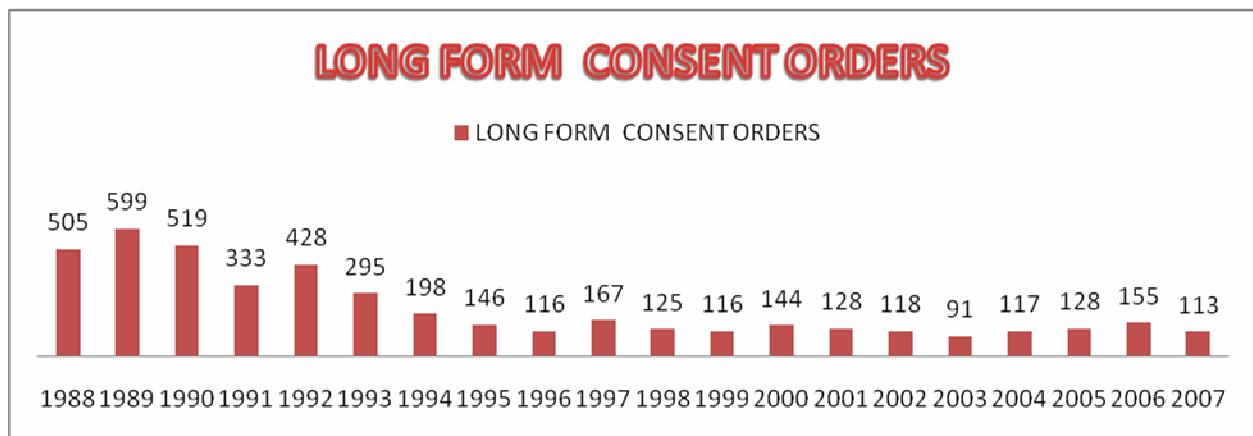
Model consent orders are comprehensive consent orders that have been developed and approved for use by the OGC with input from the various program areas. In essence, they are generic documents that enable district personnel to simply fill in the blanks with information specific to the case. So long as the district stays within the bounds of the model consent order little, if any, OGC involvement is then needed in each individual case. Thus, the model consent order, as an enforcement tool, has become more popular over time.

Once again the numbers show a general trend of increased use in this enforcement mechanism until 1995 when serious declines occurred followed by another increase and ultimate leveling off in time.



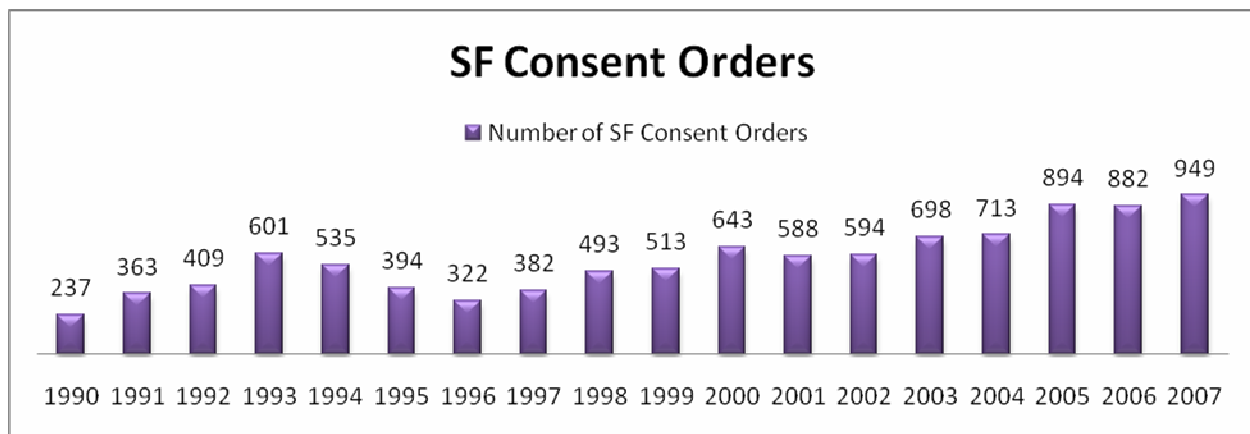
b. Long-Form Consent Orders

The following data demonstrate the dramatic change in the FDEP's use of formal enforcement. Long-form consent orders are most often used in an effort to tailor agency enforcement to the violations and violators being confronted—thus helping to ensure that the FDEP, and Floridians, will see more effective restoration of the environment. Simply stated, early in this historical period the Department took a hands-on approach to environmental enforcement. When the FDER and the FDNR merged, however, the new agency embarked on a markedly different path. Arguably, the trend over the past 20 years has been to treat all environmental violations more or less as generic, meaning less emphasis on individual cases and more emphasis on simply generating some form of enforcement, ideally short of litigation, that will result in case closure. The usage of long-form consent orders is not compatible with that approach and their use has plummeted as a result.

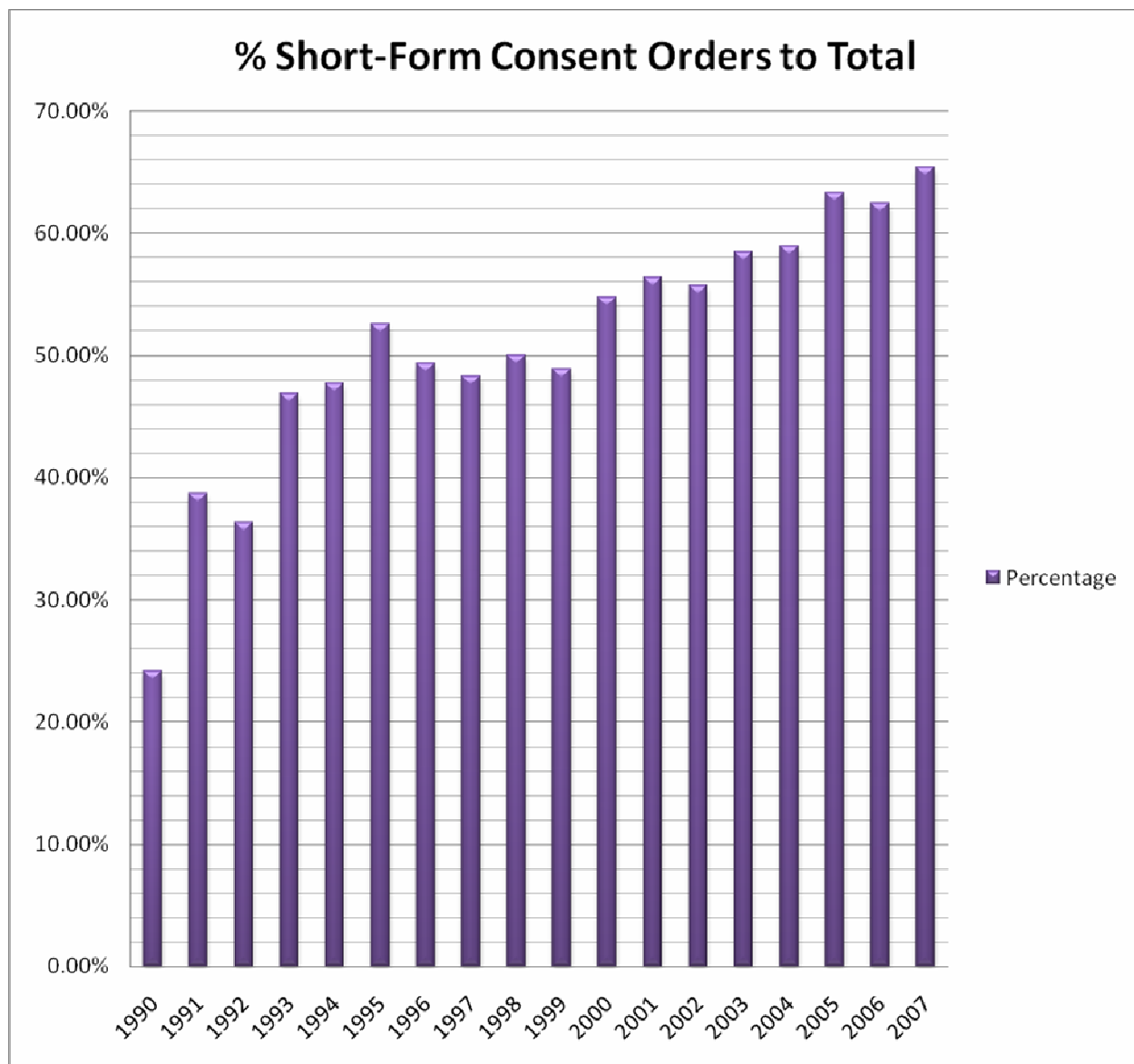


c. Short-Form Consent Orders

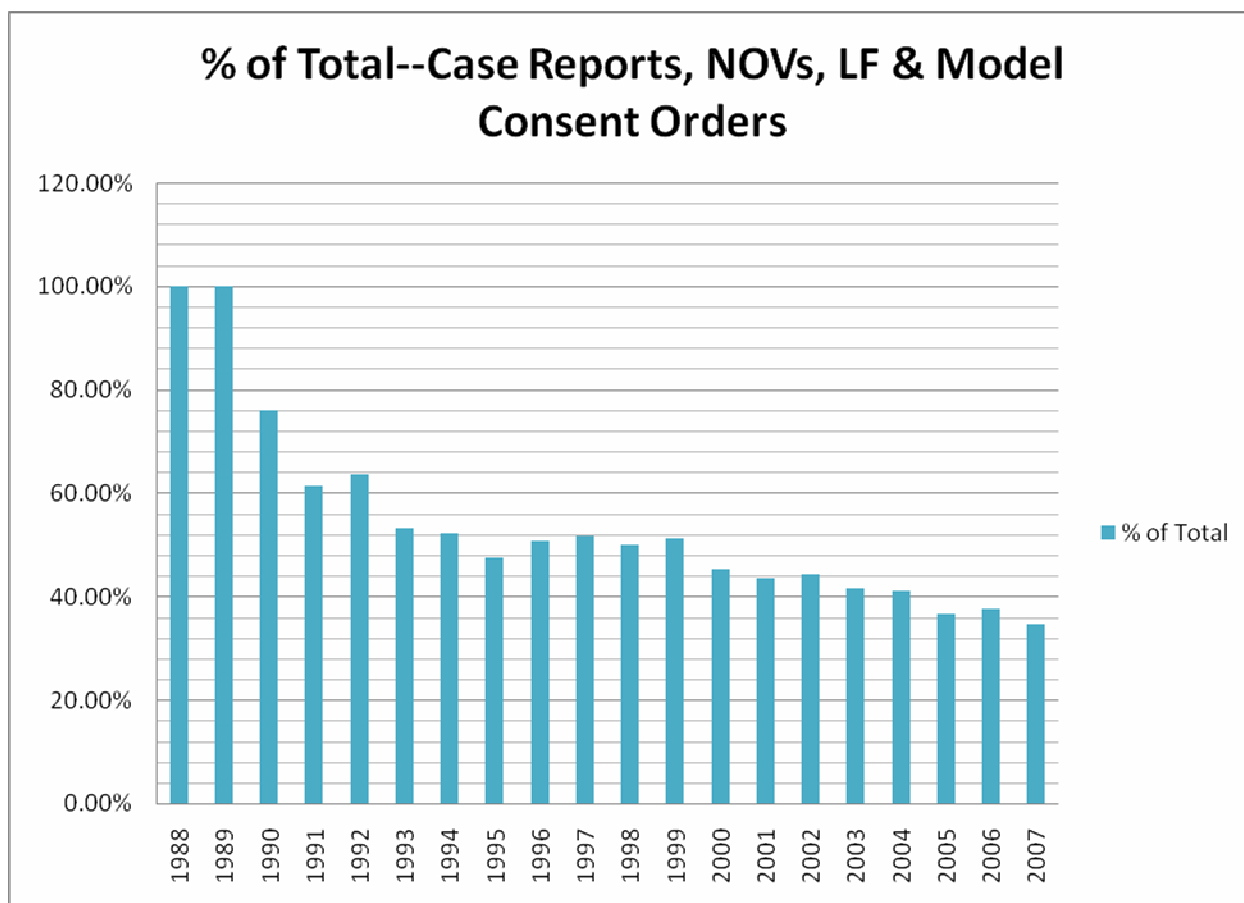
Short-form consent orders are documents used by the Department when the sole enforcement to be used is the exacting of the payment of a civil penalty. *No environmental remediation or restoration is involved with this mechanism.* The use of short-form consent orders did not begin until 1990. With the exception of 1993 and 1994 their use as an enforcement tool was not widespread until after the merger in 1995. After the merger a steady upward trend began that is almost the mirror image of the decline in the use of long-form consent orders.



Of all of the various enforcement tools, what percentage of those tools was comprised of only short-form consent orders? The following graph shows a clear and ever-increasing trend towards their usage beginning in 1993. A close review of the data shows that the actual use of this mechanism held relatively steady from 1993 through 1999, after which more dramatic increases began. 2007 registered the single largest use of short-form consent orders in the FDEP's history.



By the same token, the use of more involved enforcement tools that are designed to provide the FDEP with greater oversight in environmental restoration and remediation fell sharply over the same twenty years. The following chart depicts the combined percentage use of case reports, NOVs, long-form consent orders and model consent orders in total FDEP enforcement.



B. Assessments and Collections

We also examined the amount of money assessed by the FDEP in civil penalty assessments over the twenty year period and then also considered how much of the penalties assessed were actually collected. The results are detailed below.

1. Civil Penalty Assessments

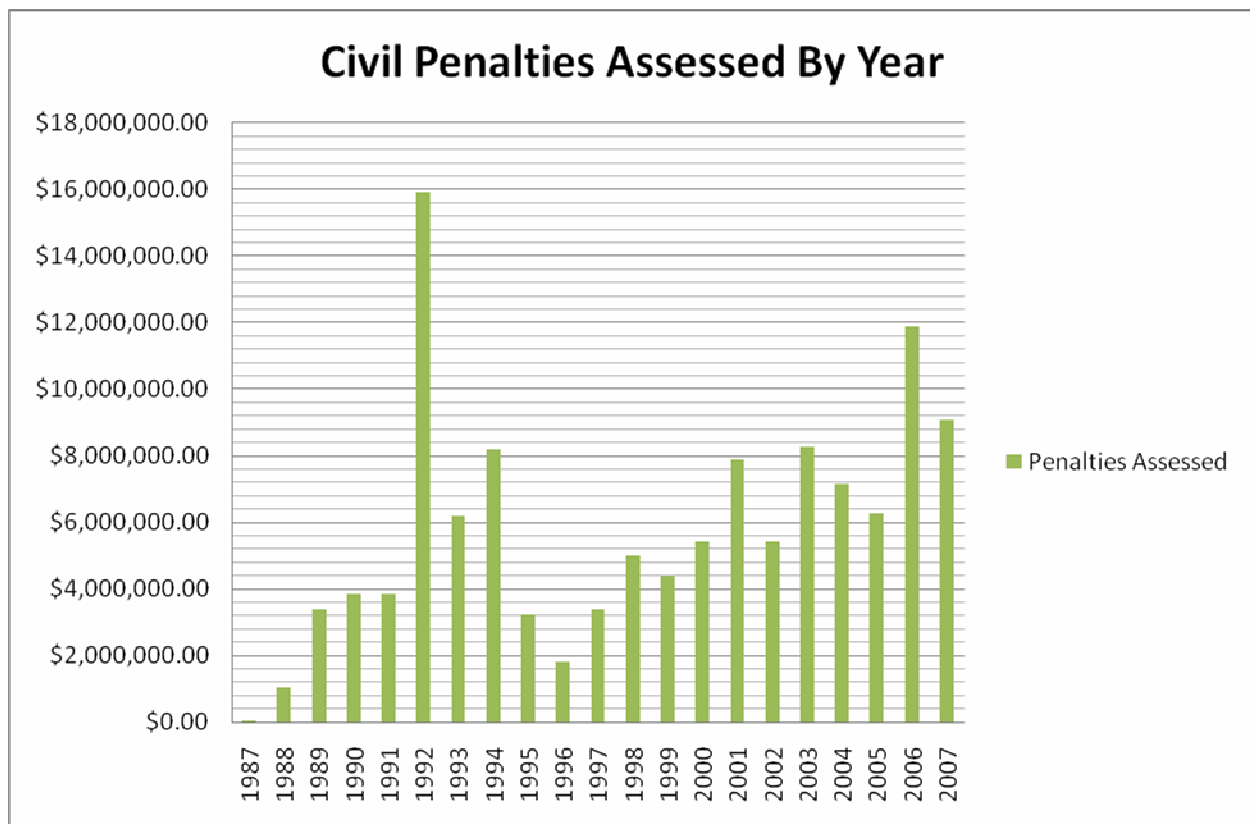
In considering how much money the FDEP has assessed against violators for violations of Florida's environmental laws it is important to realize that the Department, in reporting on its performance, provides details that differentiate between actual civil penalties assessed that need to be paid dollar for dollar and civil penalties assessed that are to be repaid via mitigation projects or pollution prevention projects. For purposes of this report we have separated these various types of assessments in order to give the reader a better understanding of the FDEP's performance.

As a starting point, the following table provides the total dollar civil penalty assessments, i.e. all types of assessments, on an annual basis.

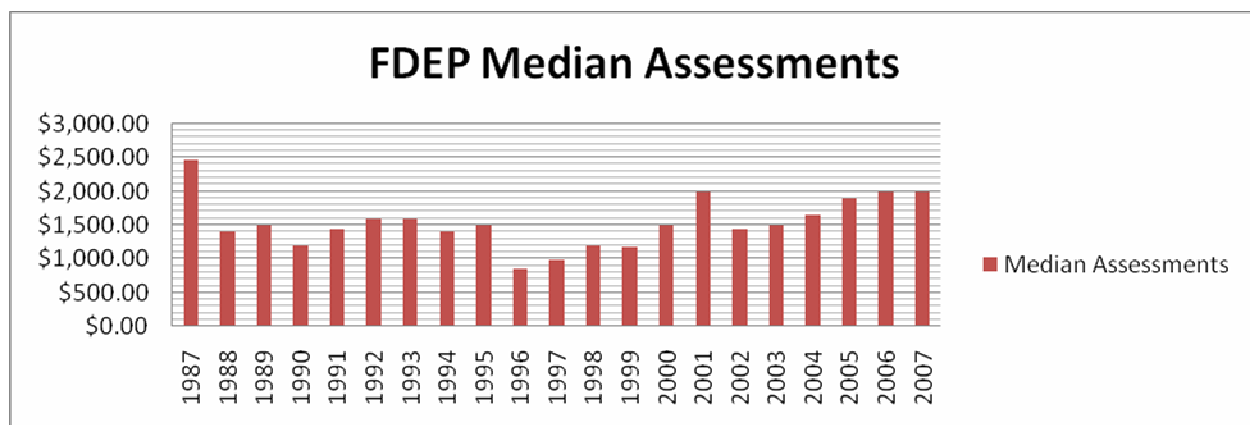
Year	Total \$ Assessments
1987	\$34,380.00
1988	\$1,027,702.16
1989	\$3,387,772.22
1990	\$4,002,873.18
1991	\$3,995,190.03
1992	\$17,629,679.55
1993	\$9,502,323.10
1994	\$8,665,712.08
1995	\$3,935,205.76
1996	\$2,397,049.38
1997	\$3,846,704.71
1998	\$11,153,368.92
1999	\$8,089,477.48
2000	\$8,087,065.90
2001	\$10,522,975.37
2002	\$8,280,268.44
2003	\$10,786,070.34
2004	\$9,705,995.46
2005	\$7,794,556.15
2006	\$16,067,695.28
2007	\$12,330,146.38

From the above, it can be seen that in 1992 the FDEP assessed more civil penalties than any other year in the twenty year history. The second highest year was 2006. The lowest year (excluding 1987 and 1988 when the Department was in its infancy) was 1996, shortly after the agency merger.

In terms of pure civil penalty assessments, i.e. only monetary fines, the Department's performance is inconsistent. However, once again, 1992 and 2006 were its highest years.

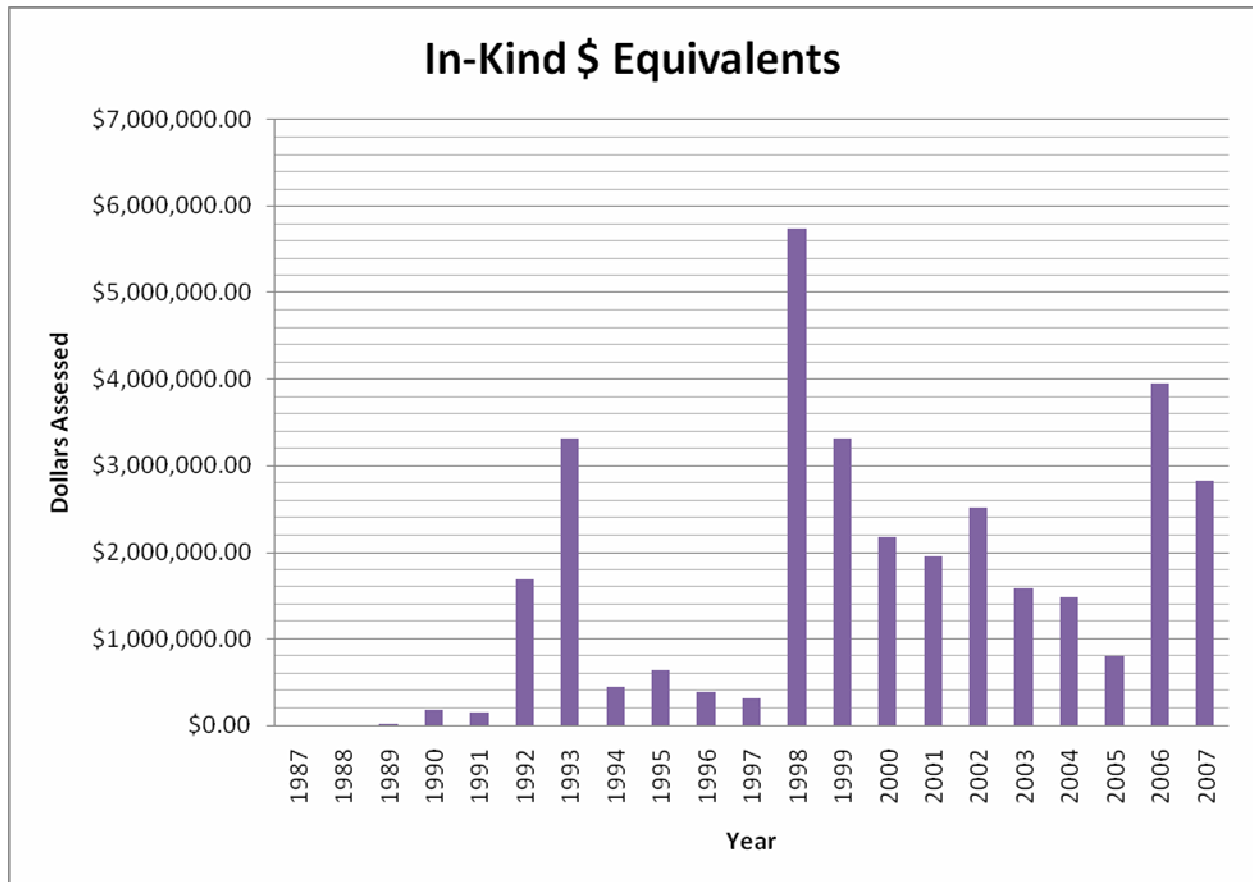


We also compared the medians of the monetary assessments each year.² The agency-wide median civil penalty assessments on an annual basis have not varied widely over the twenty-year history, though the lowest period was clearly 1996-1997. It took six years, i.e. from 1997-2002, for the Department to reach and maintain the levels that it had in 1991. Since then there has been gradual improvement.



² In past reports we have primarily reported on the averages from each year. Beginning with this report we have decided to use the median values instead in hopes that they will provide a clearer picture of the performance in each area.

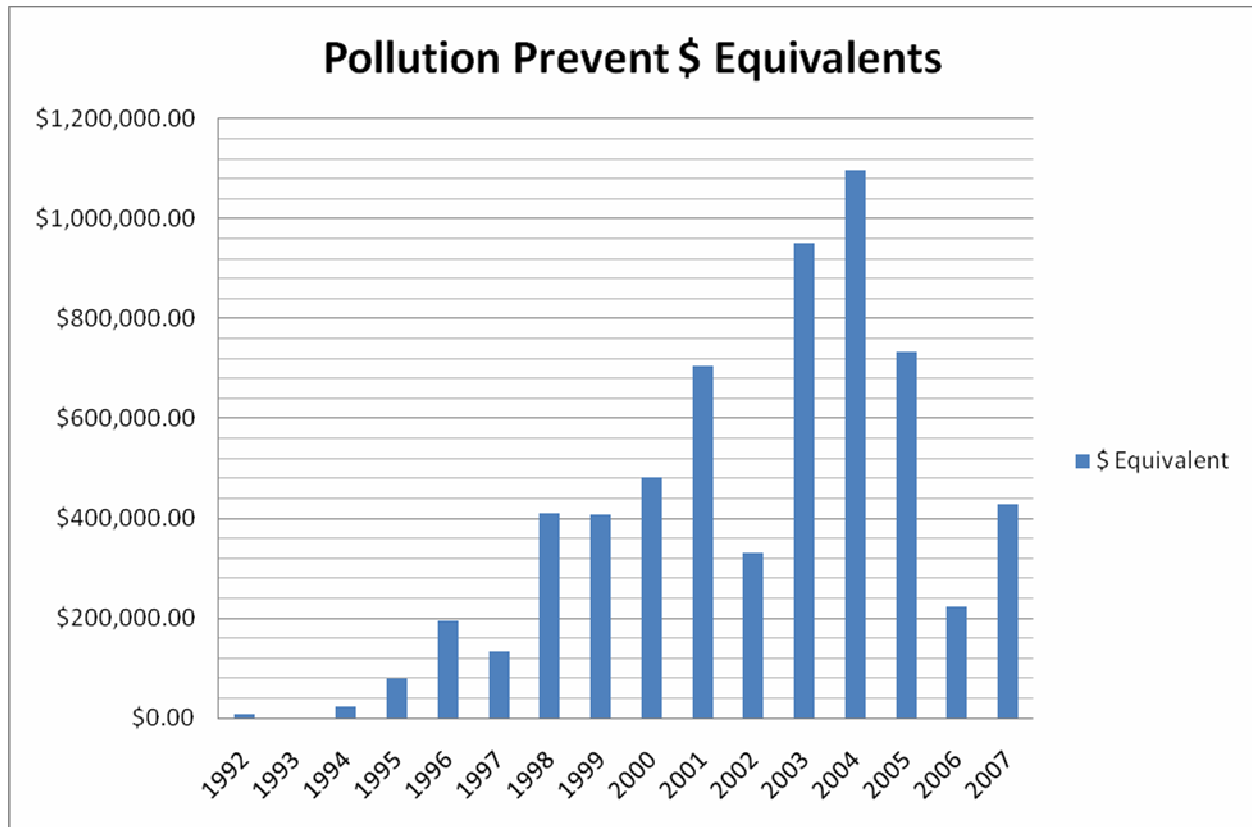
Over the same twenty years the Department used mitigation, or in-kind, measures to address environmental violations. Essentially, these assessments allowed the violator to circumvent direct payment of fines by undertaking environmental projects designed to offset the damage caused by the violator. These projects are assigned a dollar value by the FDEP and reported as such.



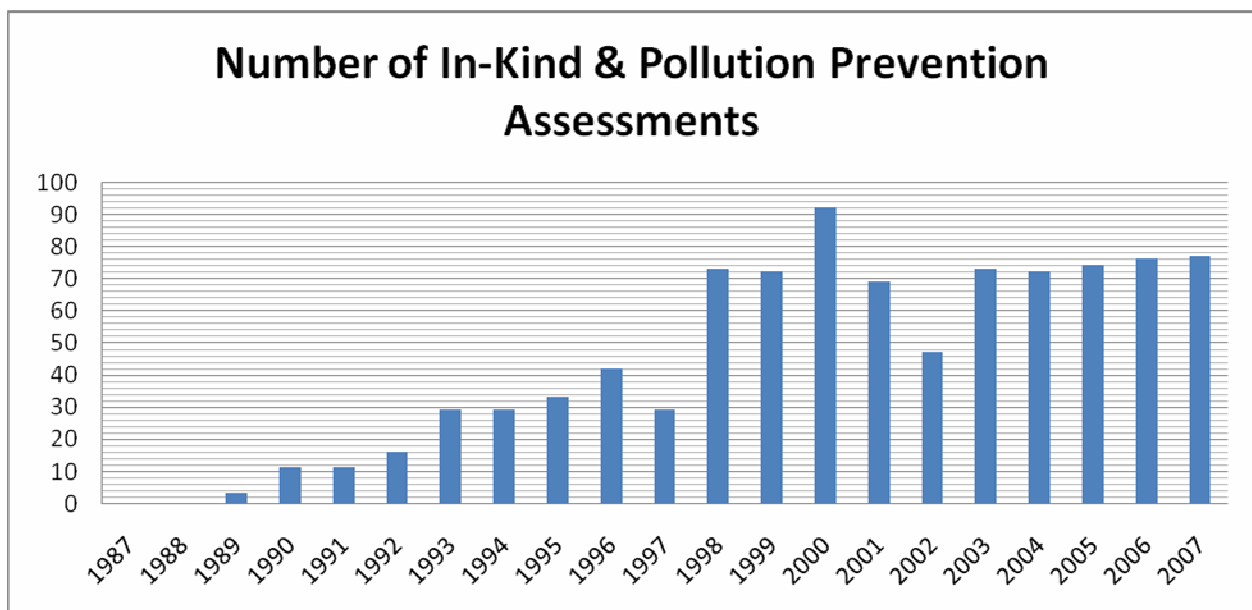
The interesting aspect of these results is that they run contrary to the public pronouncements made by the FDEP that it has undertaken a more aggressive approach towards more environmental restoration via “in-kind” projects. In fact, the data clearly shows that from 1999 through 2005 there was a steady decline in the use of such projects. While 2006 showed an increase it appears to have been short-lived inasmuch as 2007 saw another decline.

The other form of penalty assessment used by the FDEP is an assessment that allows the violator to offset the payment of a civil penalty by undertaking a pollution prevention program, e.g. a company awareness program, designed to result in better environmental compliance in the future.³ Those programs are converted into dollar equivalents and reported as such. The results are as follows.

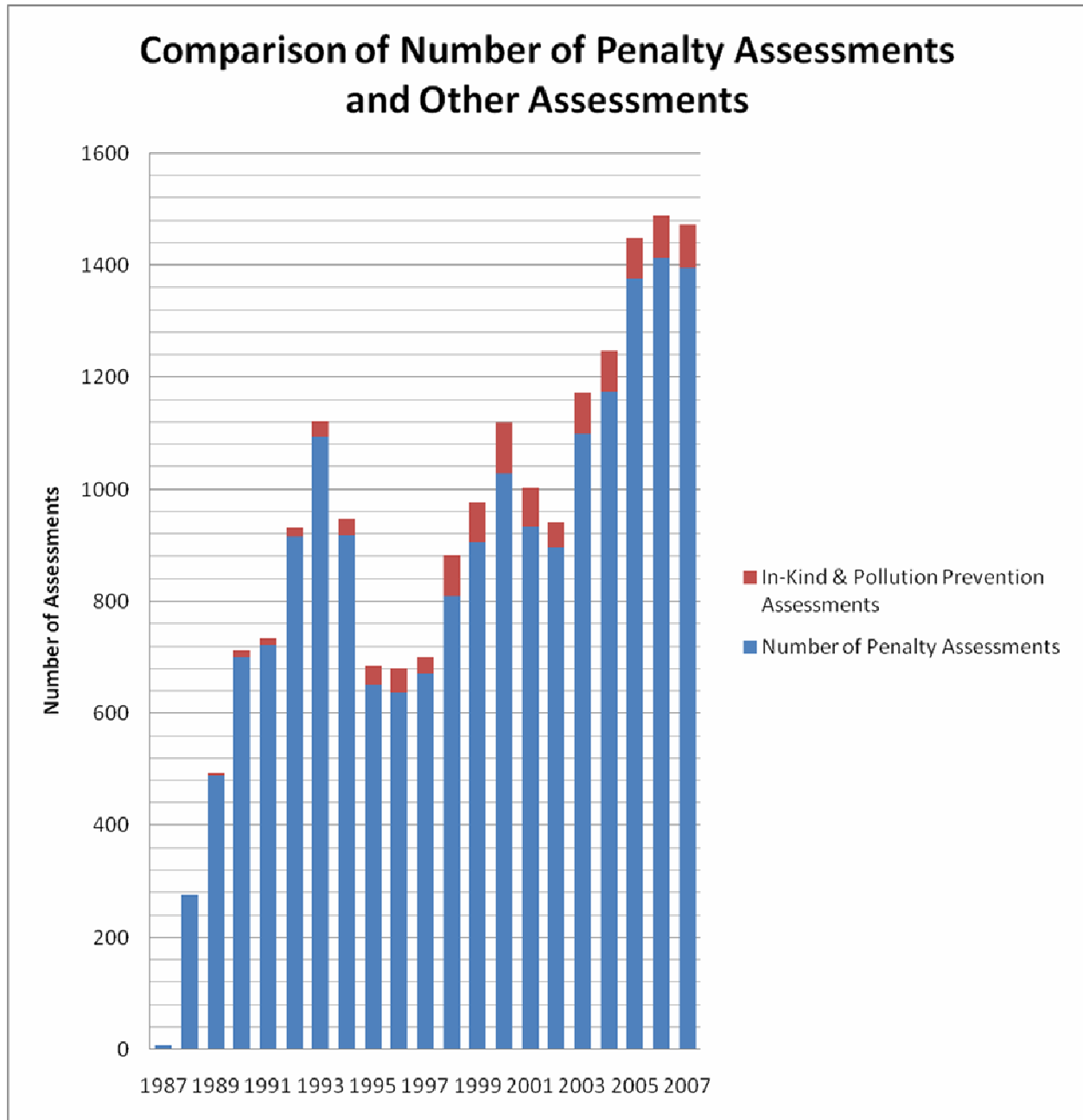
³ The use of this type of assessment did not begin until 1992.



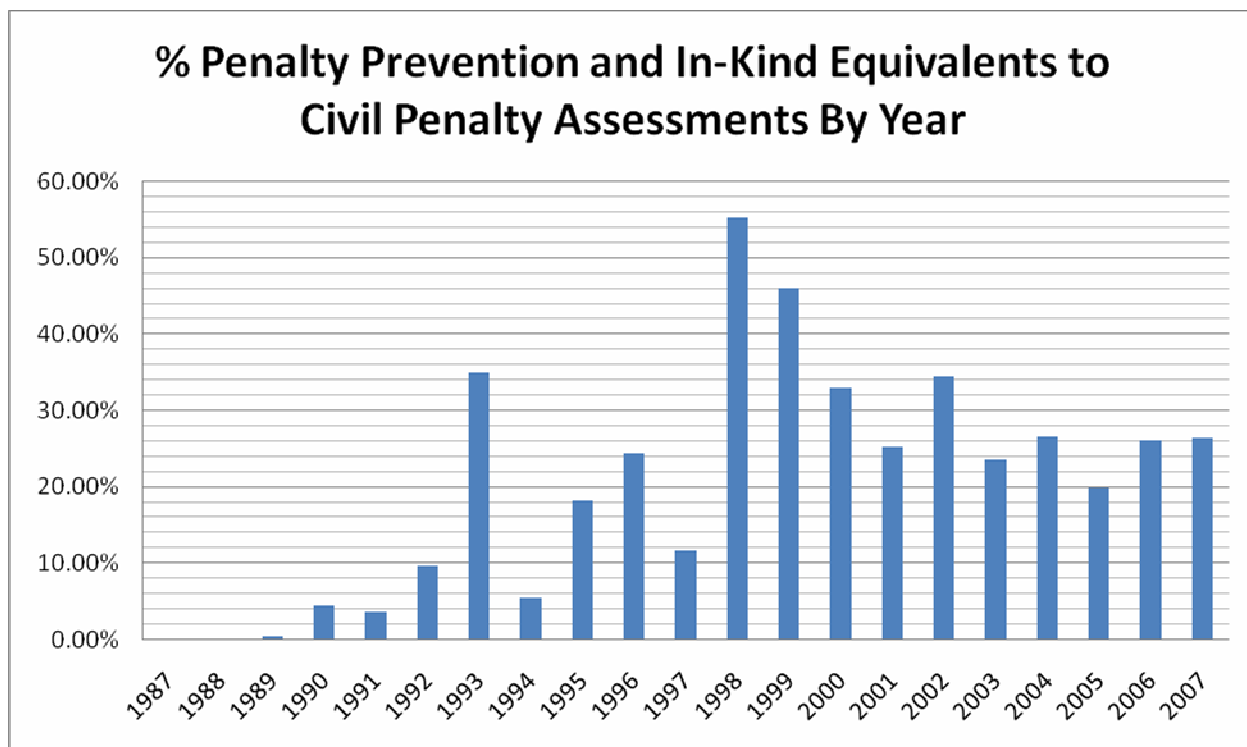
Combining in-kind and pollution prevention assessments we see that over the twenty year history there has been a gradual, yet steady, increase in the number of such assessments.



Comparing the types of penalty assessments in sheer numbers yields the following results.



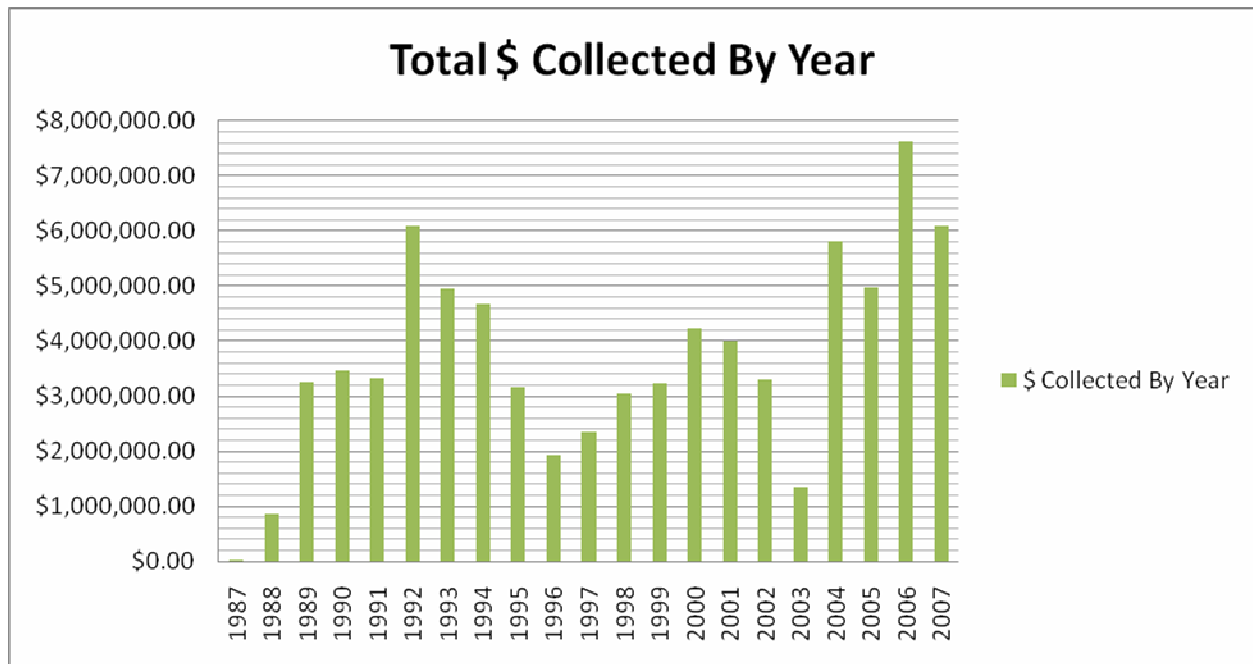
When we look at the percentage of cases in which the penalty assessment was either an in-kind assessment or a pollution prevention program we see that actually there has been a perceptible decline since 1998.



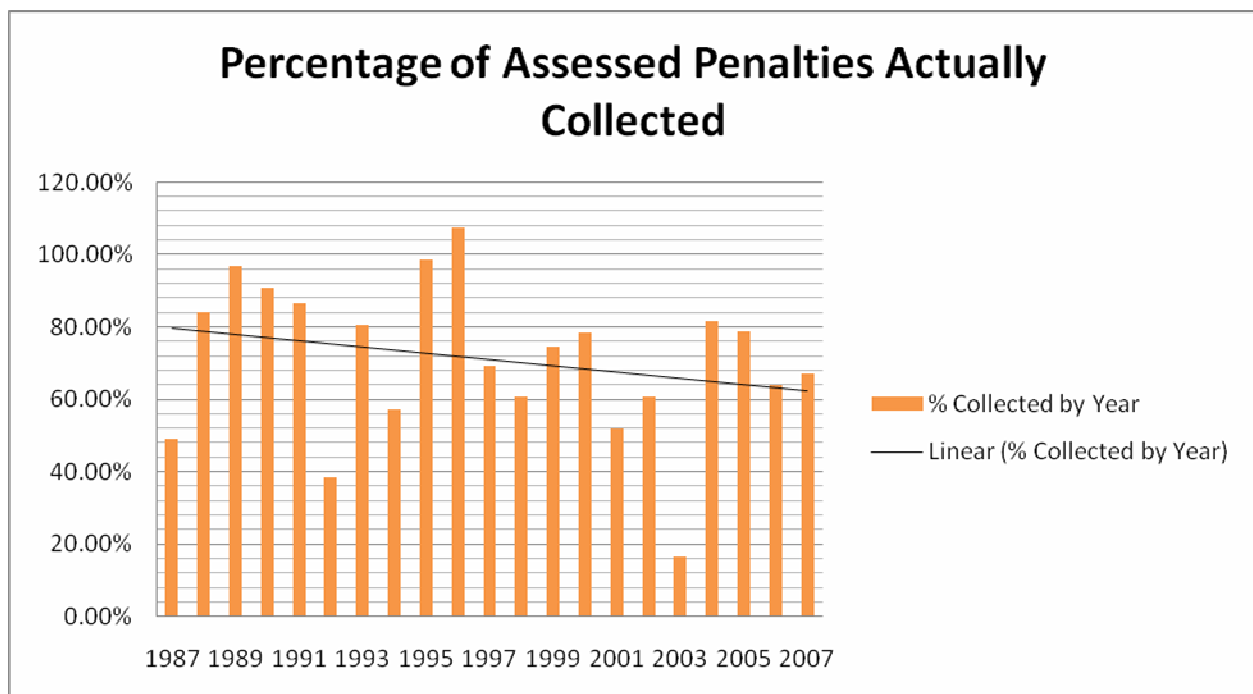
2. Civil Penalty Collections

The fact that a regulatory agency assesses civil penalties, regardless of which agency is involved, hardly means that all such penalty assessments will be collected. It would be unrealistic to expect otherwise. The FDEP generally collects over half of the civil penalties it assesses, with the exception of 1987, 1992 and 2003.

The Department is currently on a path that shows improvement in its collection activities from the standpoint of actual dollars collected.



However, when considering what percentage of penalty assessments are actually collected the results are not quite as positive. In general, as the following chart and trendline indicates, collections are trending downward.



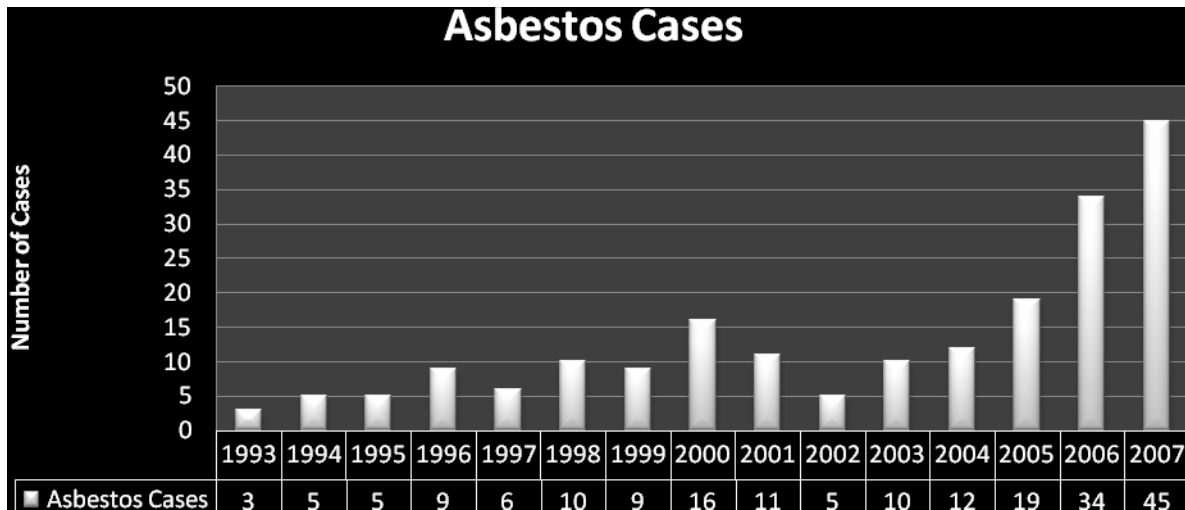
PROGRAM AREA PERFORMANCE

The FDEP regulates multiple aspects of Florida's environment and accomplishes this task by separating each aspect into what are called "program areas." The Department's enforcement data identifies which program area was involved in each case in which the Department initiated enforcement. Thus, we have the ability to separate the data so that we can determine how each program area has performed during the past twenty years.⁴ We have therefore reviewed the data for each program area⁵ in order to determine what types of enforcement tools are most often used and how the Department has handled penalty assessment and collection for each such program. The results of our review follow.

Asbestos

A. Enforcement Mechanisms

The first reported asbestos enforcement cases were in 1993. The trend over the past twenty years shows a steady increase in the number of asbestos cases initiated by the FDEP with a marked increase beginning in 1995.



The Department has issued no model consent orders and no notices of violation in this program since 1993. It has issued only 12 case reports and 12 long-form consent orders. During the same time period it has issued 175 short-form consent orders.

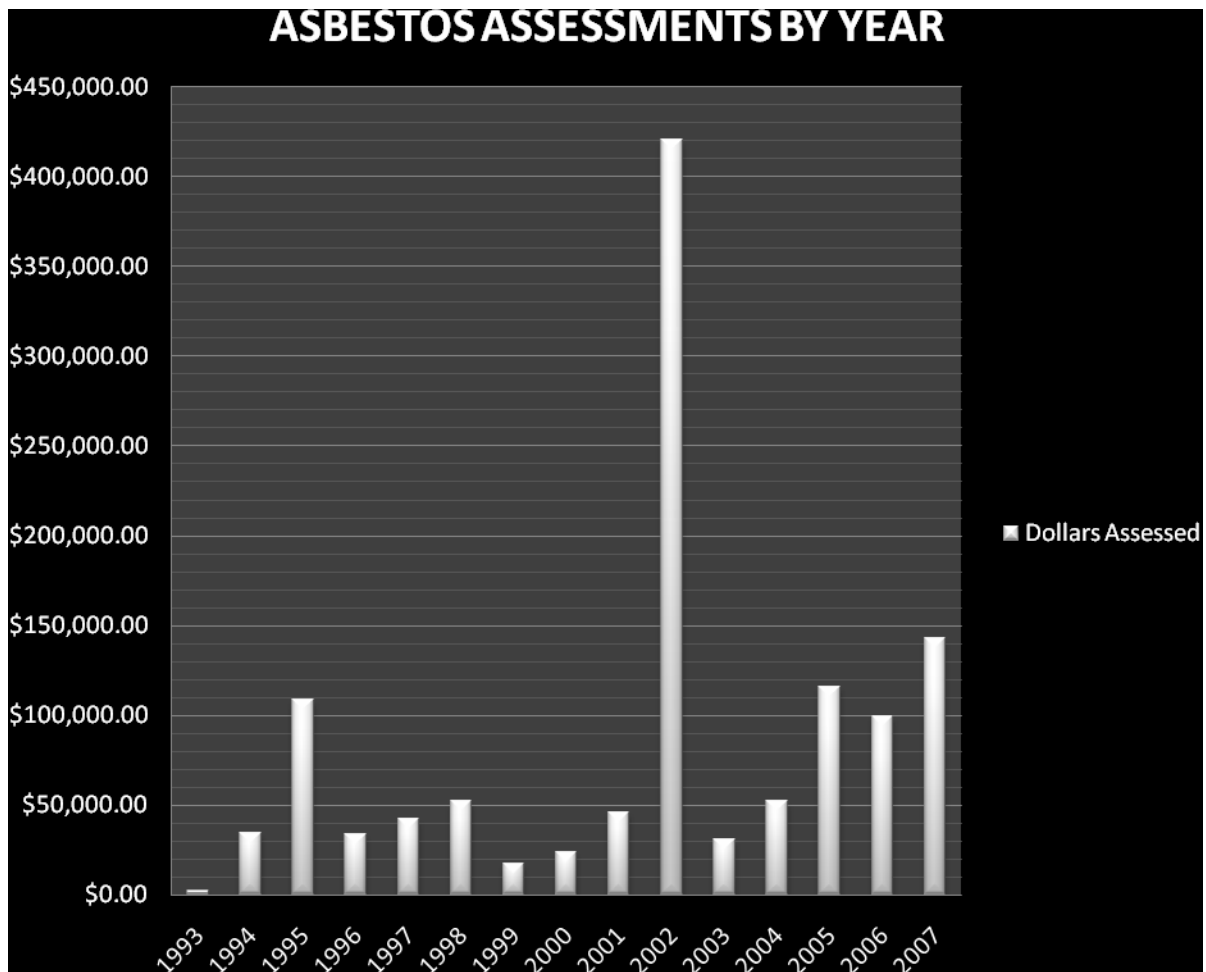
⁴ It should be noted that few program areas were in existence for the entire twenty year period. Thus, the reported numbers will cover different years from program to program.

⁵ The program areas that we have evaluated include all program areas reported by the FDEP with the exception of a few areas that were essentially de minimus in scope.

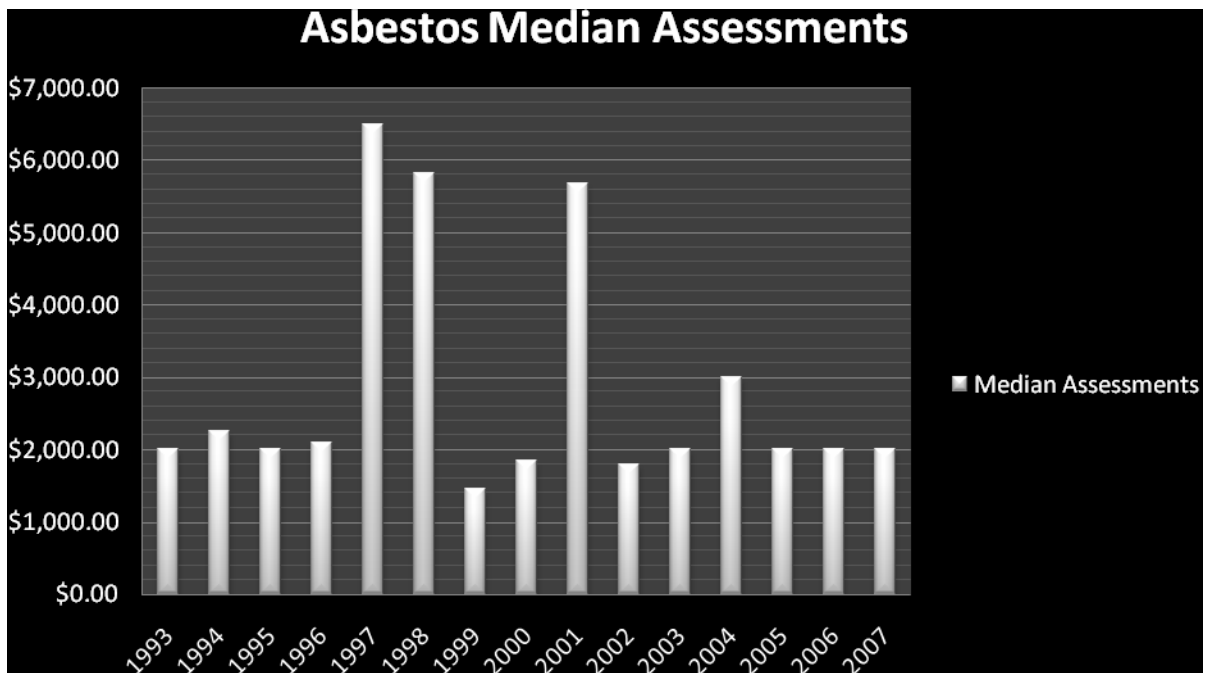


B. Assessments and Collections

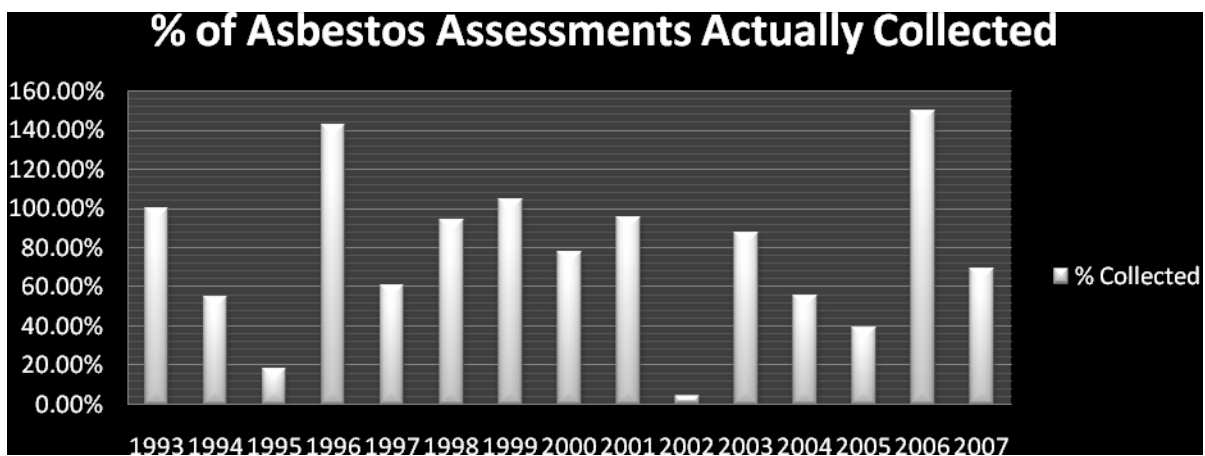
During the same period, the Department assessed civil penalties as follows:



As can be seen from the chart below, the median civil penalty assessments have not changed appreciably over the period.



In terms of collections, the agency's performance has mirrored its assessments, although the abnormally large assessments in 2002 were not collected in that year. On a percentage basis the agency's performance is as follows:

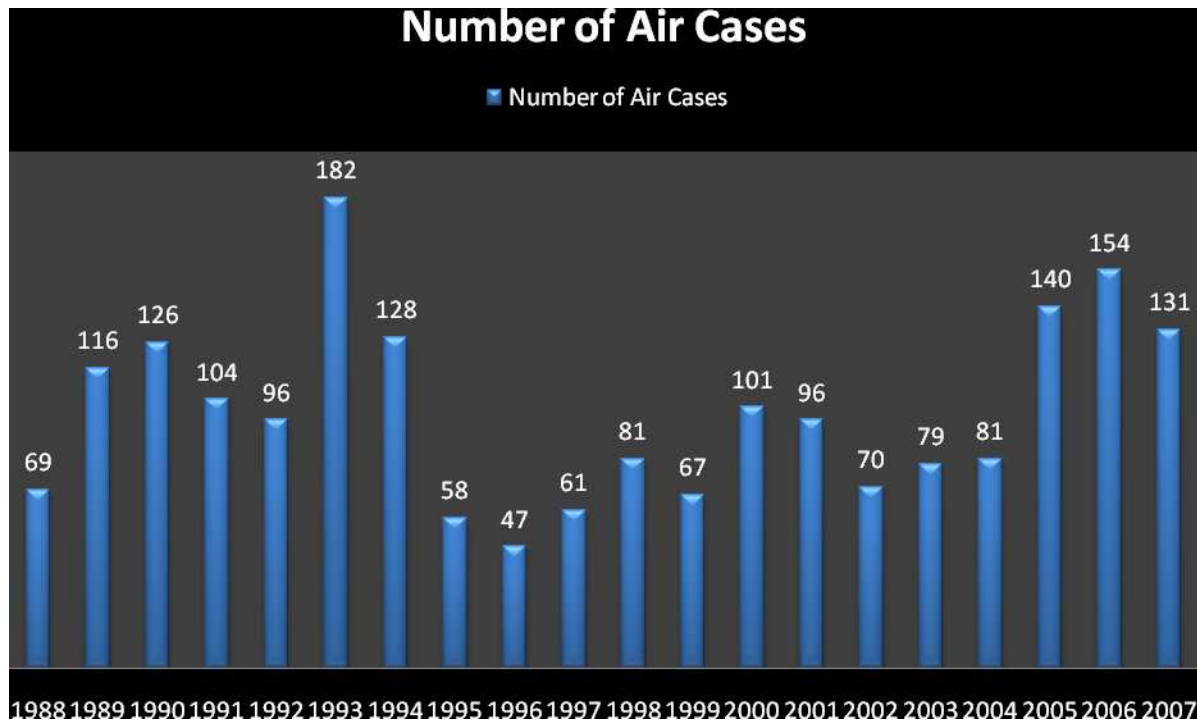


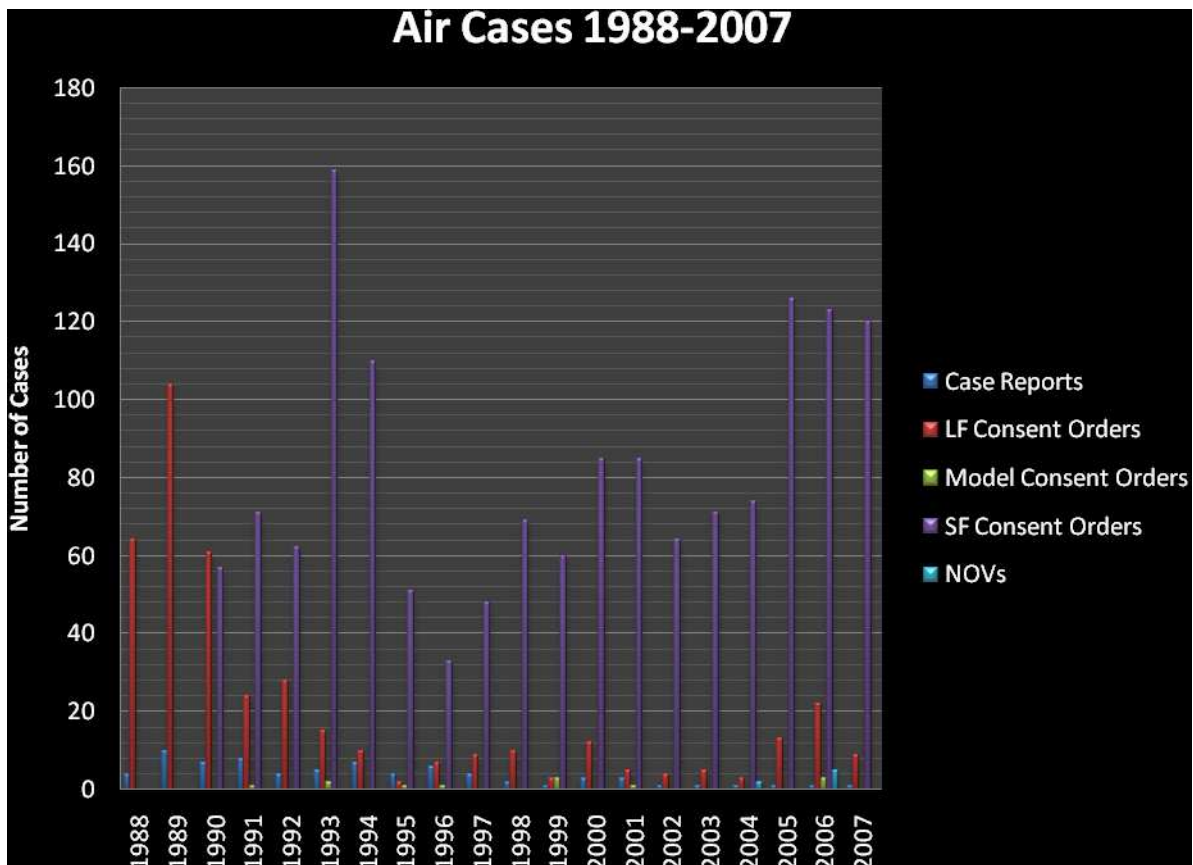
Air

A. Enforcement Mechanisms

Total enforcement in the air program has essentially been cyclical. This is characterized by two periods in which increases were evident, followed by declines. The two single best years

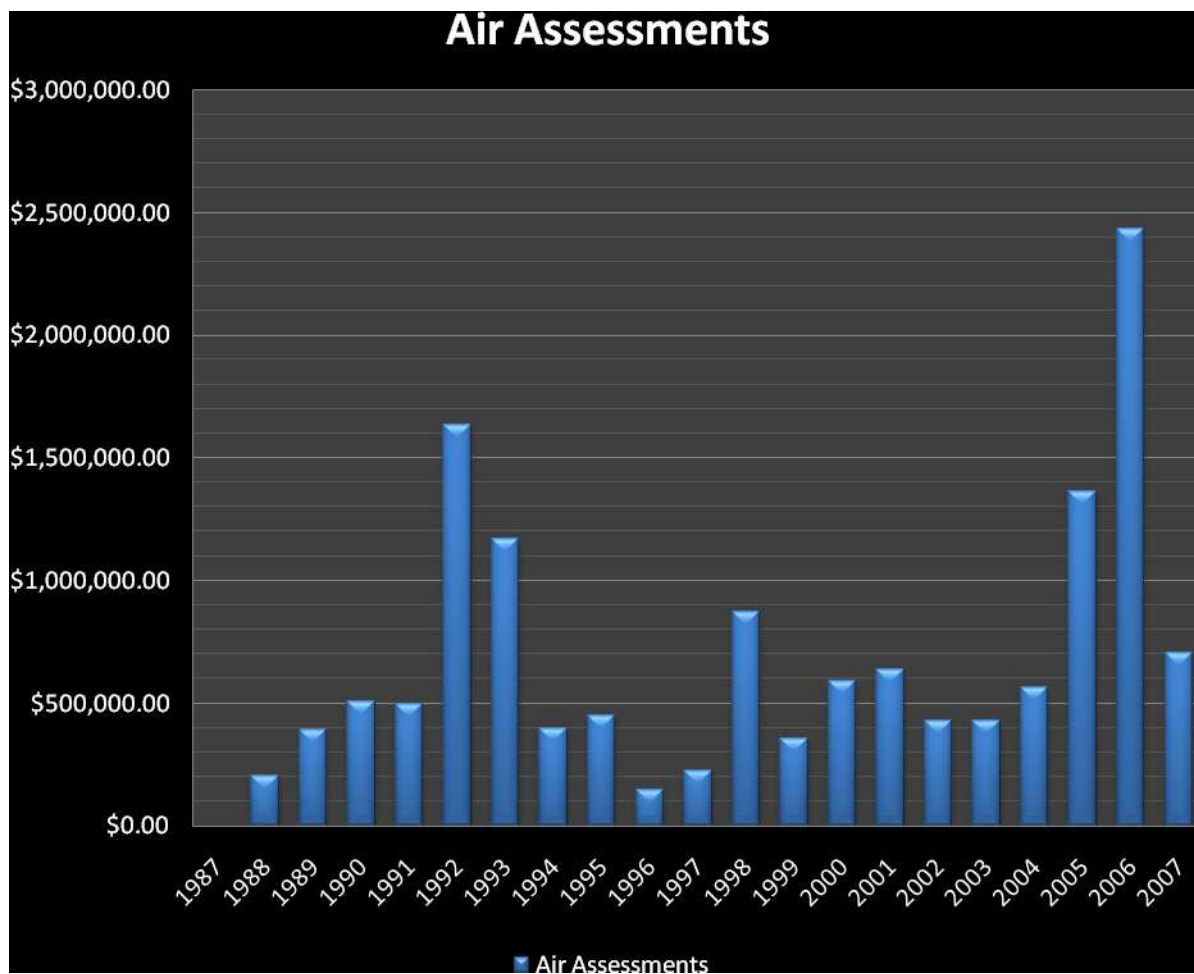
were 1993 and 2006; however, generally speaking the period of the steadiest enforcement was from 1989 through 1994. This was followed by the worst performance in years 1995 through 1999.



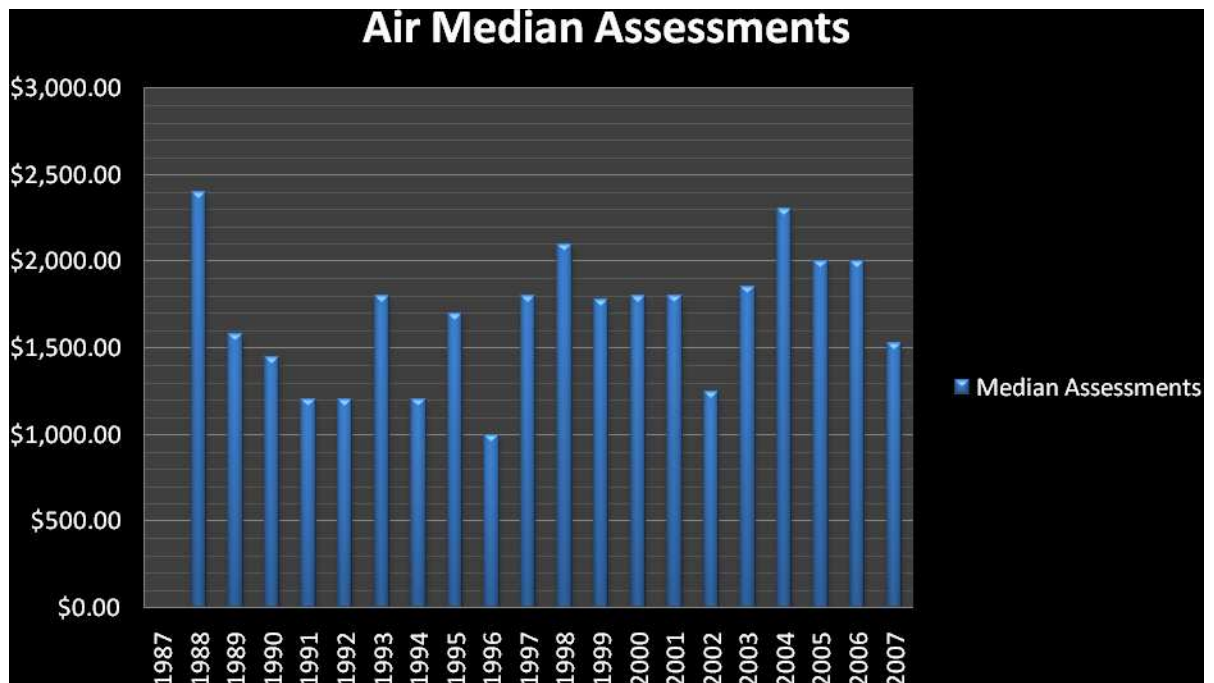


The above chart shows the contribution of each enforcement tool in comparison to other such mechanisms on an annual basis. Three things are evident in the data. First, case reports are a very small part of the program. Second, long-form consent orders, which were originally quite important, decreased significantly from 1993 through 2004. While there was a small uptake in 2005 and 2006, it appears that this performance was an anomaly. Finally, short-form consent orders have been the primary means of enforcement since 1991 and on the whole their usage is generally on the rise.

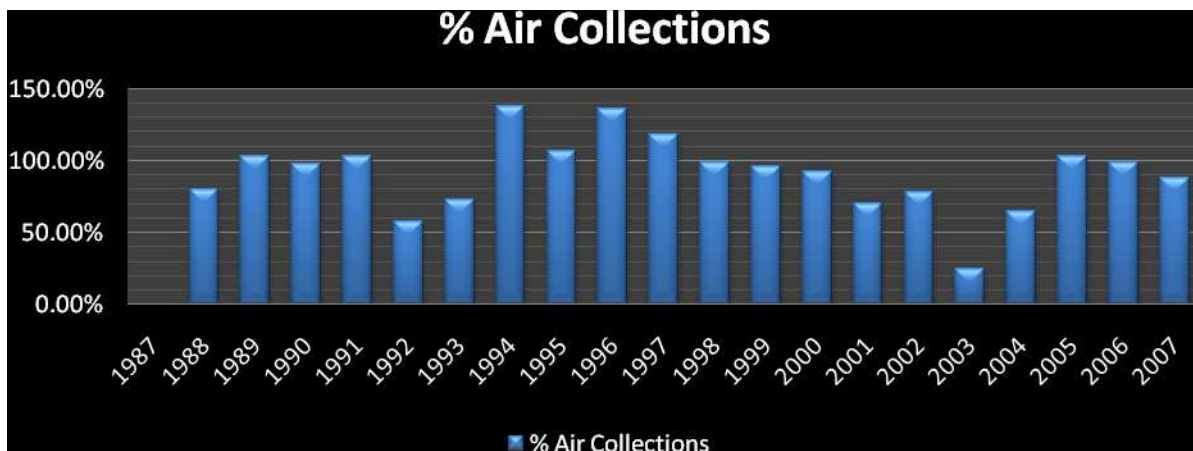
B. Assessments and Collections



As seen below, though there have been fluctuations, air median civil penalty assessments have hovered around 1700.00 for the historical period.



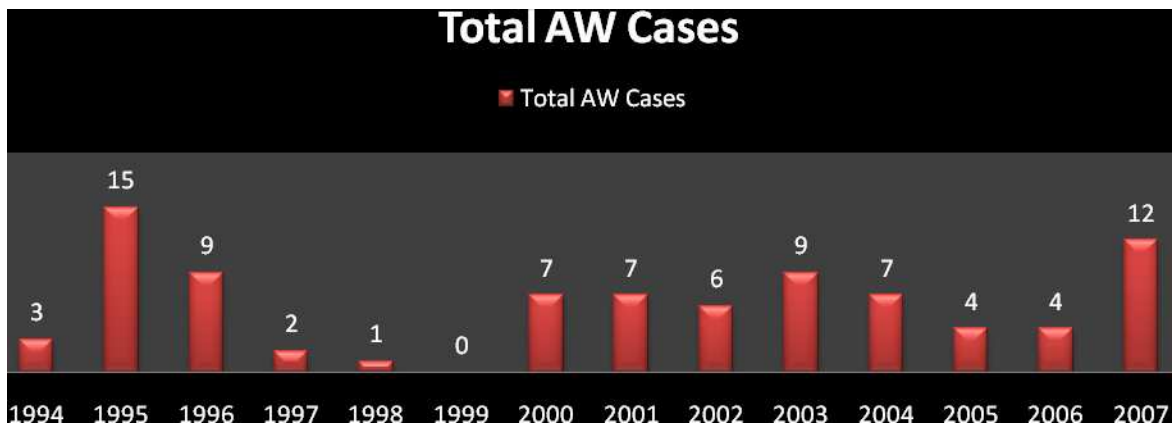
Interestingly enough, while the worst years for air assessments were from 1994 through 1999, the best years for collections (on a percentage basis) were during those same years. There is also a small decrease in the collection percentage from 2005 to the present.



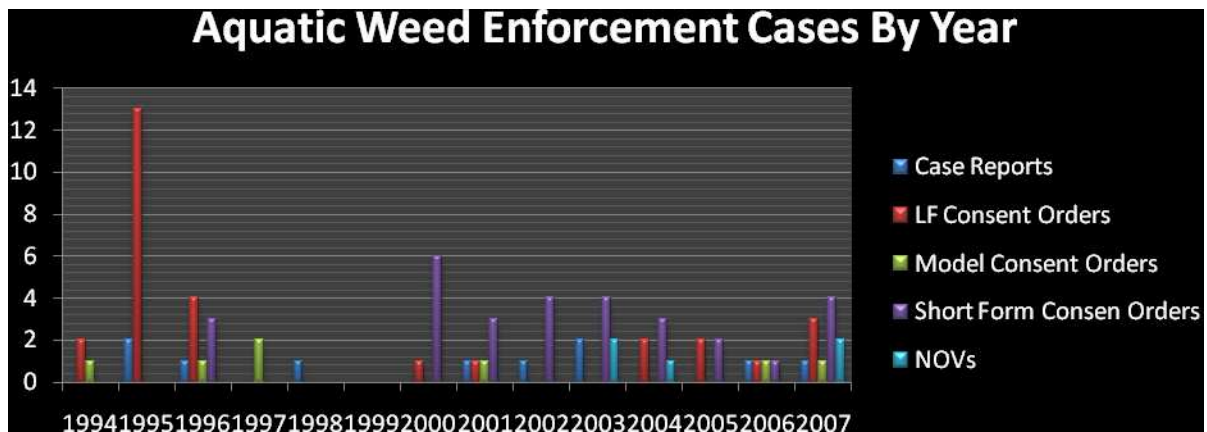
Aquatic Weed

A. Enforcement Mechanisms

The aquatic weed program is administered by the Division of State Lands within the FDEP. The program deals with invasive plant species. Compared to the other program areas it has relatively fewer enforcement cases.

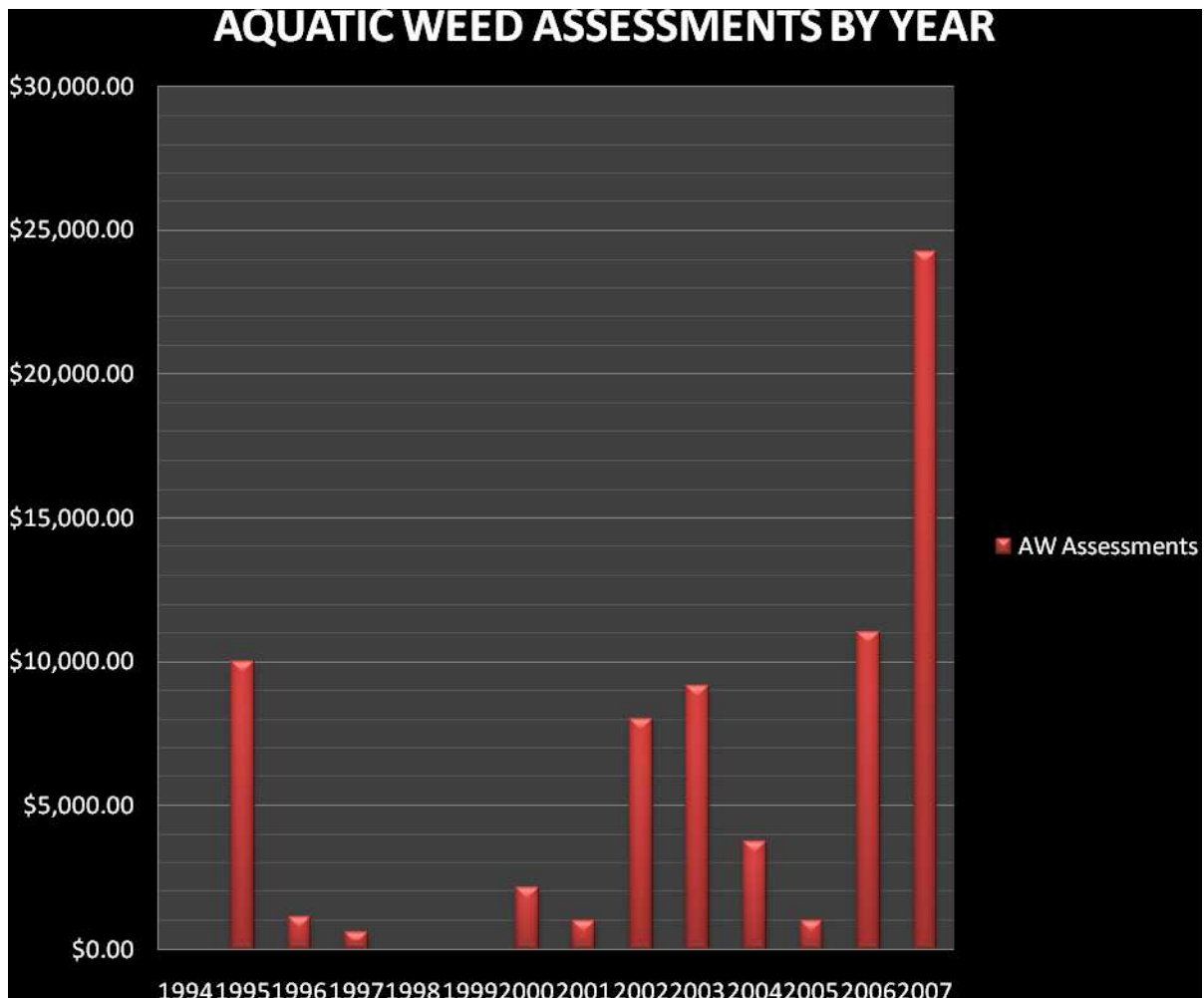


The use of specific types of enforcement cases does not appear to be trending in any particular fashion, except for the one observation that this is one program that has not been dominated by the use of short-form consent orders. Indeed, there was a decline in their usage until last year.



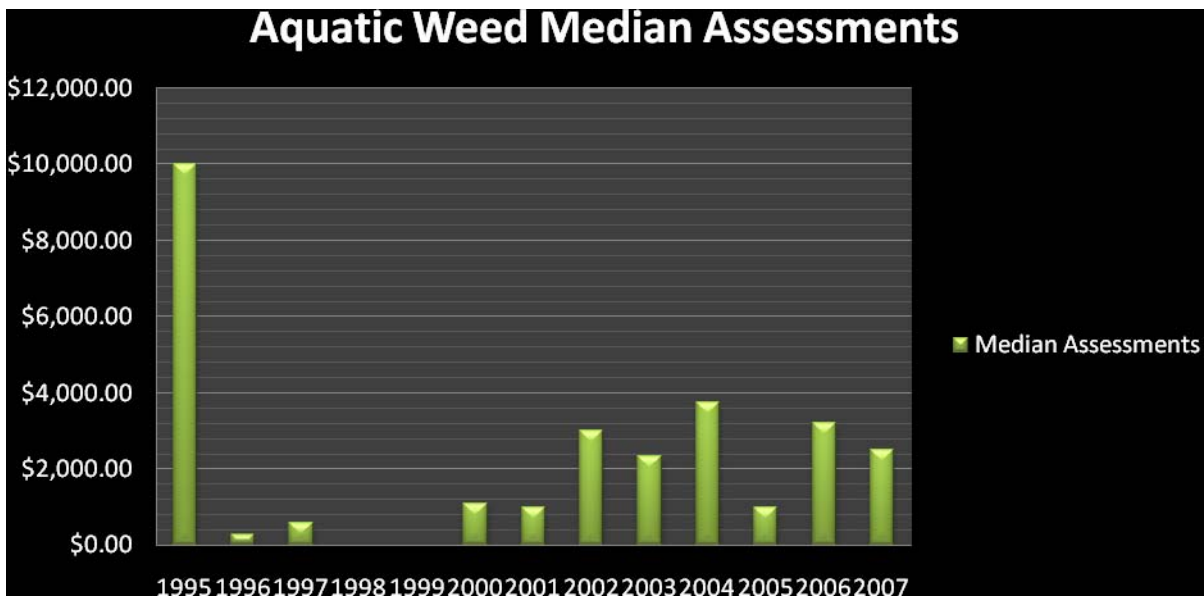
B. Assessments and Collections

Assessments in this program area have been equally sporadic.

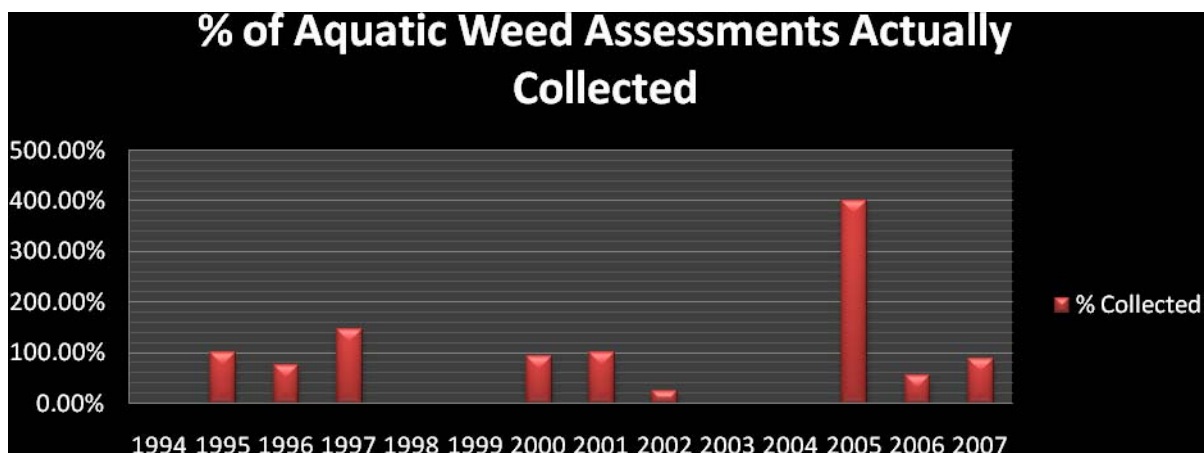


The historical median civil penalty assessment in this program⁶ has been \$2,000.00. The medians have generally not strayed too far from this mark since 2002.

⁶ The historical median was obtained by comparing all assessments from the beginning of the reporting period for each program area.



Collections, like assessments, have been sporadic:



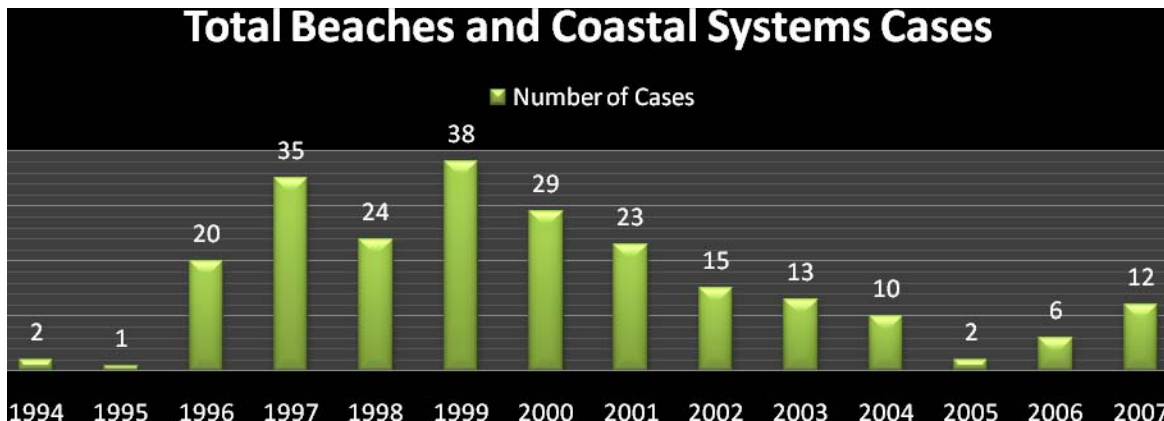
Beaches and Coastal Systems

As stated on FDEP's website, "The Bureau of Beaches and Coastal Systems, under the Florida Department of Environmental Protection, is responsible for administering the State's beach management program to protect and restore the state's beaches and coastal systems. . ."⁷

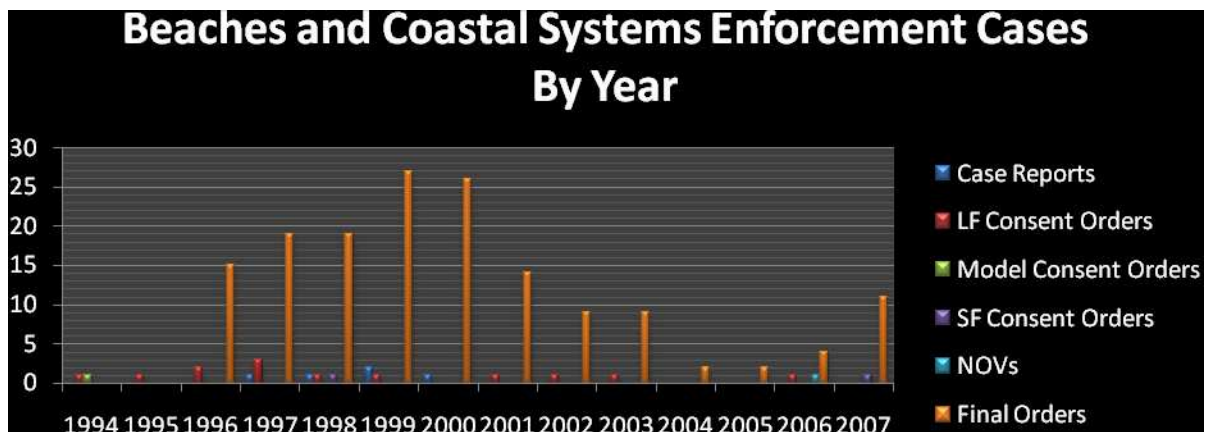
A. Enforcement Mechanisms

The number of enforcement cases in this area has steadily declined over the years, though it has seen some improvement of late.

⁷ <http://dep.state.fl.us/beaches/>

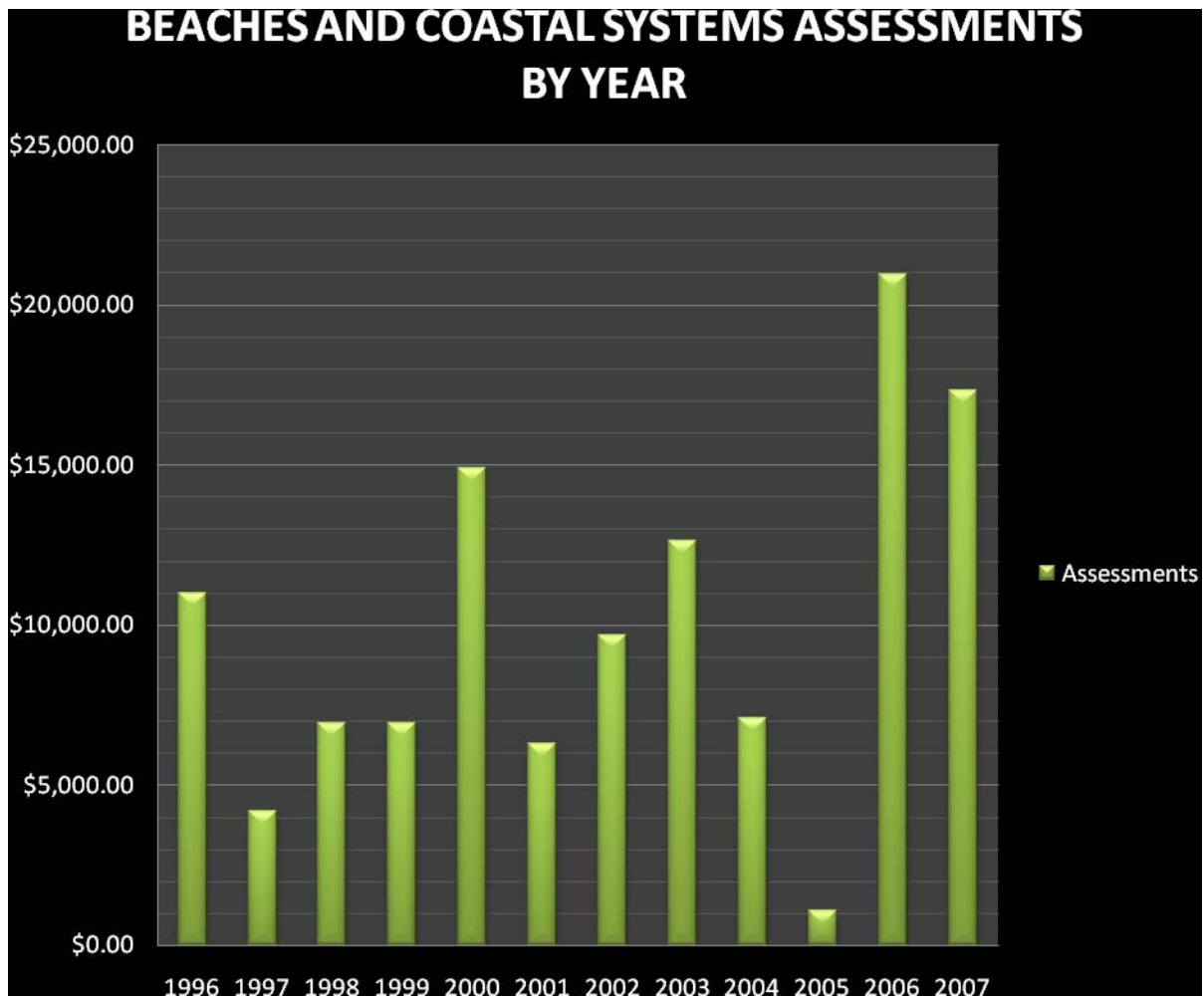


The data indicates, however, that this is one program that utilizes tougher enforcement measures, i.e. case reports, long-form consent orders and final orders, when violations are acted upon.

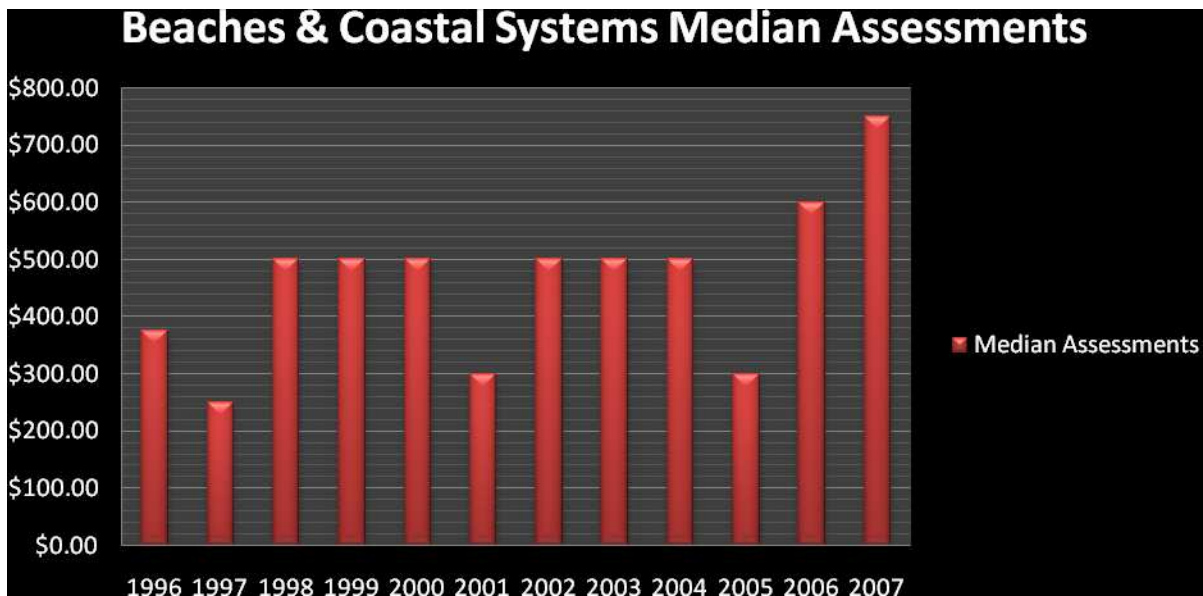


B. Assessments and Collections

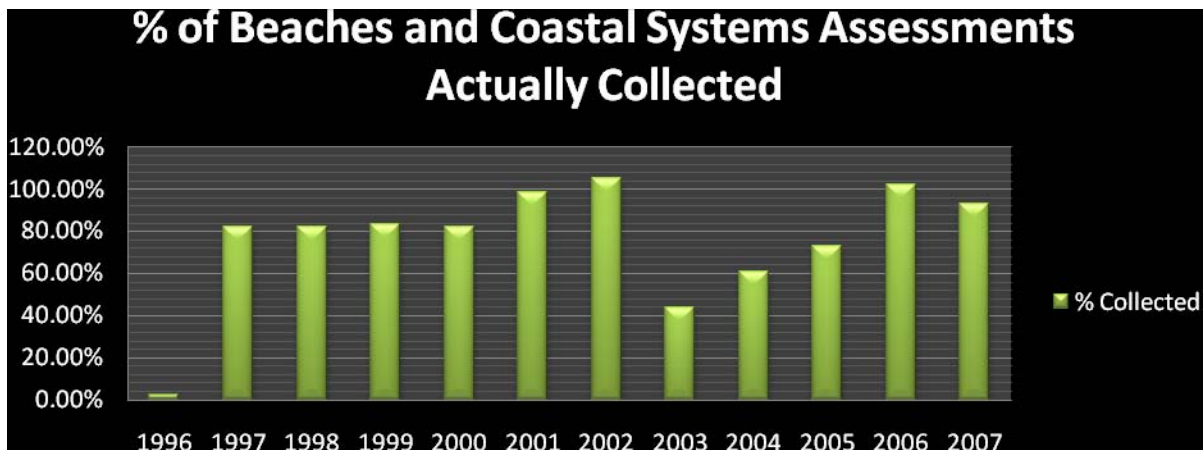
There do not seem to be any visible assessment trends within this program area, except to say that the past two years have seen an increase in assessments.



The historical median for this group has been \$500.00. In most years, the median has been met, although there was a significant increase in 2007.



While there was a steady and healthy collection rate in this area from 1997 through 2002, there was a significant downturn in 2003. The data shows, however, that there has been steady improvement from that year forward with a slight reduction last year.



Waste Cleanup

The Division of Waste Cleanup has multiple responsibilities, including the cleanup of hazardous waste sites, federal sites, and the investigation into claims of groundwater contamination.⁸

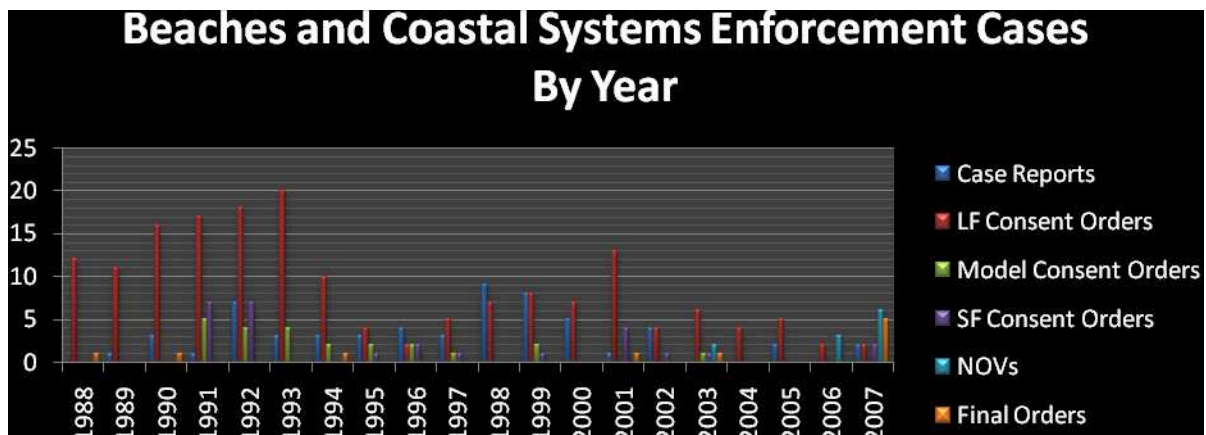
⁸ <http://www.dep.state.fl.us/waste/categories/wc/default.htm>

A. Enforcement Mechanisms

The data indicate a decline in enforcement in this area compared to the amount of enforcement that was taking place in the early 1990s. Only five years since 1994 have had more than 11 cases in any given year.



With the exception of the earlier years in this period, the enforcement tools used by the Department were rather evenly dispersed.

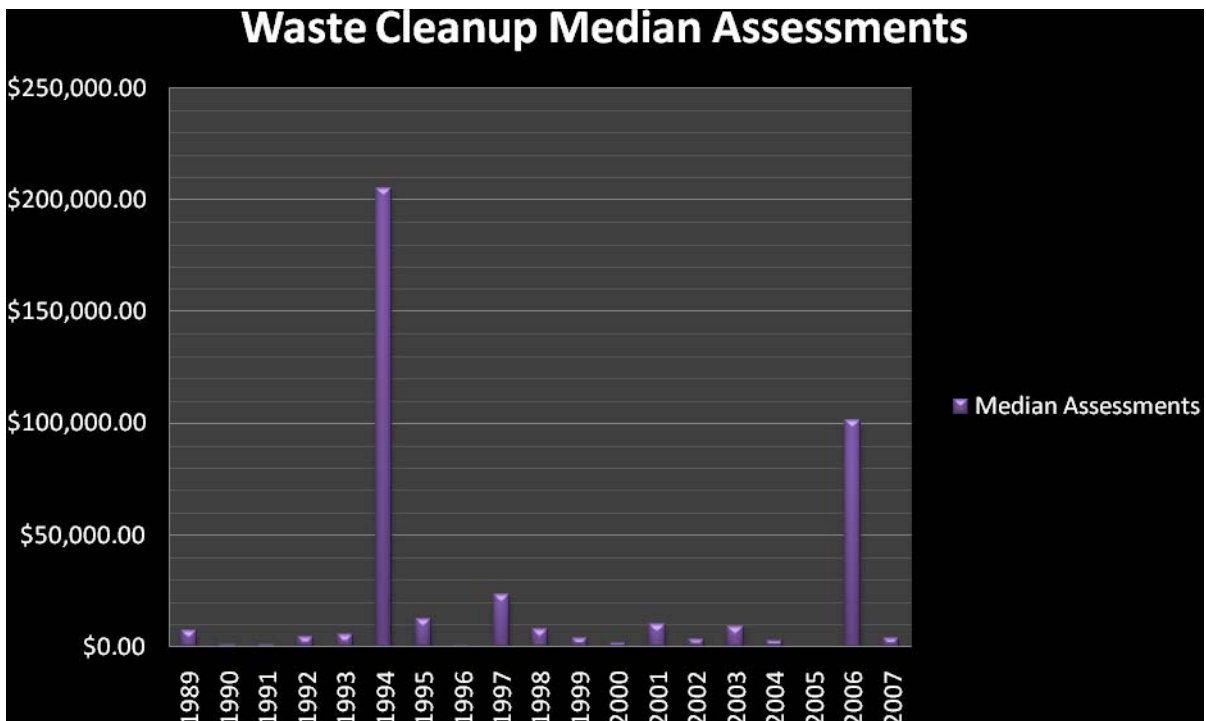


B. Assessments and Collections

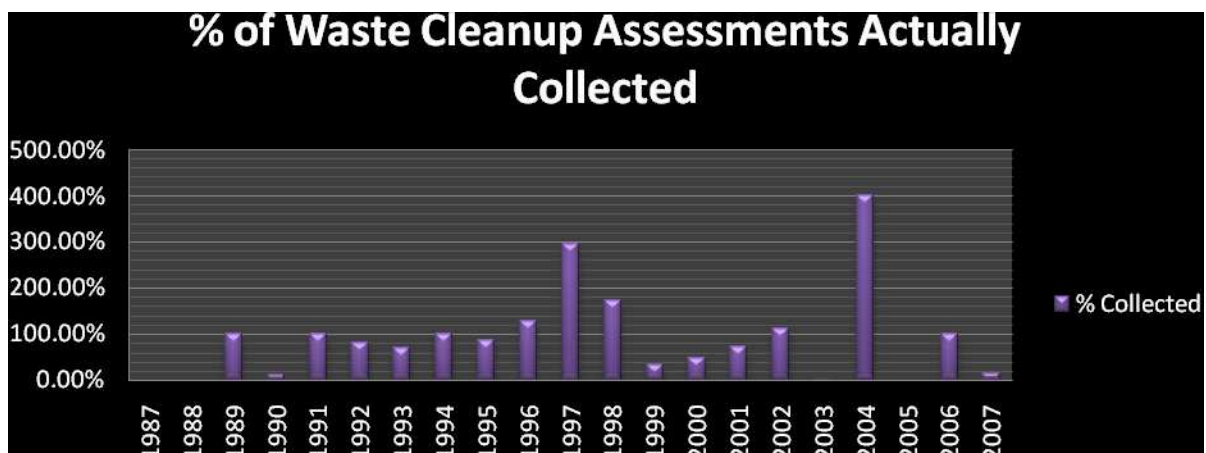
Assessments in this program area are evenly dispersed with few exceptions.



This program area has a historical median of \$4500.00 and in most years the medians have performed accordingly.



It also appears that the Department does a good job at collecting the majority of the assessments levied in this program. Collections approached 100% in most years.



Collection Cases

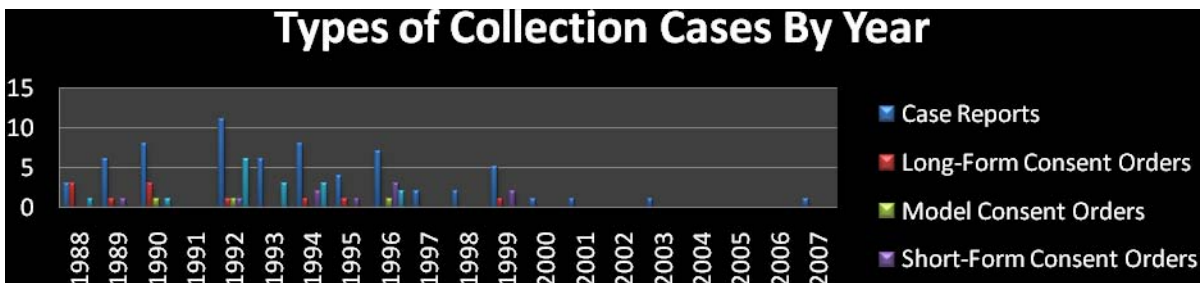
The Department also tracks those cases in which civil penalties have been assessed and in which additional measures were needed in order to collect the monies owed to the Department.

A. Enforcement Mechanisms

As can be seen in the following chart, the Department's approach to collections has been sharply curtailed since 2000.

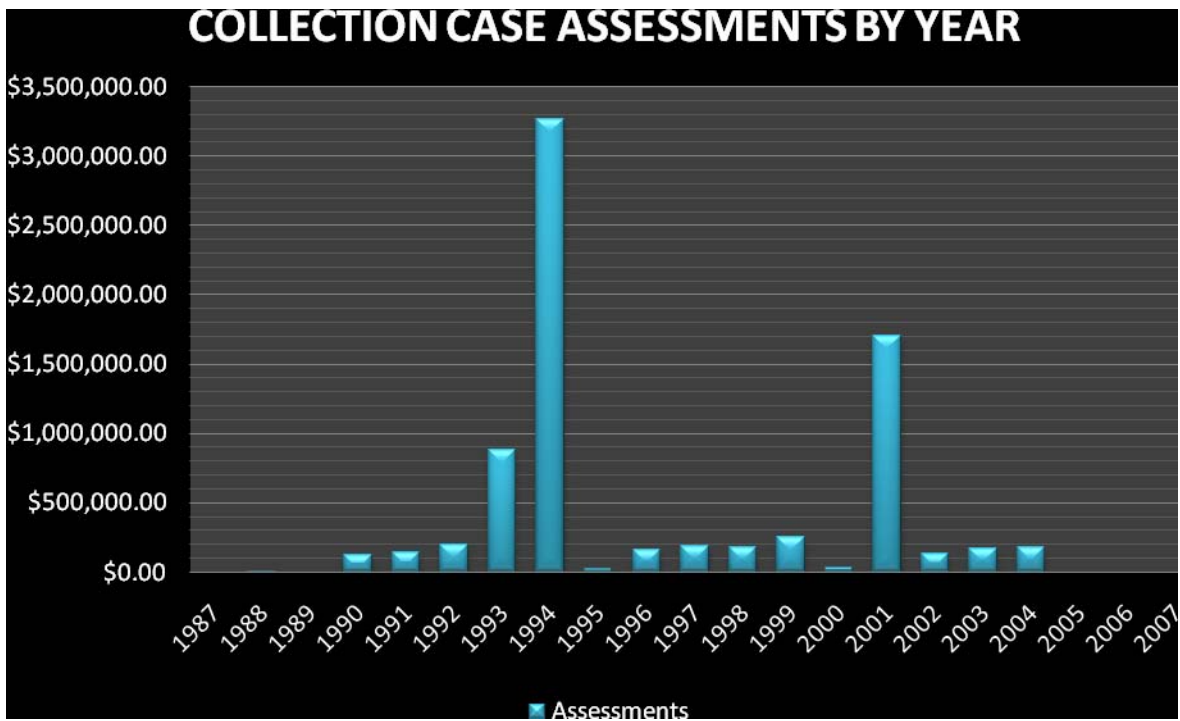


When enforcement was taken it has usually been via litigation, as evidenced by the number of case reports used throughout the period.

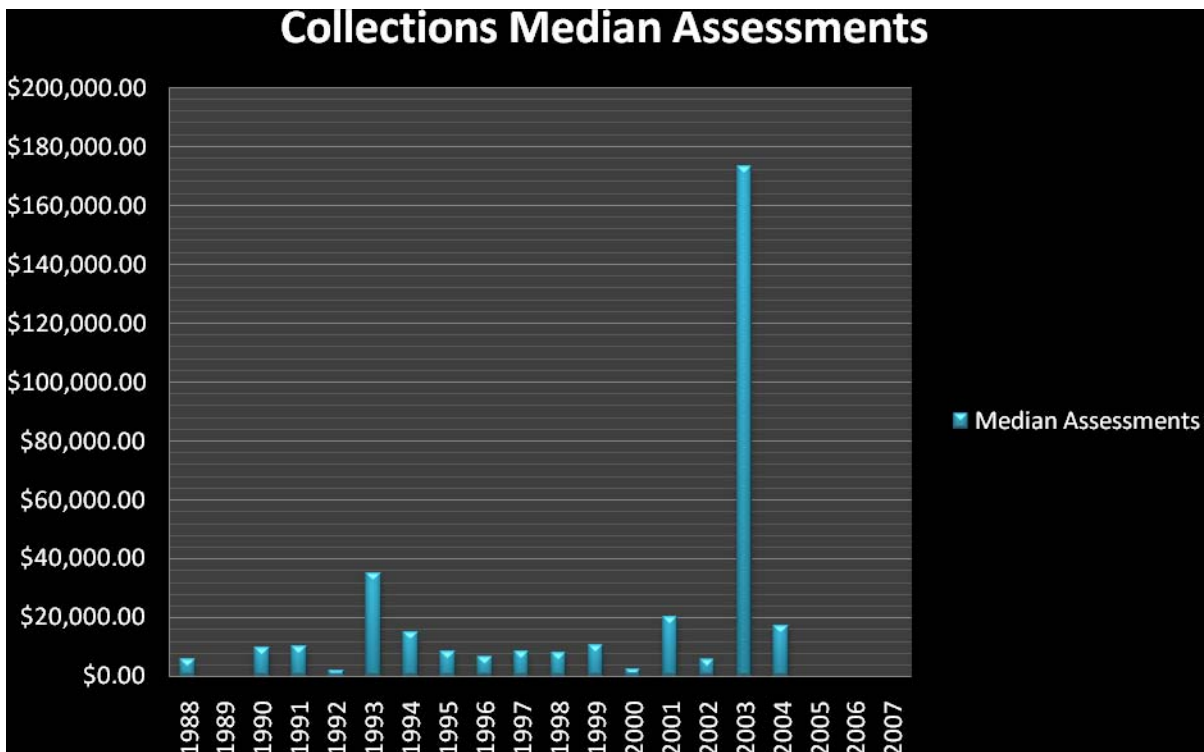


B. Assessments and Collections

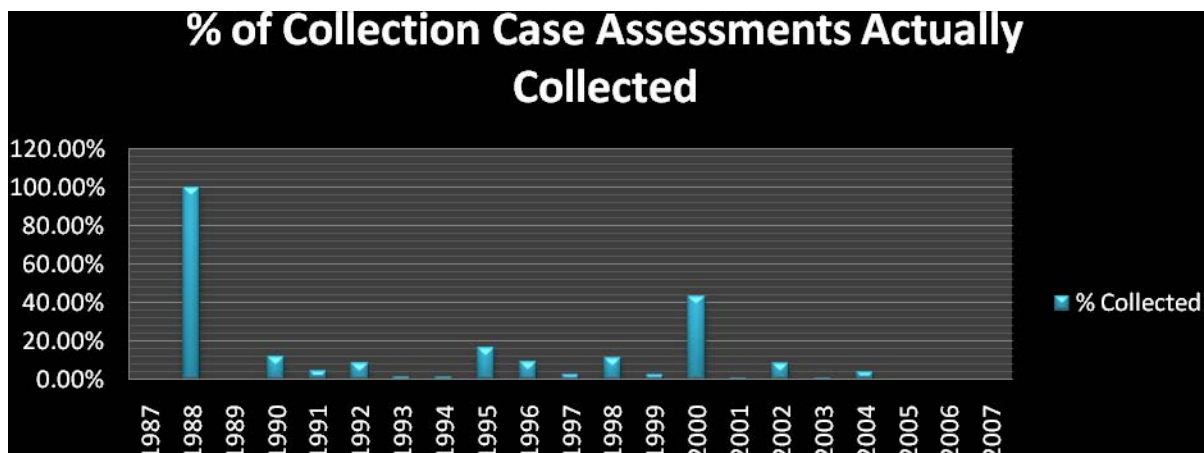
Most years in which enforcement was taken saw total assessments less than \$300,000.00.



The median civil penalty assessments in this program area have historically run \$10,080.00.



Given that these are cases in which the violator is not paying the penalty imposed in another program, thus necessitating further enforcement, it is not surprising that on a percentage basis the success in recovery is limited.



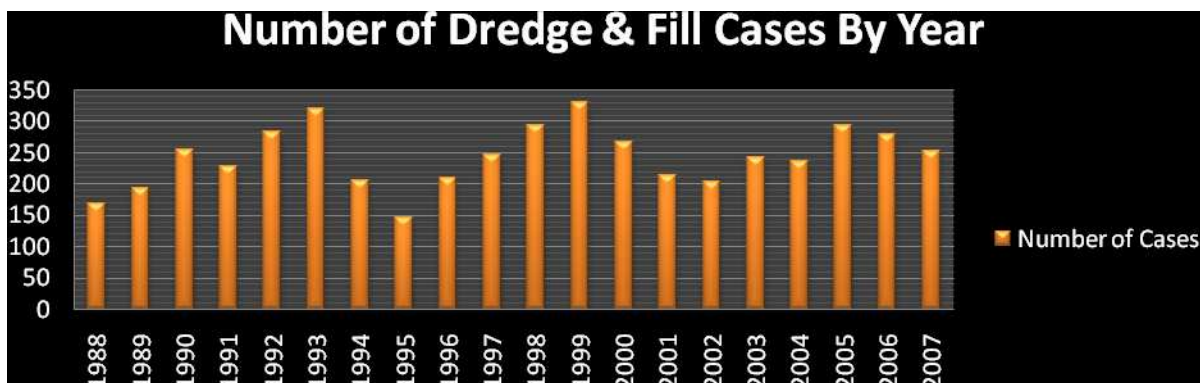
Dredge and Fill

According to the FDEP's website, "Dredging means excavation in wetlands or other surface waters or excavation in uplands that creates wetlands or other surface waters. Filling means deposition of any material (such as sand, dock pilings, or seawalls) in wetlands or other surface waters.

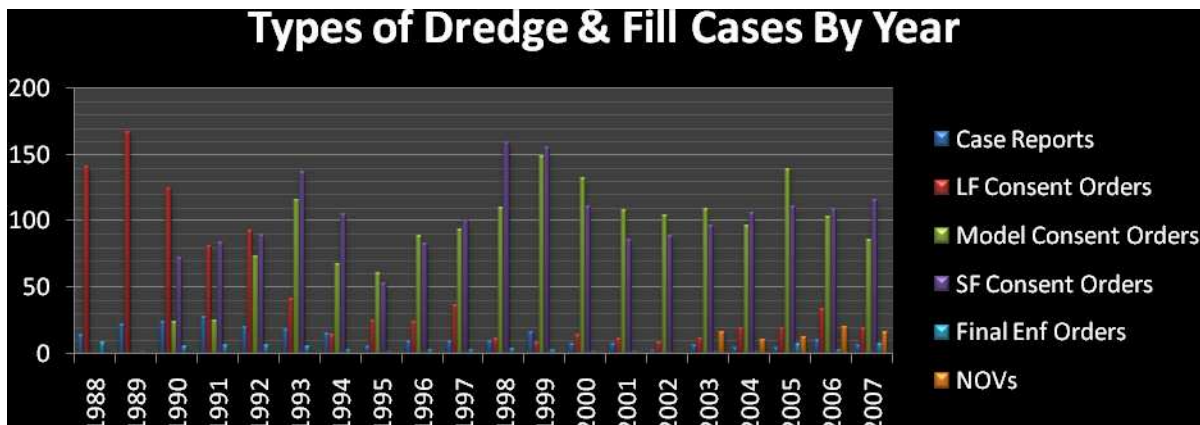
The surface waters regulated under the dredge and fill program include bays, bayous, sounds, estuaries, lagoons, rivers, streams, the Gulf of Mexico, the Atlantic Ocean, most natural lakes, and all waters and wetlands (natural or artificial) that are connected, either directly or by a series of connections, to the above waters.”⁹ Thus, this important program area is largely responsible for regulating the extent to which Florida’s wetlands can be excavated and developed.

A. Enforcement Mechanisms

As can be seen below, the number of dredge and fill cases brought by the FDEP appears to follow a rather cyclical pattern ranging from a low of approximately 150 to a high of 330.



Enforcement through litigation has clearly taken a nosedive in this area. While long-form consent orders have likewise dropped dramatically, the decline has been accompanied by an increase in model consent orders. And while the latter type of enforcement is arguably not as substantial as enforcement that is directly tailored to each individual violation, it is nonetheless more comprehensive than short-form consent orders.



⁹ <http://www.dep.state.fl.us/water/wetlands/erp/dffact.htm>

As can be seen below, the use of short-form consent orders to resolve these types of violations is, however, high for this program area, hovering around 40% each year.

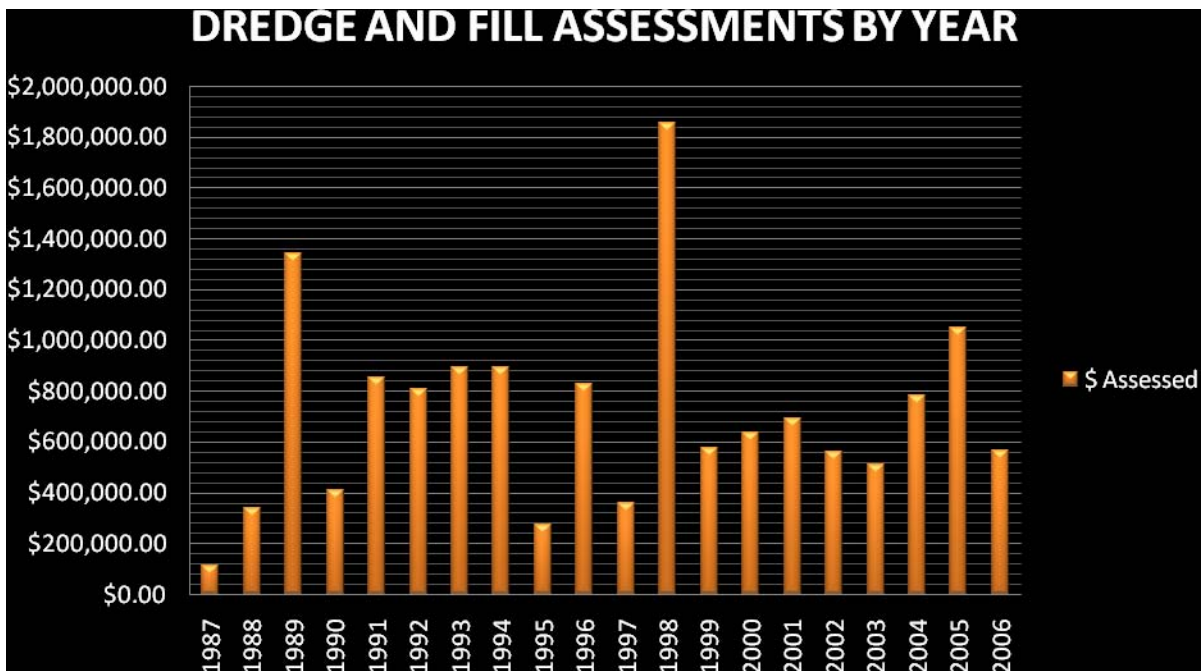


The recent history of the Department is, it can be fairly said, one of increased resistance to the concept of wetland protection. This is most visible in the proposed adoption of a methodology called the Harper Methodology that would, in essence, allow increased wetland destruction by asserting that wetlands themselves are responsible for a certain amount of pollution.¹⁰ The concept has significant negative ramifications for the stormwater runoff program as well.

B. Assessments and Collections

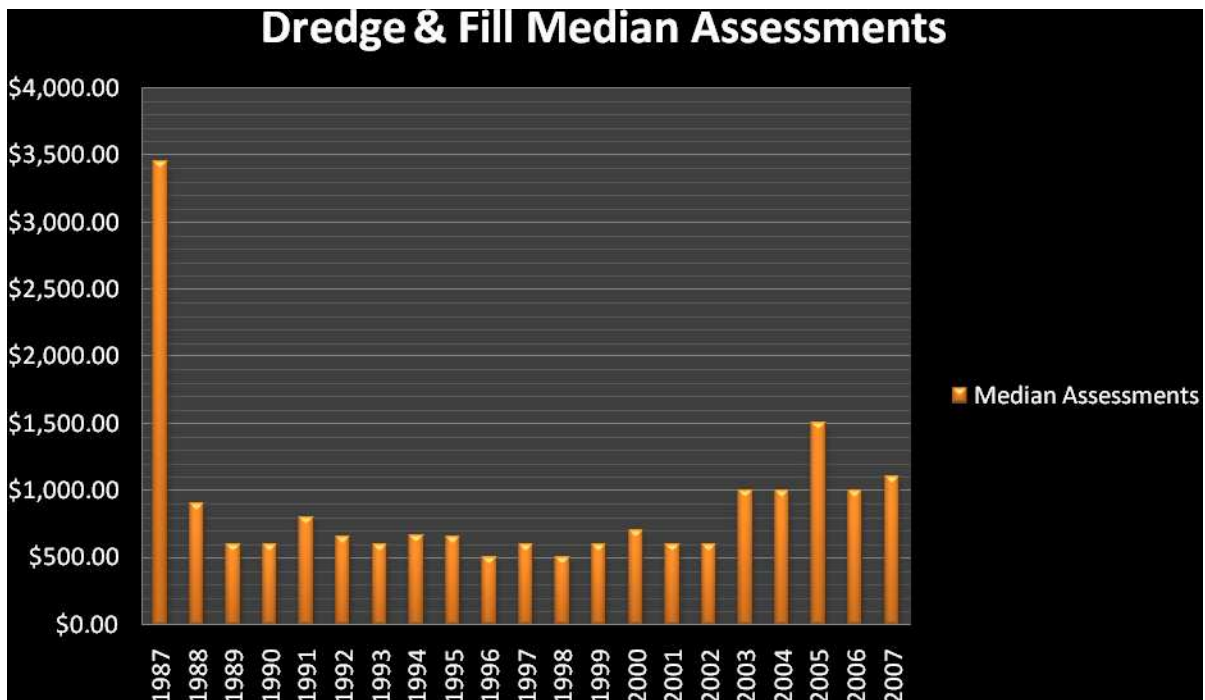
While assessments in this program area do not appear to be trending in any one direction, it is clear that the period of highest sustained significant assessments was in the early 1990s. This was followed in 1995 by the lowest performance since the first year in which records were maintained. Assessment levels have not recovered since that time.

¹⁰ http://www.dep.state.fl.us/water/wetlands/erp/rules/stormwater/docs/response_epa08harper.pdf

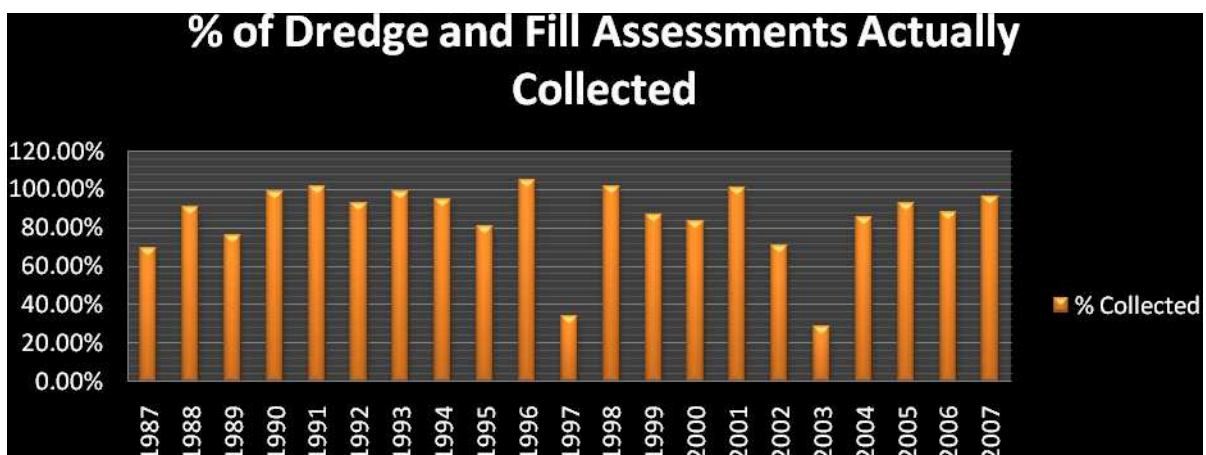


From 2004 to the present there appears to be a slight tendency towards increasing the amount of moneys actually assessed, though once again, it is not on a sustained level such as we saw in the early part of the reporting period.

While the median assessments have risen of late, the historical median for the dredge and fill program is \$700.00.



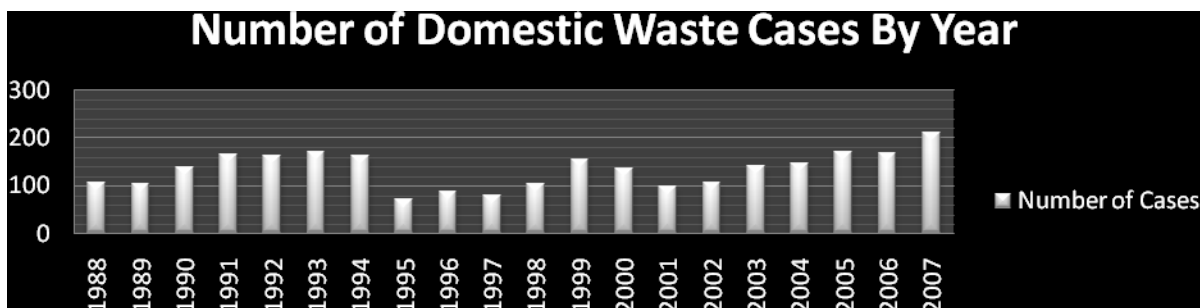
Collection of the assessments is consistent, however, with all but two years showing recoveries in excess of 50% of the dollars assessed.



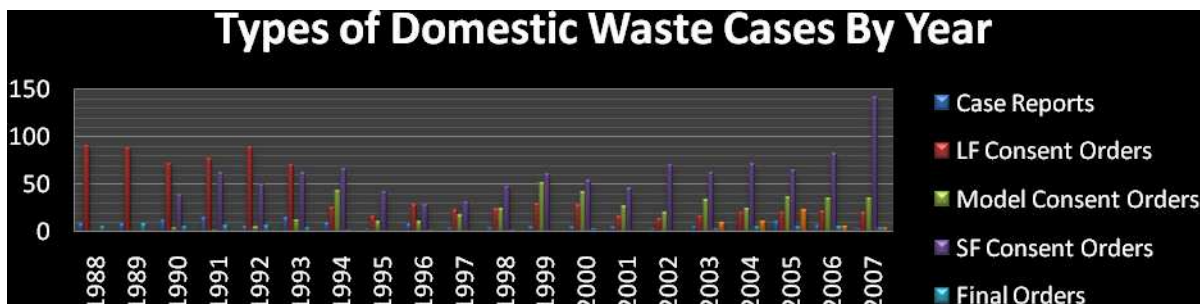
Domestic Waste

A. Enforcement Mechanisms

As with other program areas, the number of domestic waste enforcement cases maintained a high level in the early 1990s and then dropped significantly in 1995. Since that time the levels have steadily risen and are now back to the previous higher levels.



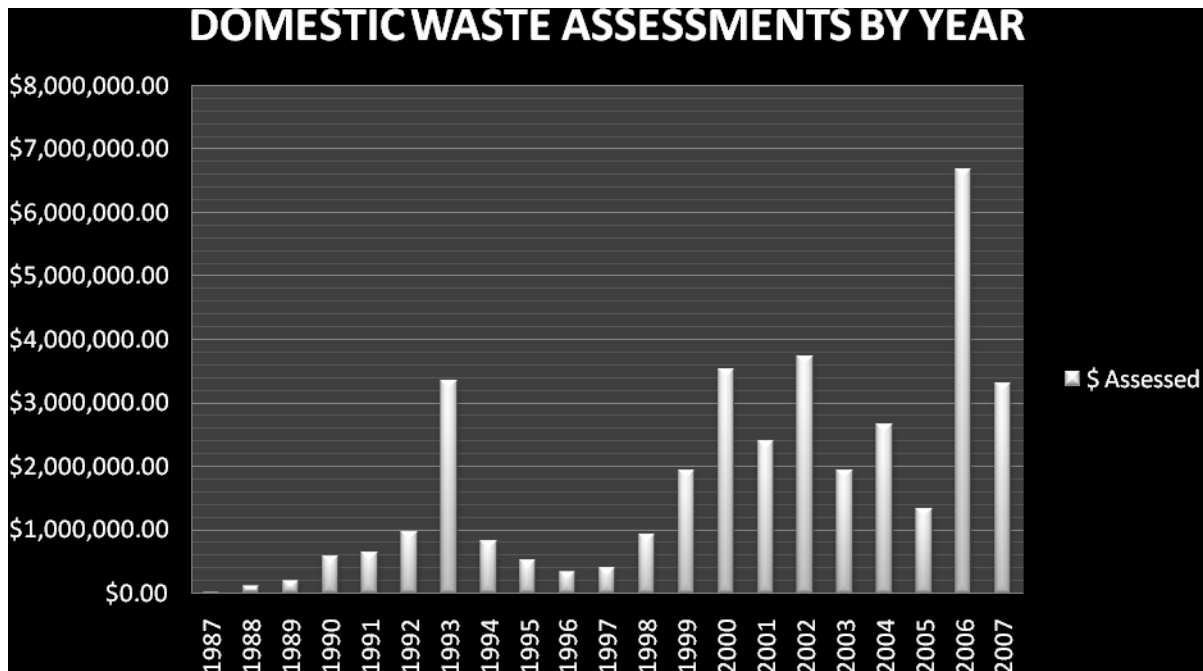
As seen below, the nature of enforcement taken in these cases has followed the department-wide trend of a reduced number of lawsuits being filed and a steady increase in the number of short-form consent orders being used to resolve cases. The increase in the total number of cases in 2007 was accompanied by a dramatic increase use of short-form consent orders to resolve those cases.



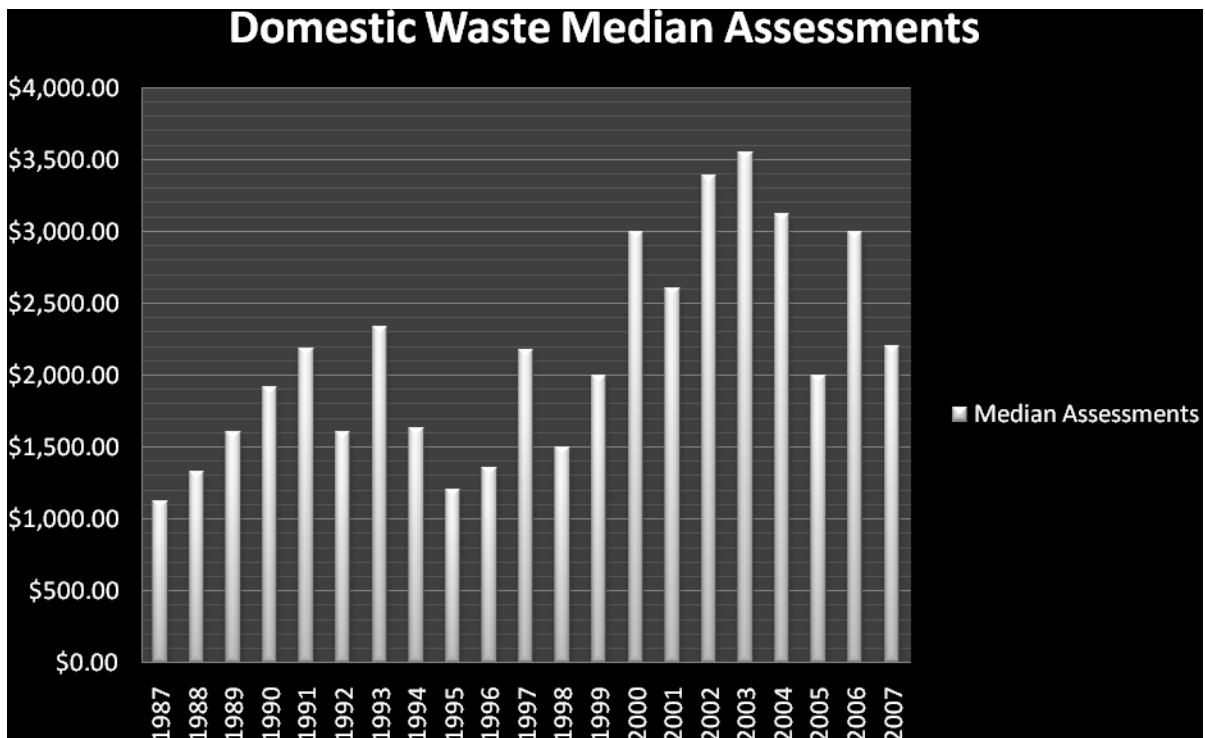
The fact that the number of domestic wastewater cases has been on the increase is not exactly an indication that the program is under control. In a June 2008 report entitled *The Gulf of Mexico, Florida's Toilet*, the Clean Water Network concluded that enforcement of Florida's domestic wastewater program was seriously flawed. In pointing to Florida's growth, the report stated, that "[s]ewage treatment plants are at or near capacity, or in some cases, actually exceeding capacity. Treatment capacity and quality is not keeping pace with population growth. Enforcement of existing wastewater treatment rules is neither consistent nor effective. The result is an increasing amount of pollutants and excess nutrients entering our waterbodies, groundwater and coastal beaches, contaminating drinking and bathing water as well as causing harmful algae blooms, fish kills and seagrass die-offs. Report at 10-11." This report was the result of an extensive review of FDEP files from 2003 to 2008, and when compared with the overall data discussed above, shows just how bad the situation is in Florida when serious violations continue to occur even when the same time period shows an increased number of cases being opened.

B. Assessments and Collections

After years of mediocre performance in civil penalty assessments, the trend began to significantly improve in 1998. While inconsistent, the improvement has continued since that time, with the single largest assessments in the period having occurred in 2006.



Median assessments historically have been \$2,250.00 for the domestic waste program. While there was a decided increase beginning in 2000, there currently appears to be a bit of a downward trend.



While civil penalty assessments have increased, the same cannot be said for the actual collection of those penalties. In fact, with few exceptions collections have steadily declined since 1995, as shown by the trendline below.



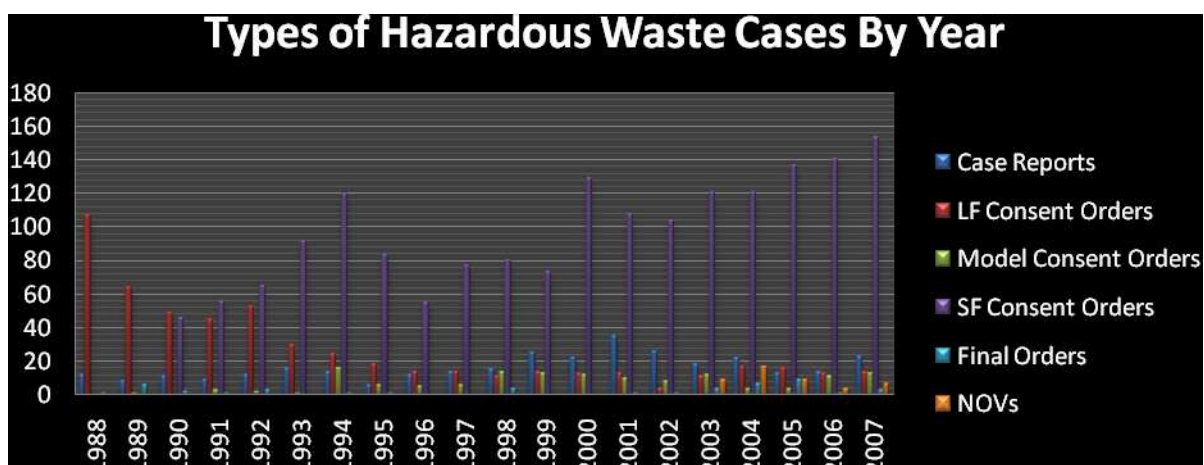
Hazardous Waste

A. Enforcement Mechanisms

Like the domestic waste program, the hazardous waste program saw a drop in cases in 1996 followed by a steady increase. However, the annual number of cases in this program area is now at an all-time high.



In spite of the increased number of cases, this program has seen a disproportionately large number of cases settled through the use of short-form consent orders, while the use of other mechanisms remained relatively flat. This is remarkable considering the extremely serious nature of most hazardous waste violations. The one bright spot is that cases reports have held their own and even shown some modest increases over the period.

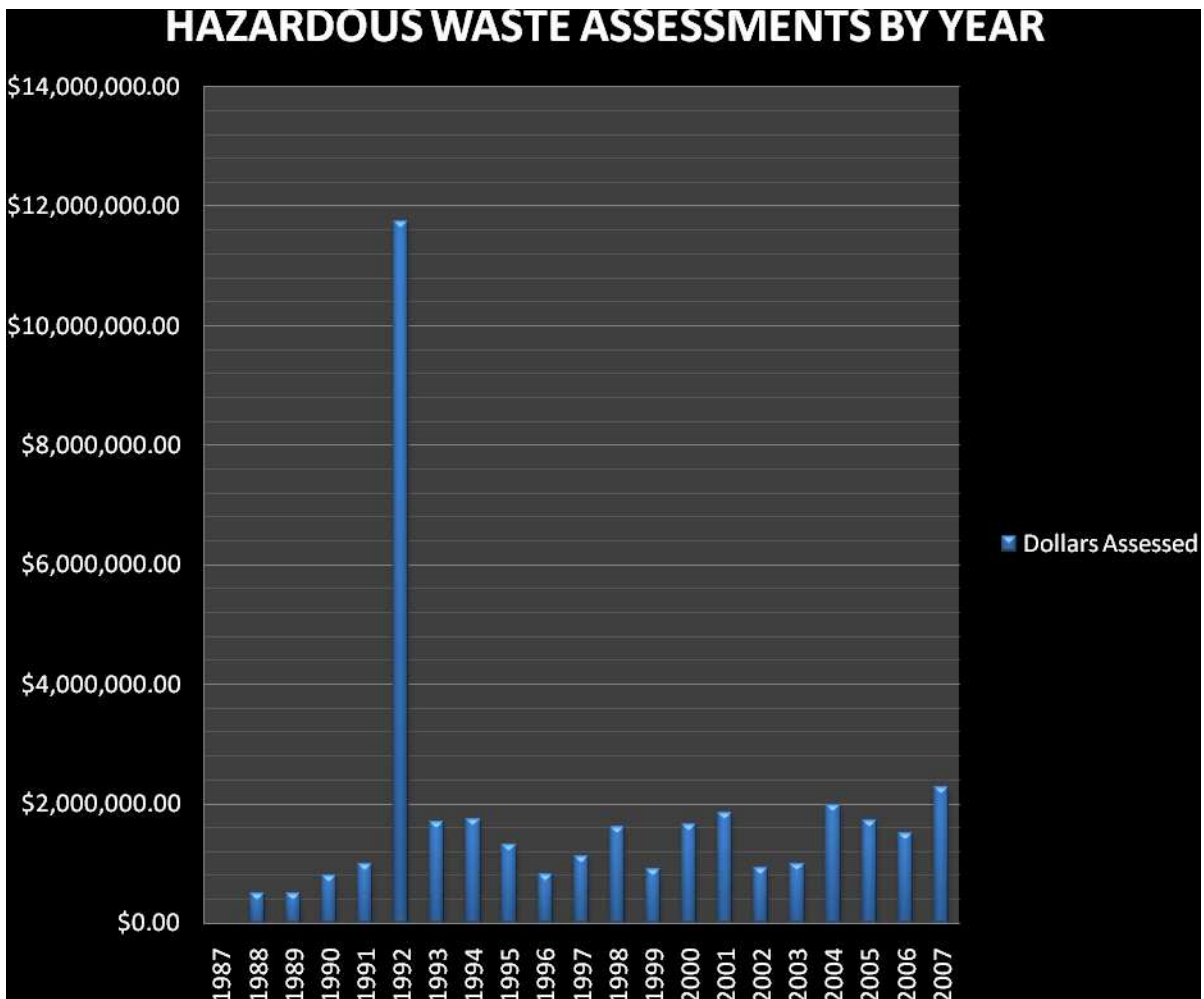


Comparing the percentage of case reports and short-form consent orders nevertheless shows the disparity in the usage of the two mechanisms.

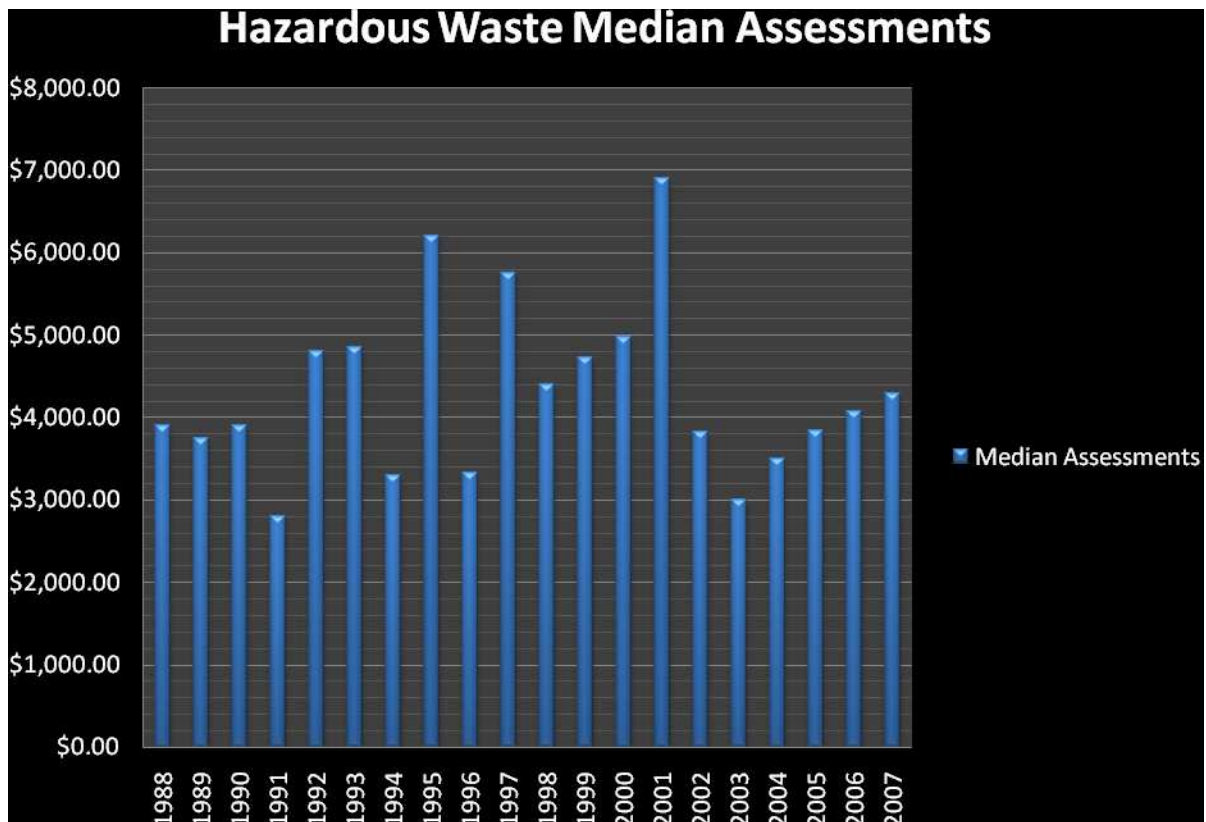


B. Assessments and Collections

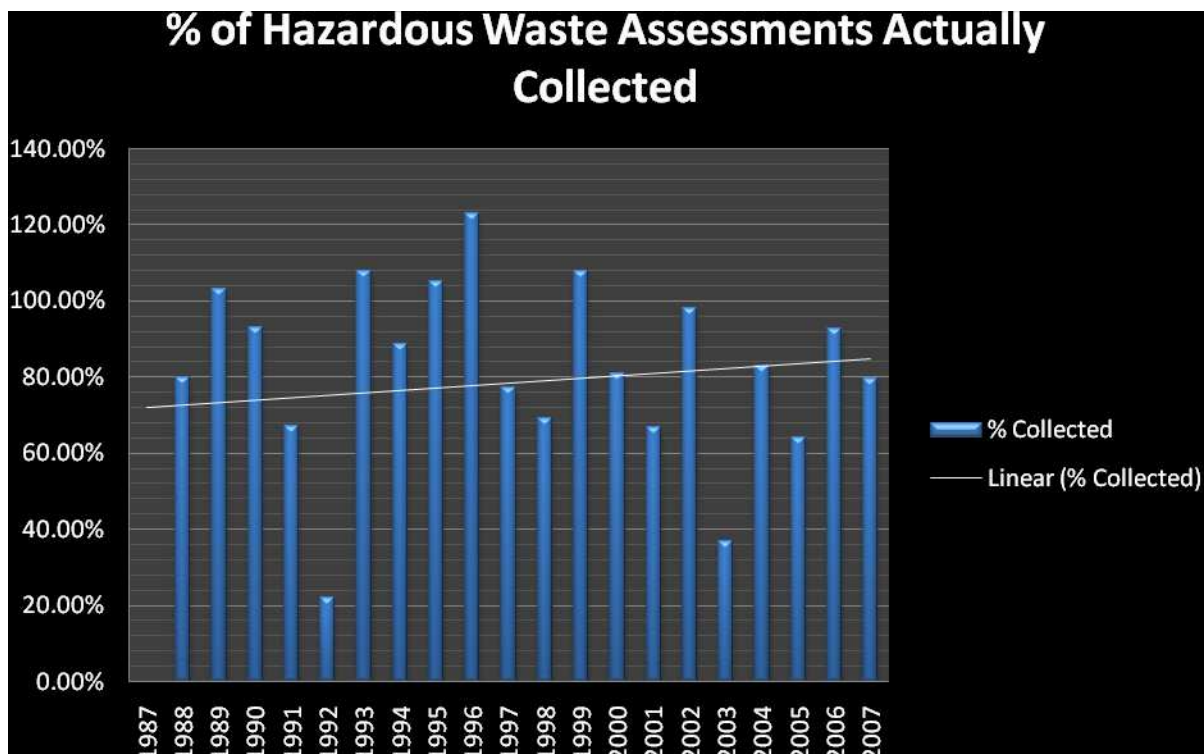
A review of the civil penalties assessed in this program area shows that overall the assessments are rather stable, fluctuating between \$400,000 and \$2,000,000 per year.



Historically, the median civil penalty assessment for the hazardous waste program has been \$4,100.00. Over the past few years the medians have been trending upward.



And while the Department currently does not collect as much of the penalties assessed as it did in the early 1990s, the trendline is nonetheless indicating modest improvements over time.



Industrial Waste

The Department's website describes the industrial waste program as follows:

“In Florida, all wastewater that is not defined as domestic wastewater is considered industrial wastewater. Since Florida is among our nation's most populous and fastest growing states, industrial wastewater permitting is increasingly important for protection of our state's most precious natural resource—water.

Sources of industrial wastewater include manufacturing, commercial businesses, mining, agricultural production and processing, and wastewater from cleanup of petroleum and chemical contaminated sites. Industrial wastewater discharged under NPDES permits may be subject to federal Effluent Limitations Guidelines (ELG). In addition, all industrial wastewater discharges in Florida must provide reasonable assurance of meeting Florida's Water Quality Standards for surface water or ground water in order to receive a discharge permit.”¹¹

¹¹ <http://www.dep.state.fl.us/water/wastewater/iw/>

A. Enforcement Mechanisms

Like most of the major program areas, the industrial waste program has seen multiple occasions of low overall enforcement followed by gradual increases. The early 1990s saw the greatest enforcement with subsequent gains and losses.



The data further indicates that there has been a steady lessening of significant enforcement in this area since 2000. The use of mechanisms that would provide more oversight has been replaced with an increasing reliance upon the use of short-form consent orders that allow violators to resolve their cases simply via payment of a fine with no increased oversight. Given the serious impact that industrial waste has to Florida's water supply it is perplexing to see such an unfettered reliance upon traffic ticket equivalents by those who are charged with keeping Florida's water supply safe.

This is not an esoteric argument that has no realistic impact upon Floridians and their environment. One need only consider the recent proposals by the Governor for a massive purchase of property owned by U.S. Sugar in an effort to aid in Everglades restoration to understand the results of years of failure to properly enforce Florida's environmental laws. It is entirely appropriate to question how we reached the point at which such drastic measures need to be taken and whether such measures would have been needed had the Department aggressively pursued enforcement of Florida's environmental laws throughout its history.



B. Assessments and Collections

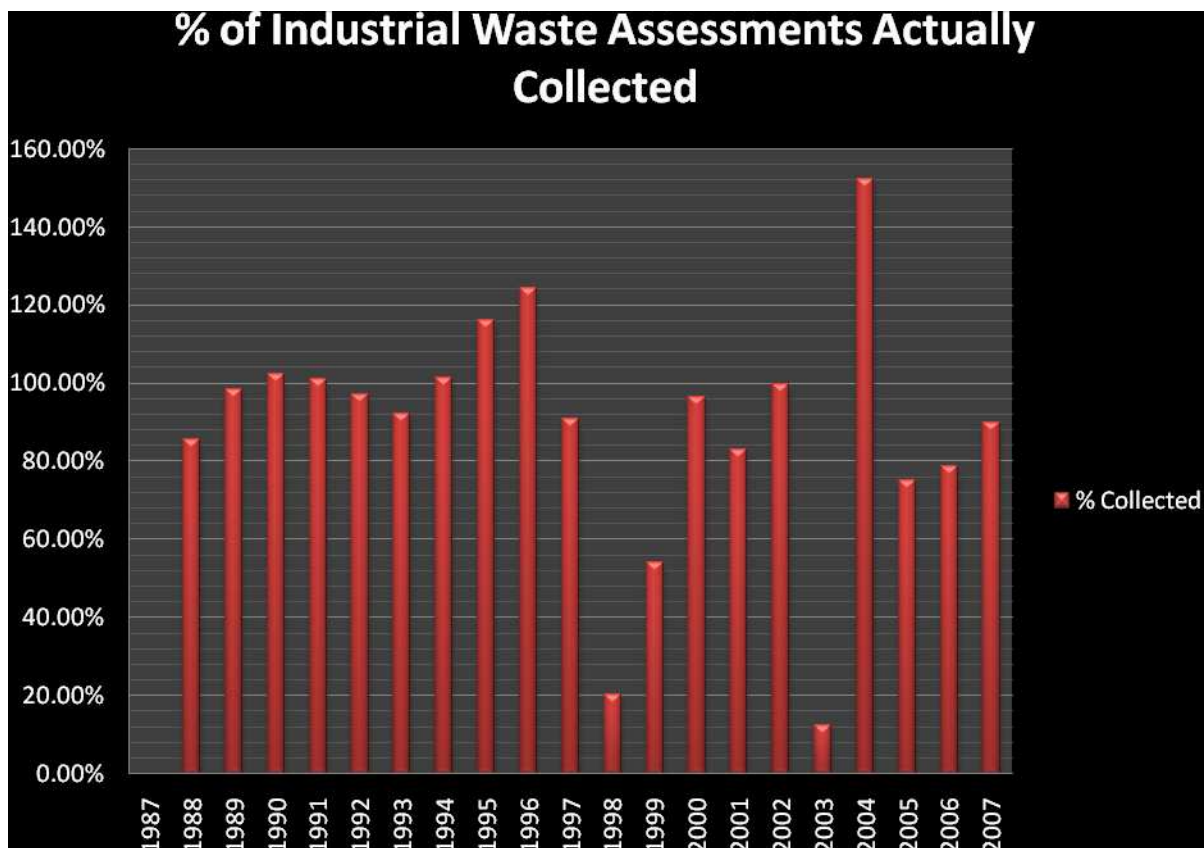
Without question, the period from 1994 – 1996 represents the worst performance in terms of civil penalty assessments for this program. However, as the following data shows, there has never been a consistent level of assessments over the course of the past twenty years.



The medians for this program area have been \$4,500.00. However, since 2000 there has been a steady decline in those numbers with underperformance in every year from 2001 through 2007.



The inconsistency in levying assessments was not seen in the actual collection of those assessments from 1989 through 1997 when almost all of the assessments were paid by the violators. Since that time collections have declined overall, though there has been an increase from 2005 to 2007.



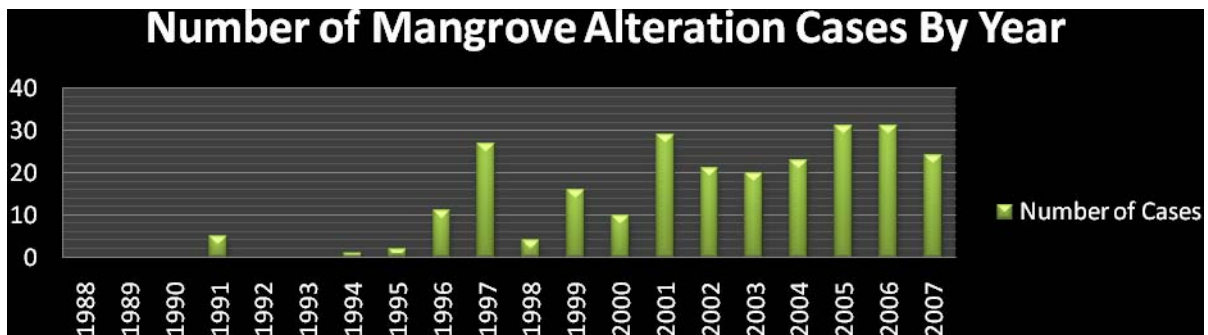
Mangrove Alteration

The FDEP describes the importance of mangroves to Florida's environment by stating that "[m]angroves trap and cycle various organic materials, chemical elements, and important nutrients in the coastal ecosystem. Mangroves provide one of the basic food chain resources for marine organisms. Mangroves provide physical habitat and nursery grounds for a wide variety of marine organisms, many of which have important recreational or commercial value. Mangroves serve as storm buffers by reducing wind and wave action in shallow shoreline areas."¹²

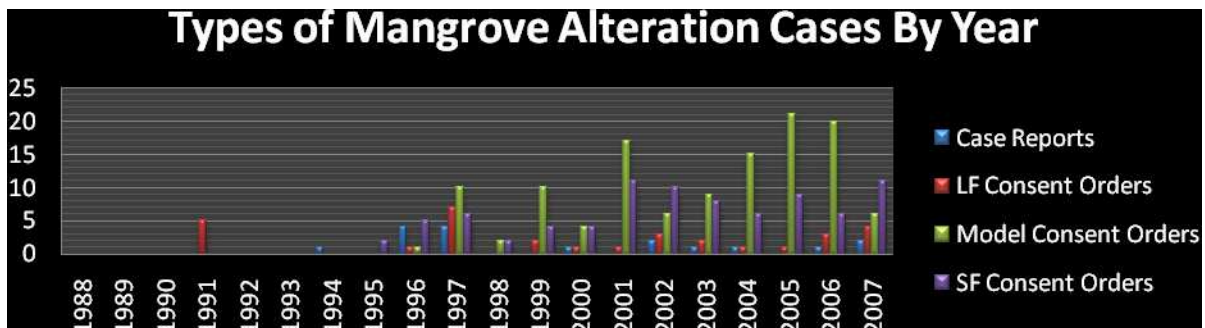
A. Enforcement Mechanisms

Though the Department appears to have arrived on the scene a bit late, once it began enforcement in this critical area there has been a steady increase through 2006.

¹² http://www.dep.state.fl.us/water/wetlands/mangroves/mangrove_facts.htm

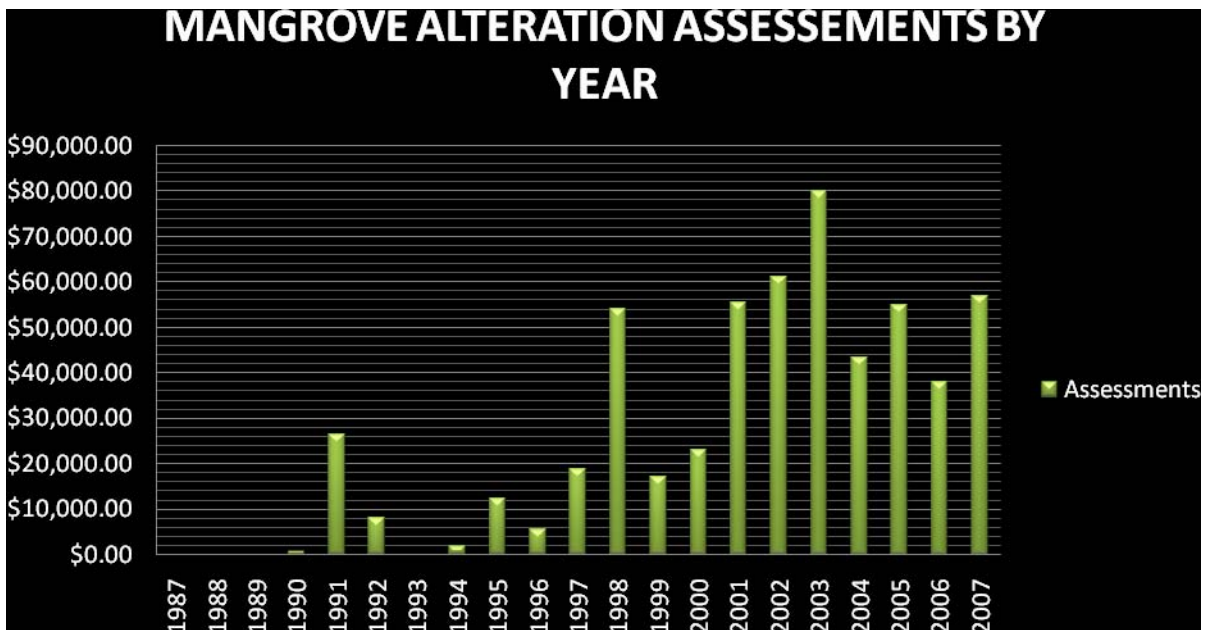


In addition, this one of the few program areas in which enforcement has not been dominated by the use of short-form consent orders. The one caveat is that 2007 saw an overall decline in the number of cases, coupled with a significant increase in the number of those cases resolved through short-form consent orders.

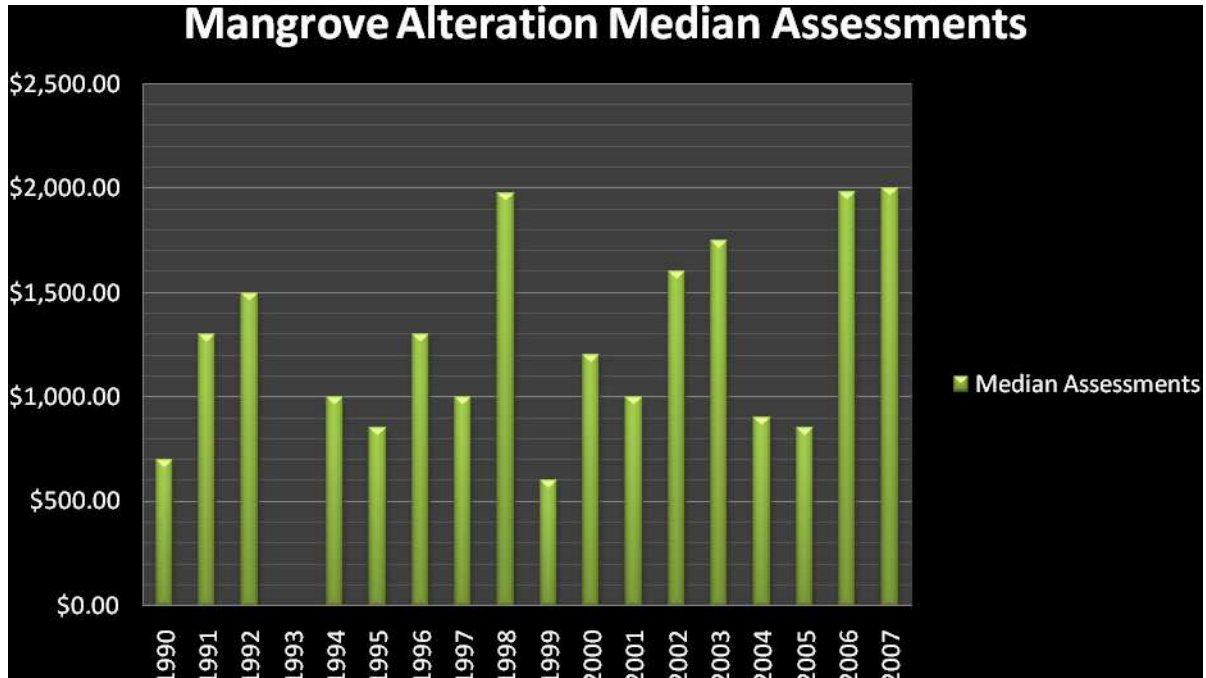


B. Assessments and Collections

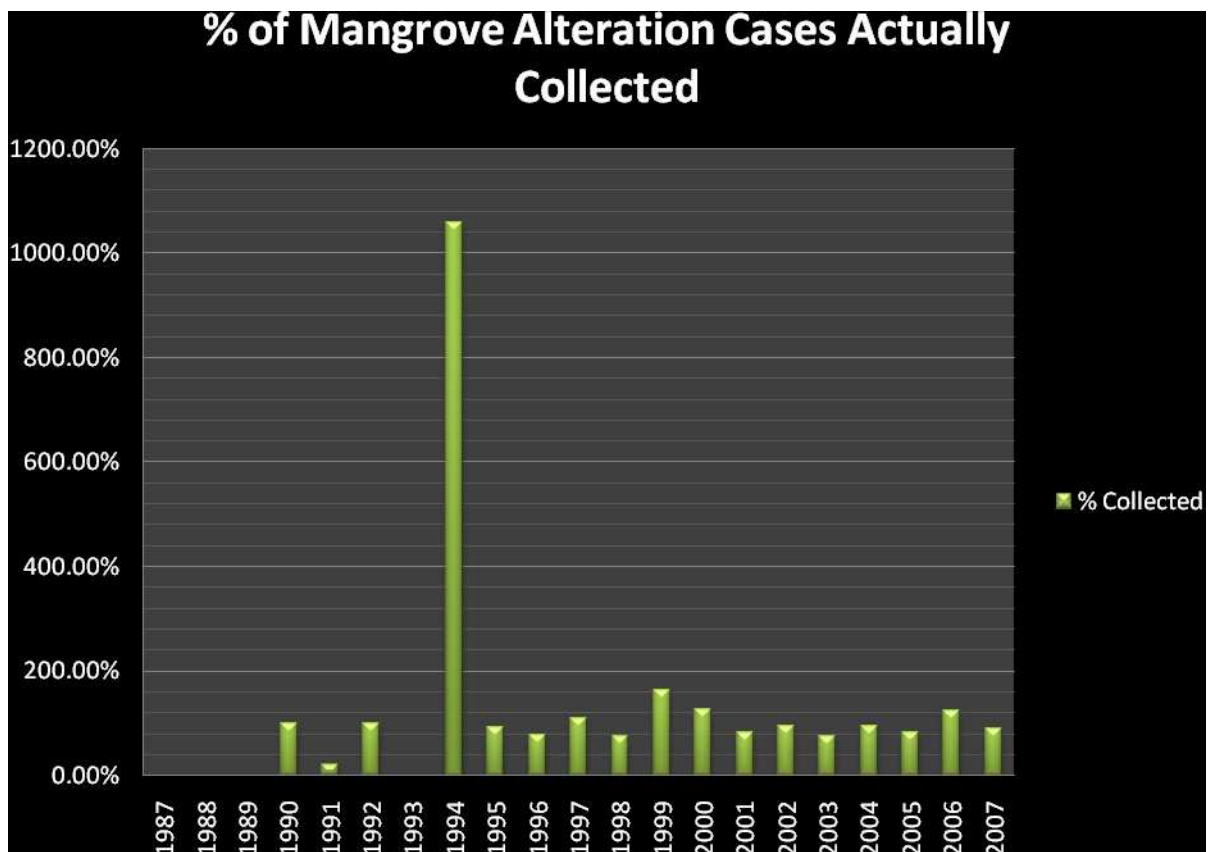
The climb in civil penalty assessments has largely mirrored the increase in the number of cases. However, while the number of cases dropped in 2007 there continued to be a rise in dollars assessed.



The median civil penalty assessment for the mangrove alteration program is \$1,200.00; however, this program has done significantly better in 2006 and 2007.



Once assessed, the program has a consistently high collection rate of the civil penalties.

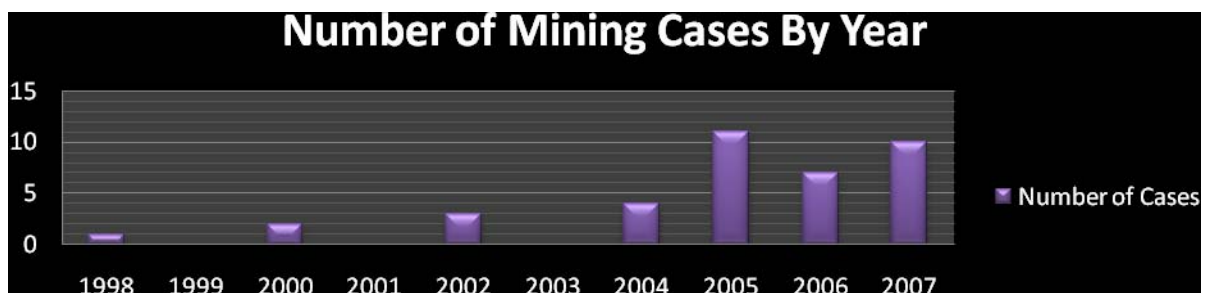


Mining

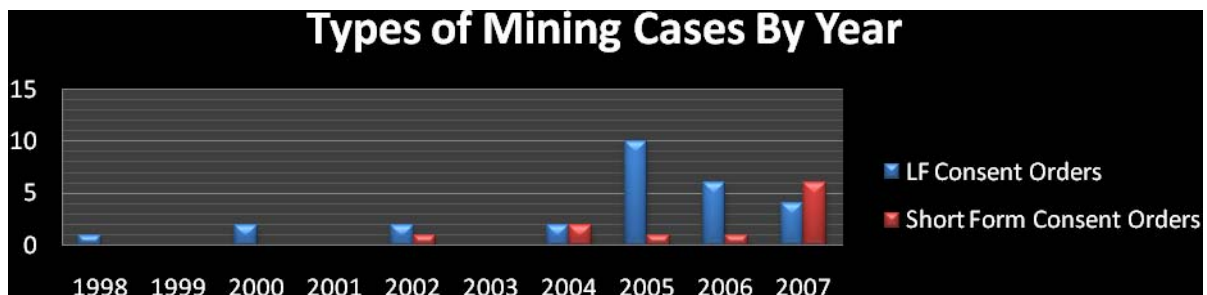
This program area regulates a wide variety of mining operations including reclamation and protection of water resources.

A. Enforcement Mechanisms

Enforcement numbers for this program have only been available since 1998. The maximum number of cases in any one year has been 11.

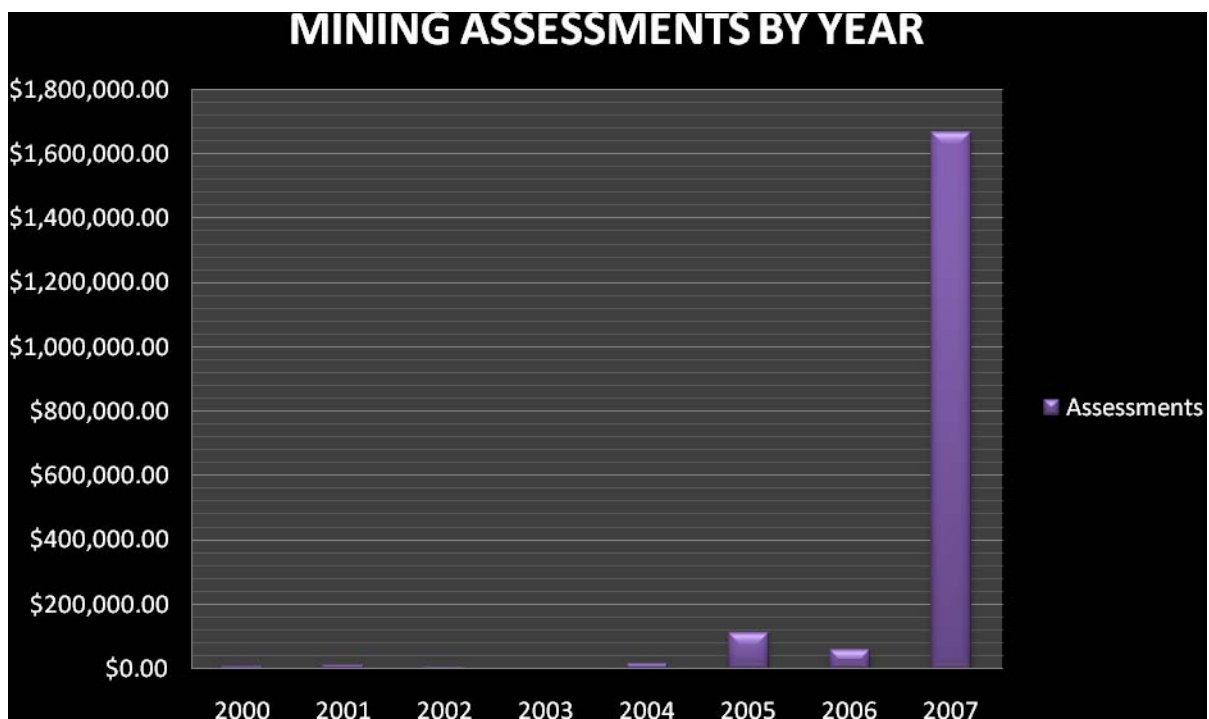


And once taken, the types of enforcement have been limited to either long-form or short-form consent orders.

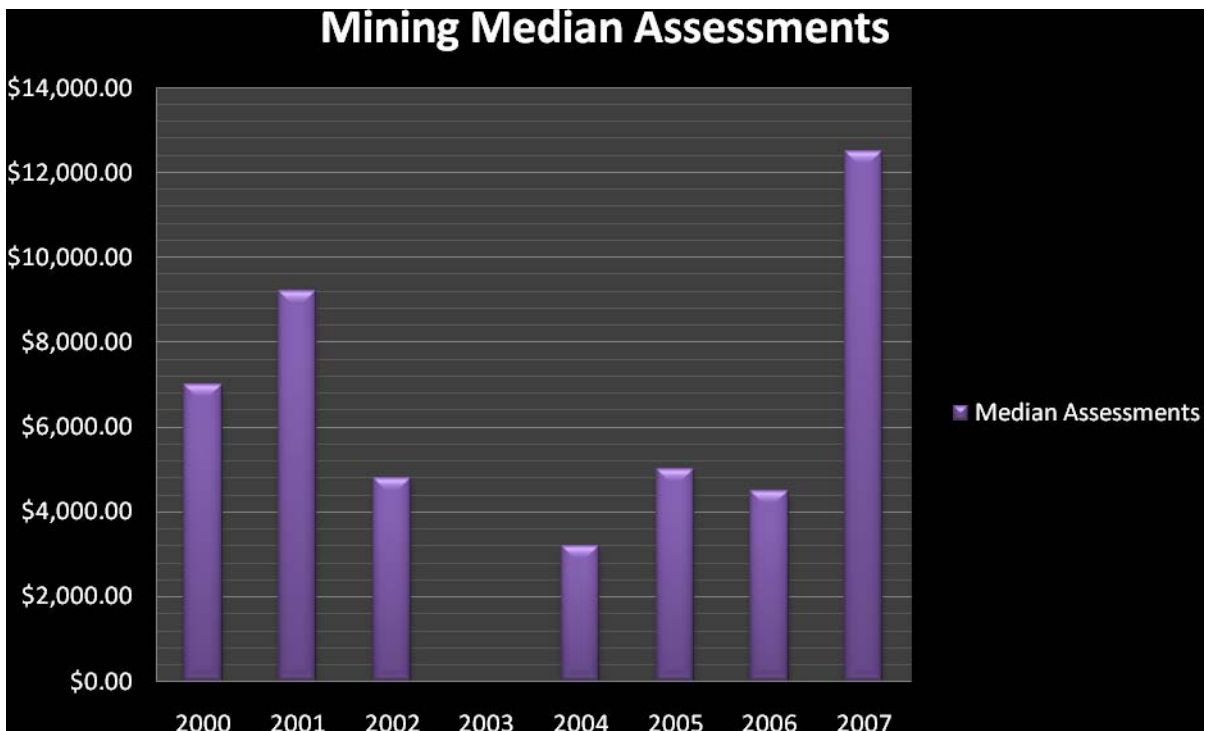


B. Assessments and Collections

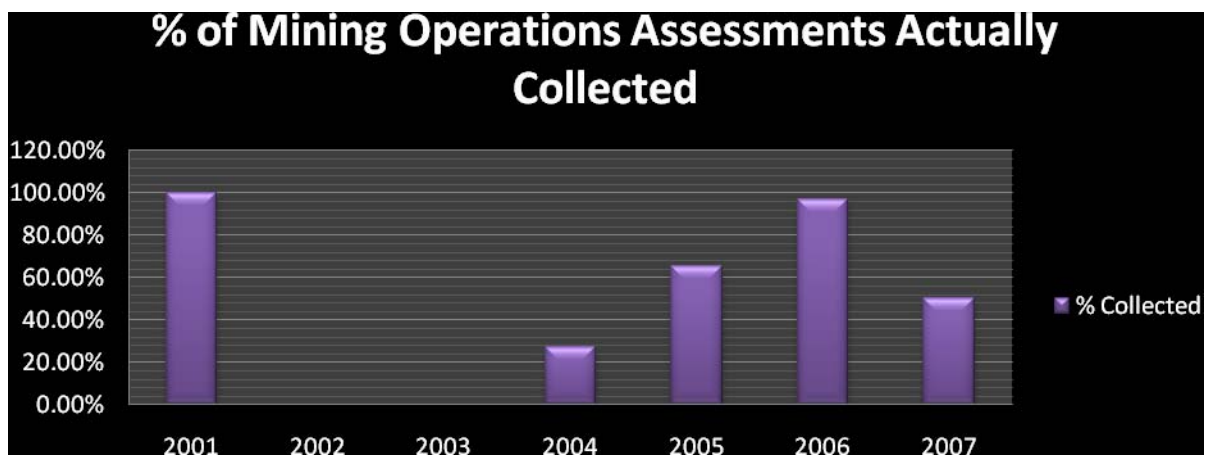
The data does not show any assessments until 2000. Those assessments have been relatively minor, except for 2007.



The median assessment is \$5,250.00.



Collections have been sporadic.



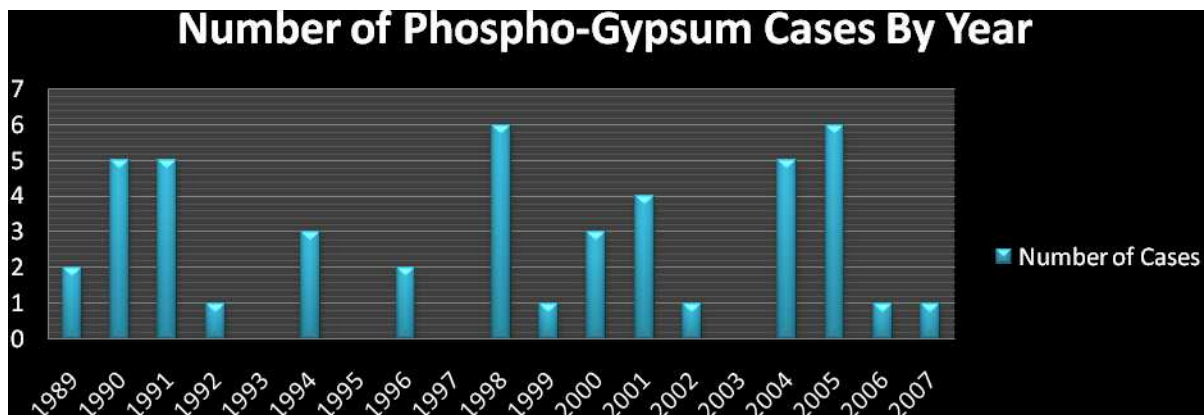
Phospho-Gypsum

The FDEP describes this program as follows: “The Phosphogypsum Management Program regulates (permitting, compliance, enforcement) the design, construction, operation and maintenance of phosphogypsum stack systems. It ensures the proper closure and long-term

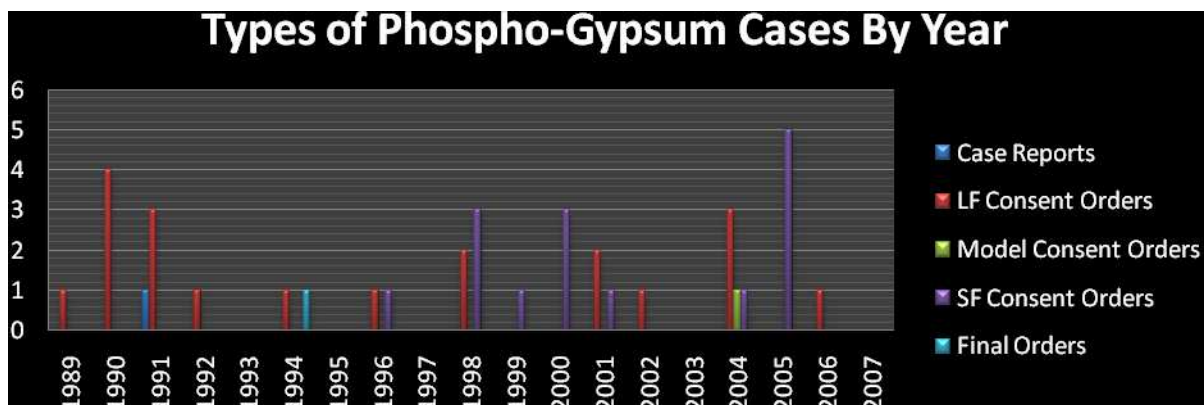
monitoring and maintenance of those systems which have concluded useful production, or which are otherwise required by rule to be closed. The program also administers financial responsibility requirements designed to guarantee that owners/operators have the financial ability to properly close and manage the gypstacks.”¹³

A. Enforcement Mechanisms

The maximum number of cases brought by the Department in any one year is 6. Generally, performance has been sporadic.



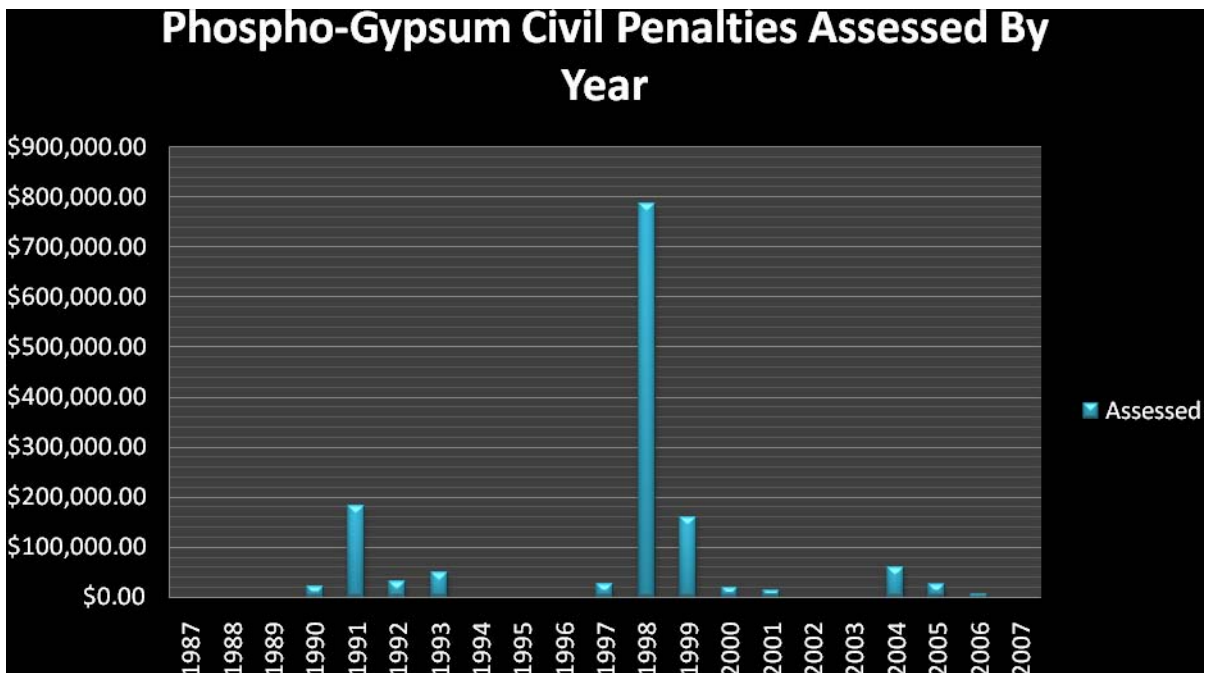
And once taken, the enforcement is almost invariably done via long-form or short-form consent order.



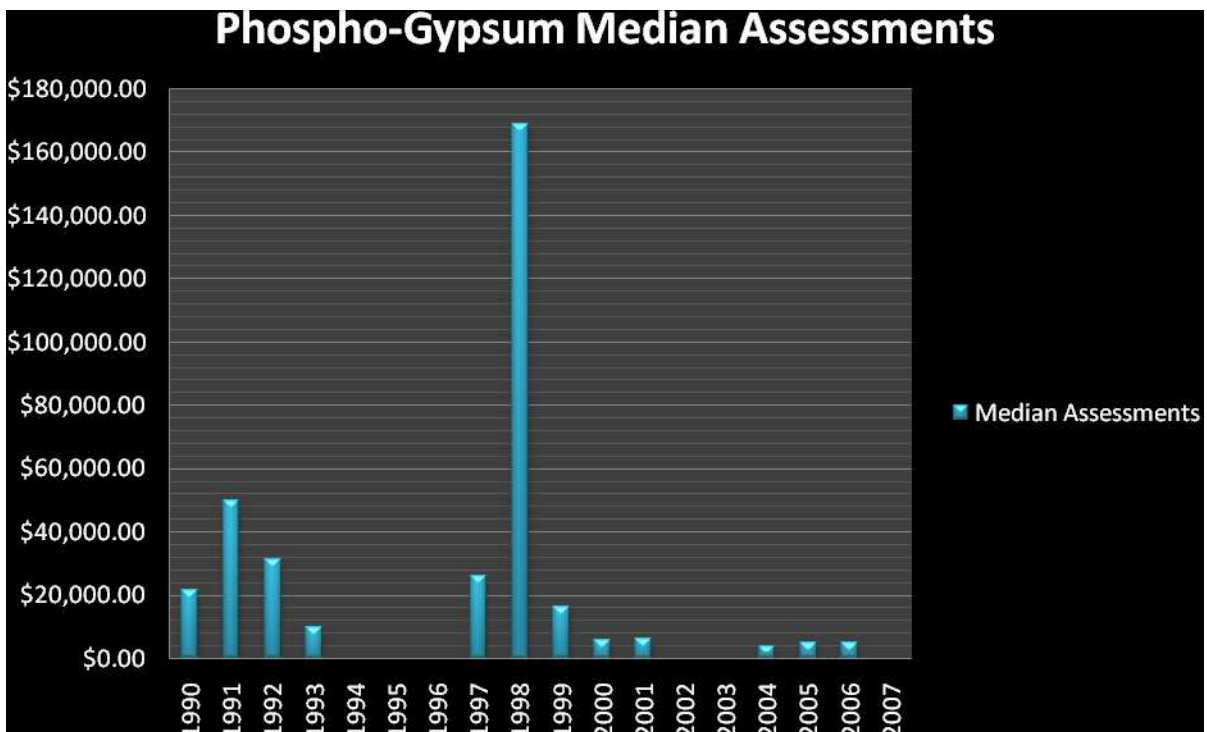
B. Assessments and Collections

Assessments have been largely sporadic as well.

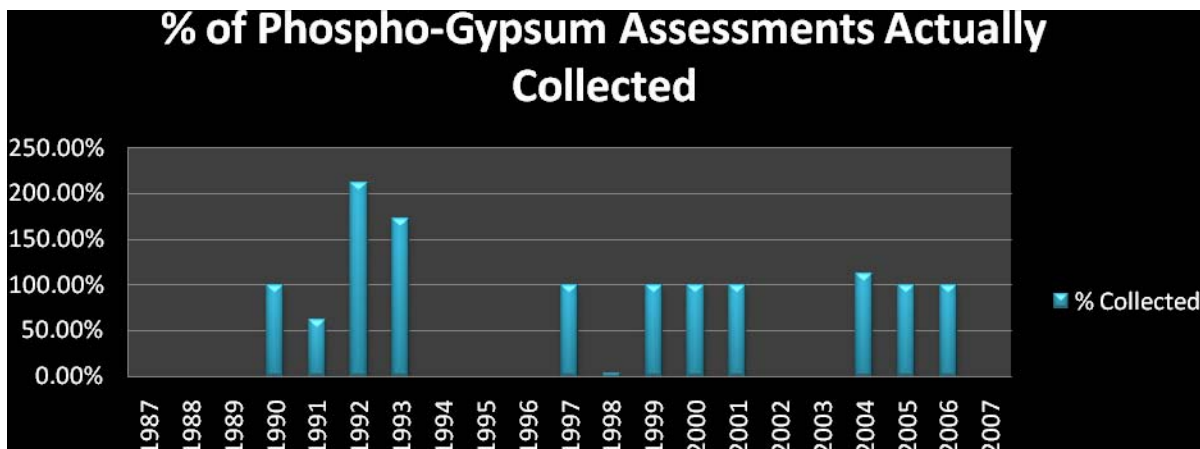
¹³ <http://www.dep.state.fl.us/water/mines/phogyp.htm>



The \$10,000.00 median assessment in this program area is due largely to the program's performance prior to 2000. Since that time the program has consistently underperformed.



Once assessed, this is one program that has a history of almost always collecting all of said penalties.

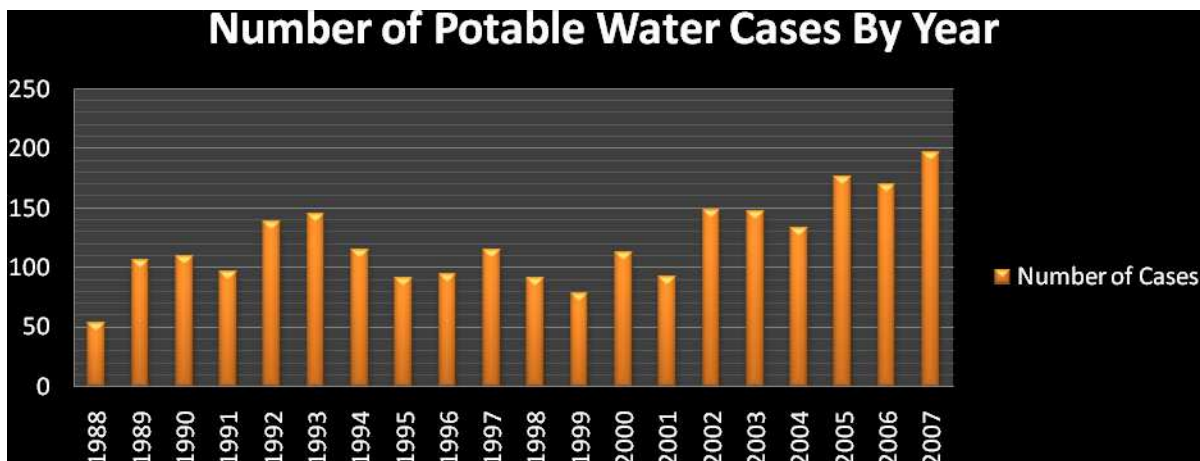


Potable Water

The FDEP has the job of regulating public water systems throughout the state, thus ensuring the safety of the public's drinking water supply.

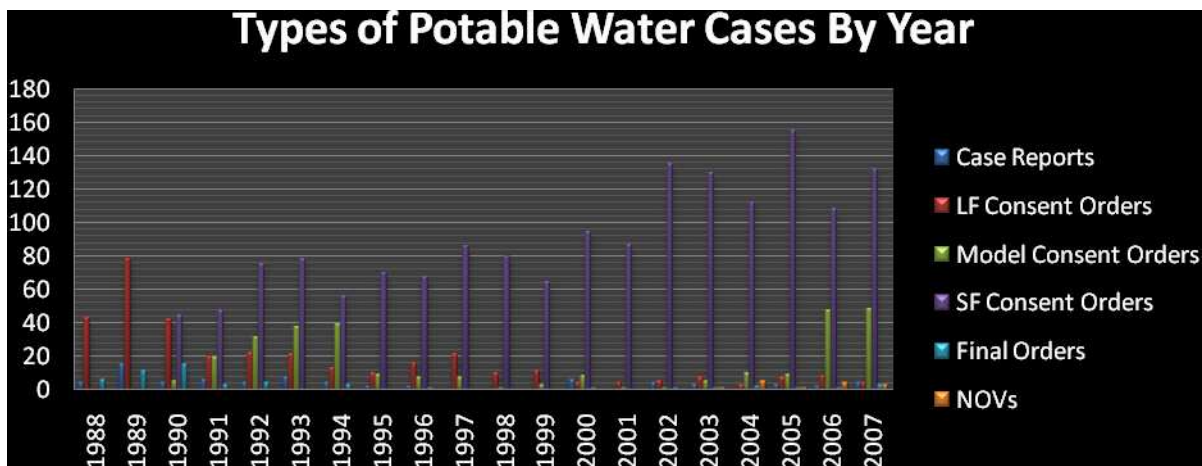
A. Enforcement Mechanisms

The data clearly shows a trend towards bringing more enforcement cases in this program area.



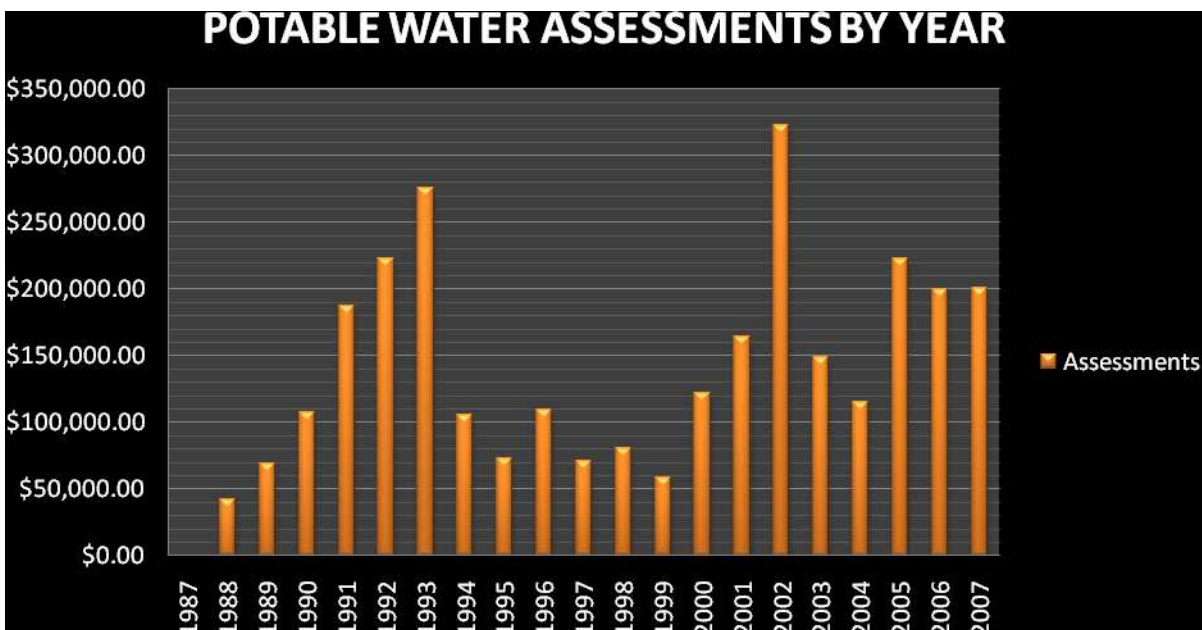
However, a program that began by using greater monitoring over violators, as evidenced by greater usage of long-form consent orders, model consent orders and case reports has devolved to one that uses disproportionately large numbers of short-form consent orders. There

has been, however, a marked increase in the use of model consent orders in 2006 and 2007, thus perhaps signaling more involvement by the Department in these cases.



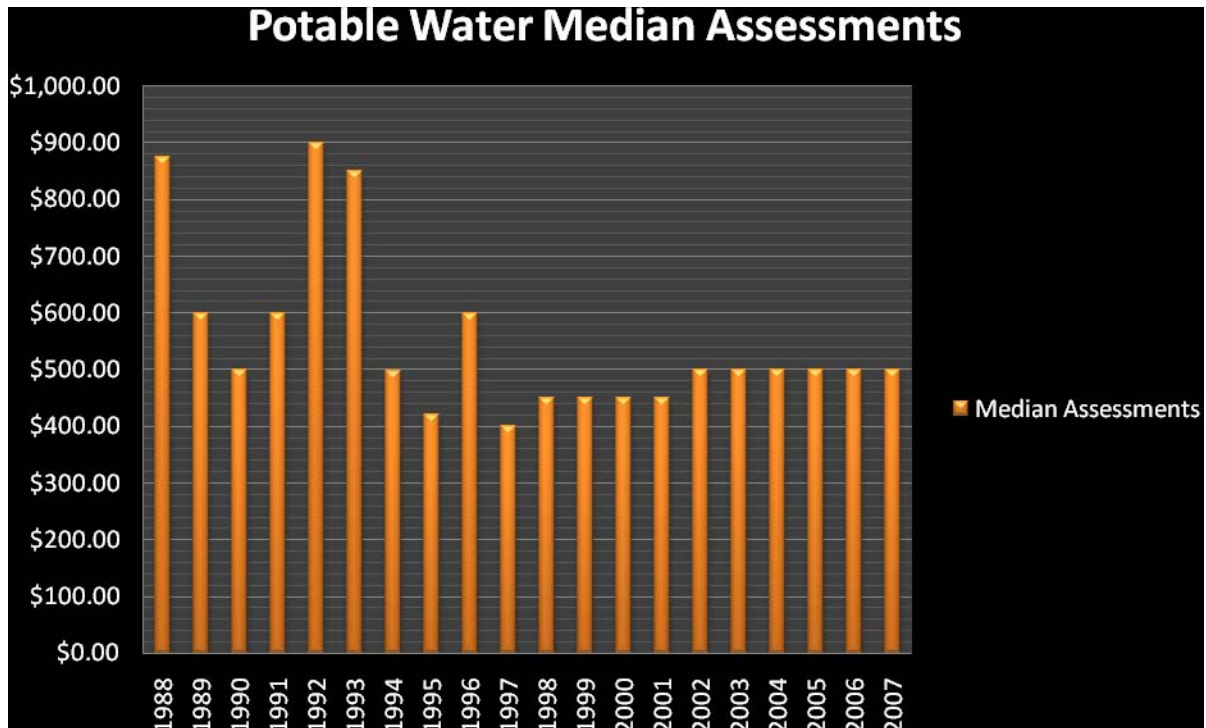
B. Assessments and Collections

The data generally shows a period of increasing assessments in the early 1990s, followed by a significant decline that lasted through 2000. Since that time assessments have increased on a steady basis.

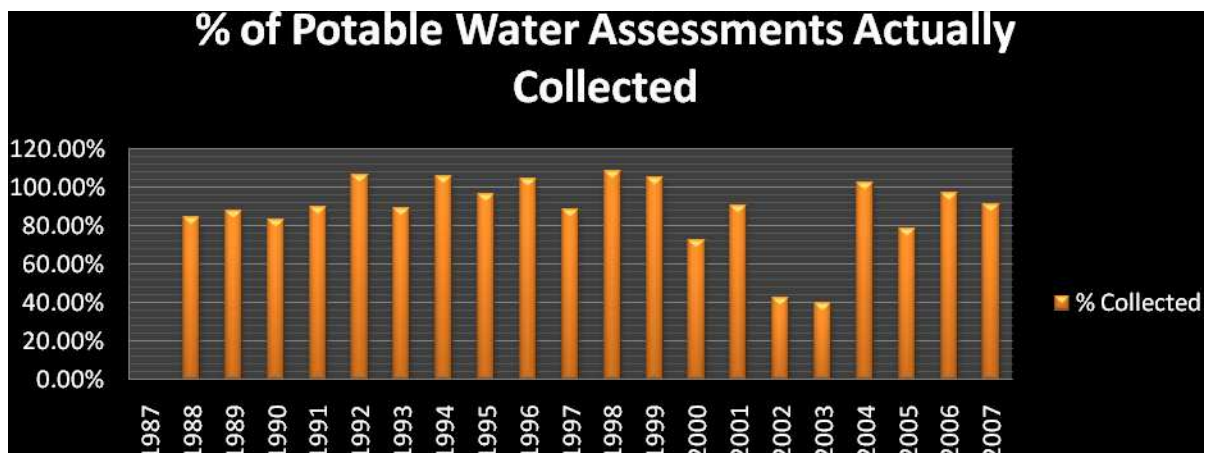


This program nevertheless has one of the overall flattest performances of all of the programs over the period.

The median civil penalty assessment is \$500.00.



The program almost routinely collects over 80% of the monies assessed. Only about 40% of the disproportionately high assessments in 2002 appear to have actually been collected, however.

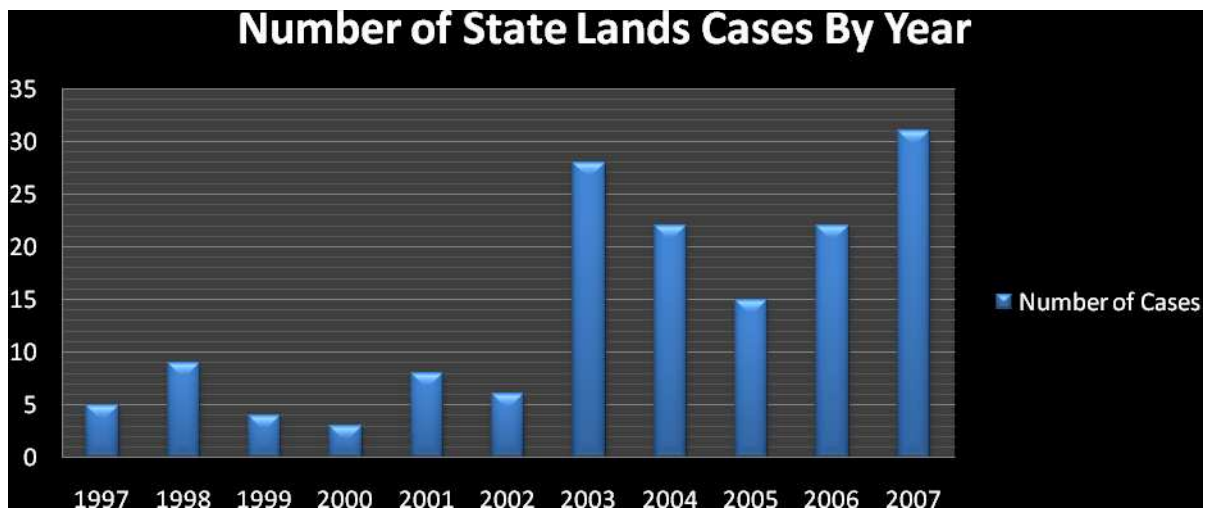


State Lands

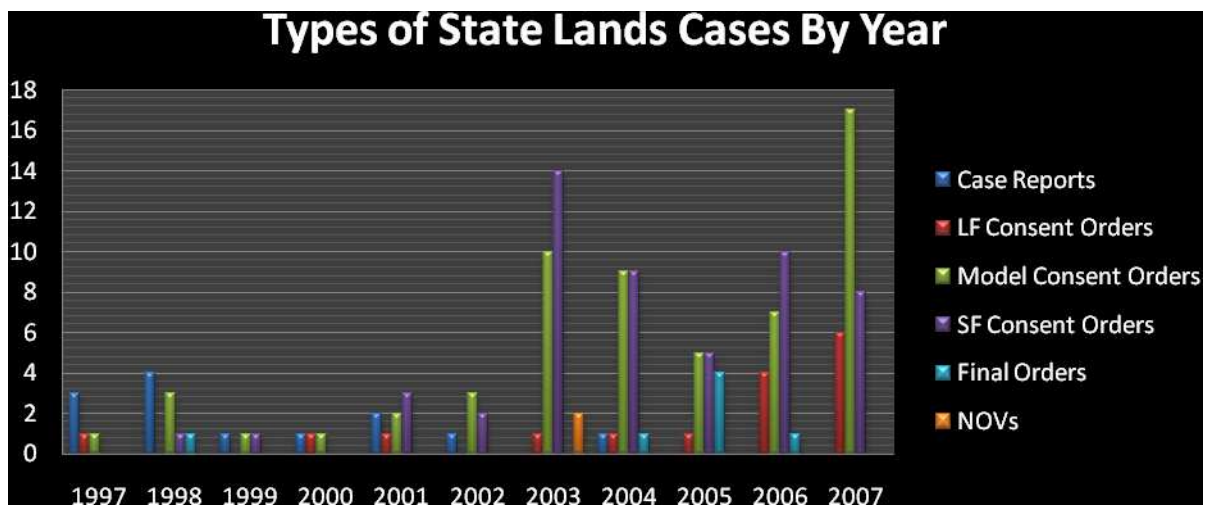
This program regulates the use of lands owned by the State of Florida, including its parks, springs and submerged lands system.

A. Enforcement Mechanisms

With the ever increasing emphasis on the purchase of lands for preservation purposes has come an increase in the number of enforcement cases related to those lands.

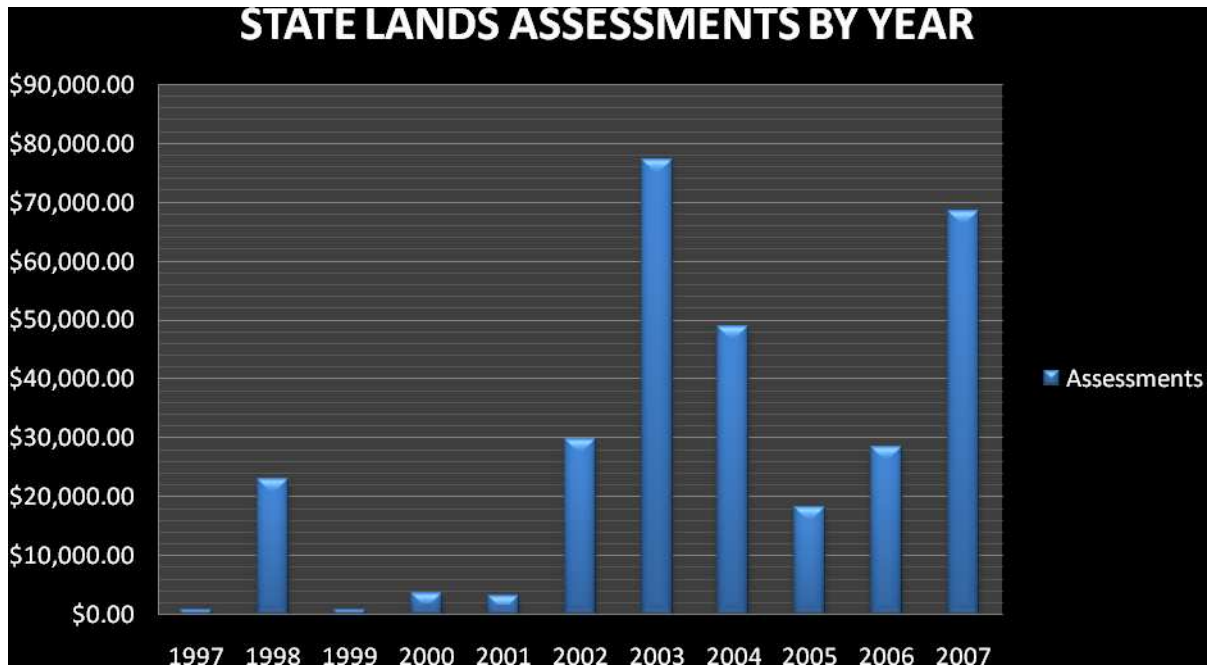


This is also one category in which the enforcement taken is most often of a form other than through the use of the short-form consent order.

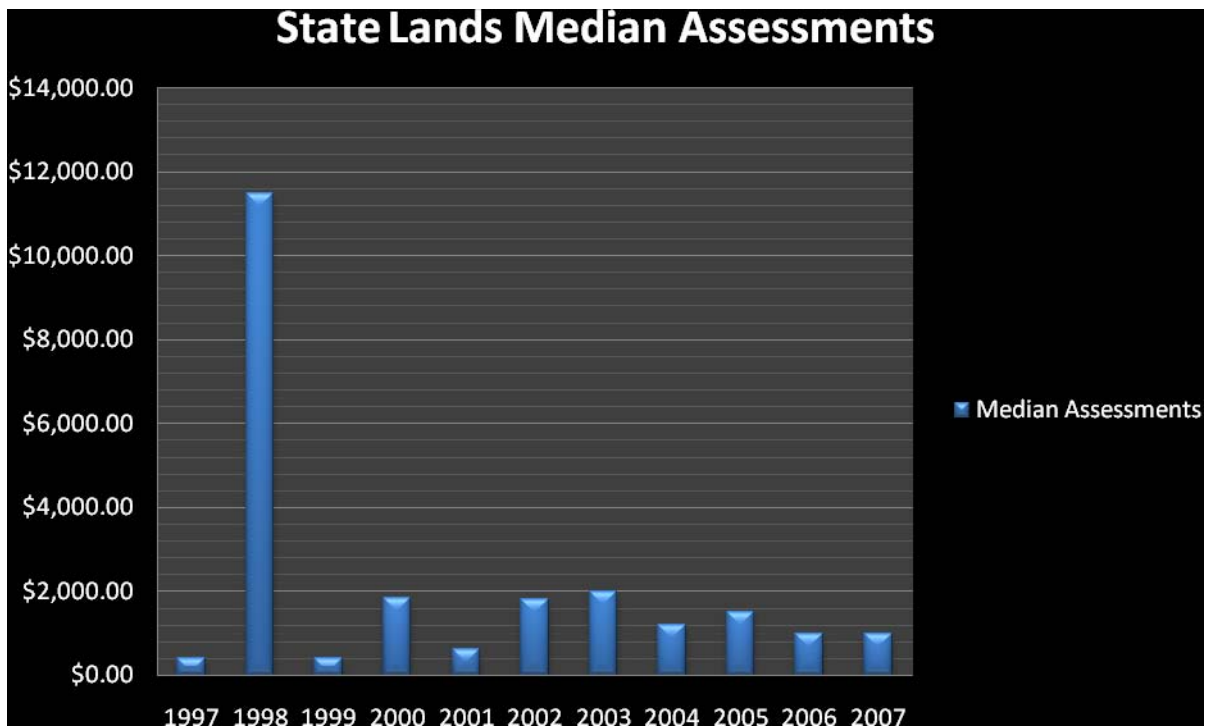


B. Assessments and Collections

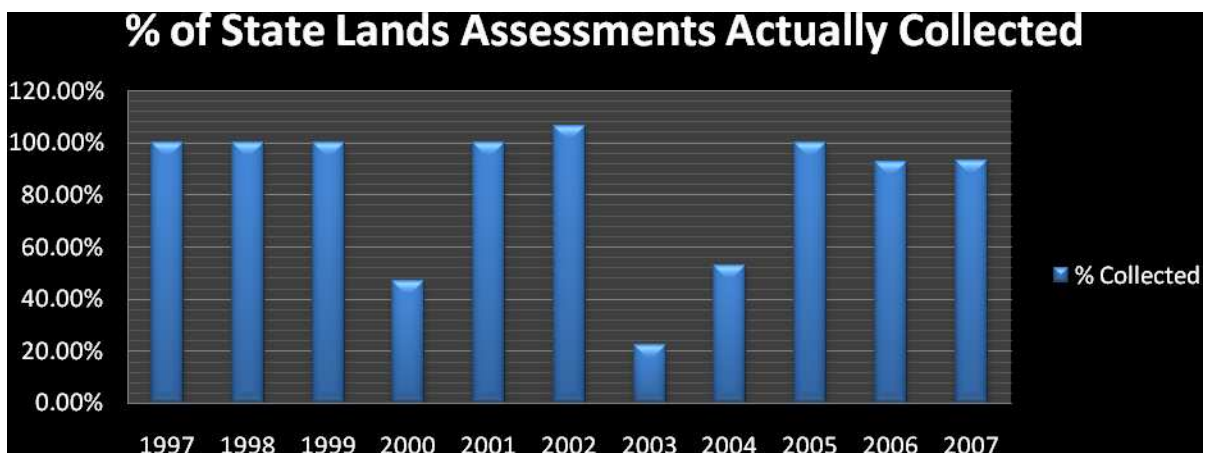
Penalty assessments in this program were relatively insignificant until 2002 when violations were more aggressively pursued. From that point on there has been a rather steady increase.



The median for this program area is \$1,200.00. Performance has been sporadic over the period.



A large percentage of the penalties, once assessed, are collected in this program.

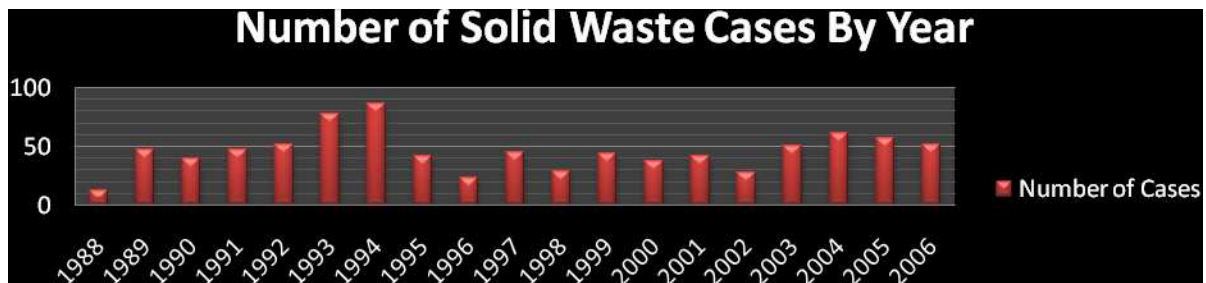


Solid Waste

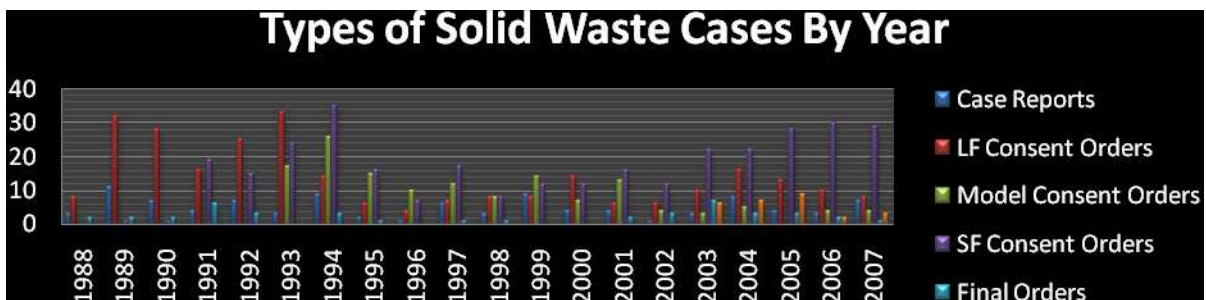
This program area regulates the many landfills in Florida, as well as other wastes such as used tires.

A. Enforcement Mechanisms

The solid waste program area began with an aggressive emphasis on enforcement that was followed in 1995 and the following six years by significant decline. Since that time it has been gradually improving in terms of the number of cases initiated.



The types of enforcement mechanisms used are quite varied, with an early emphasis on the use of long-form and model consent orders, as well as case reports.

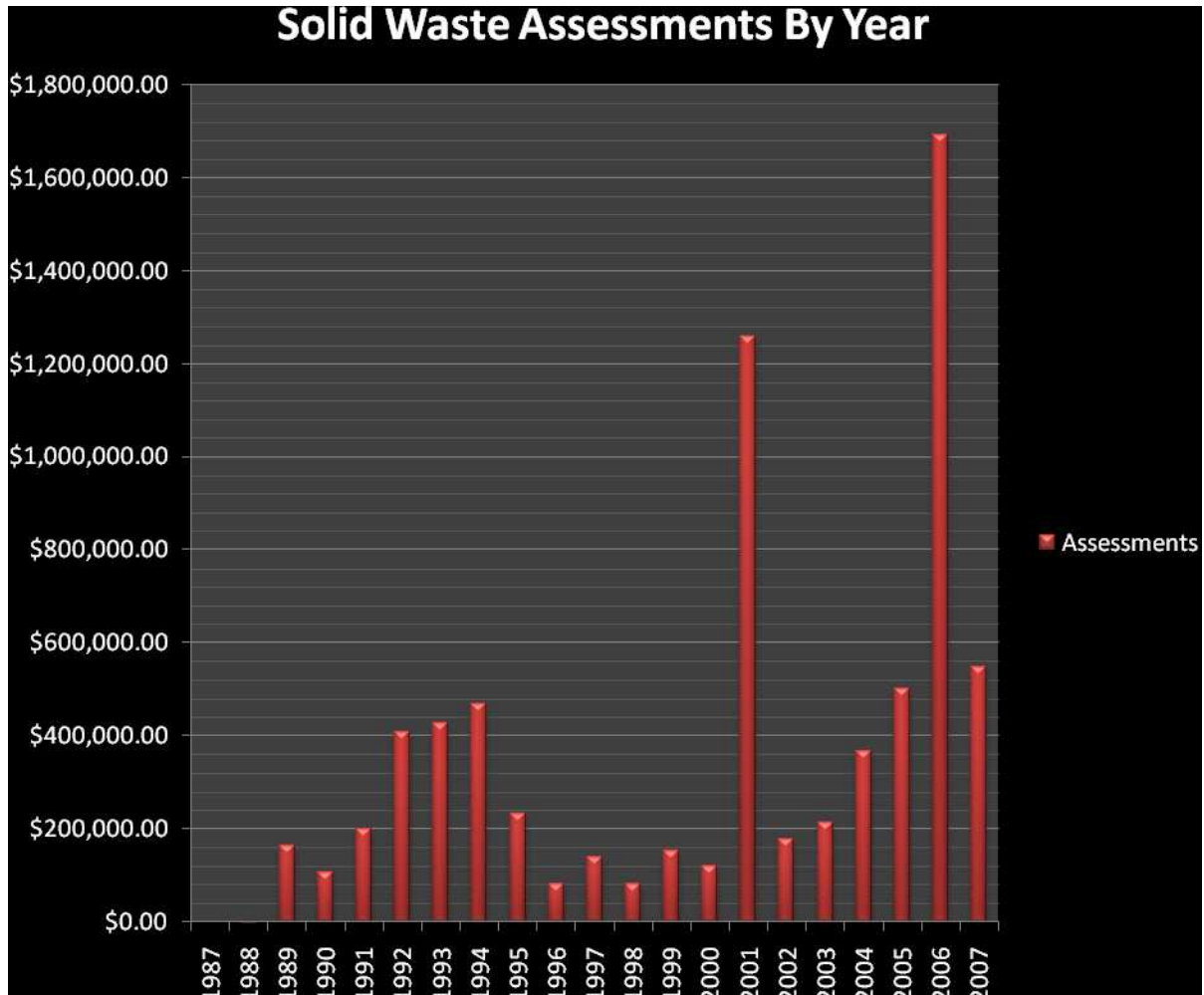


But the increased enforcement in 2003 was accompanied by a corresponding increase in the use of short-form consent orders.

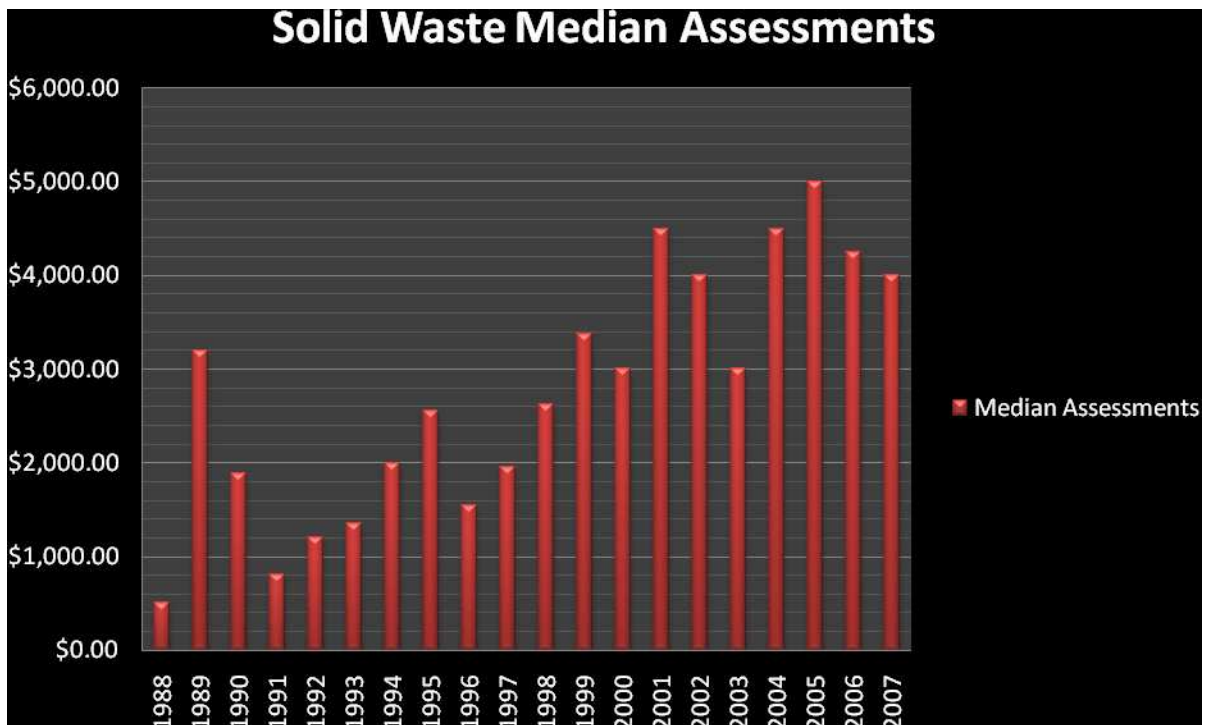


B. Assessments and Collections

Assessments have likewise increased steadily during the period from 2002 through 2007.



Civil penalty assessments in this program area have a median of \$2,843.00 and the trend is clearly favorable since 1997.



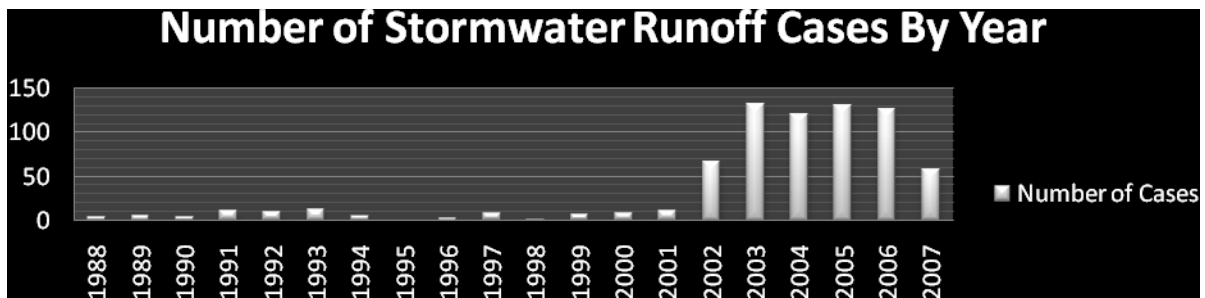
Generally speaking, the program area collects roughly 80% of the penalties assessed in the recent years.



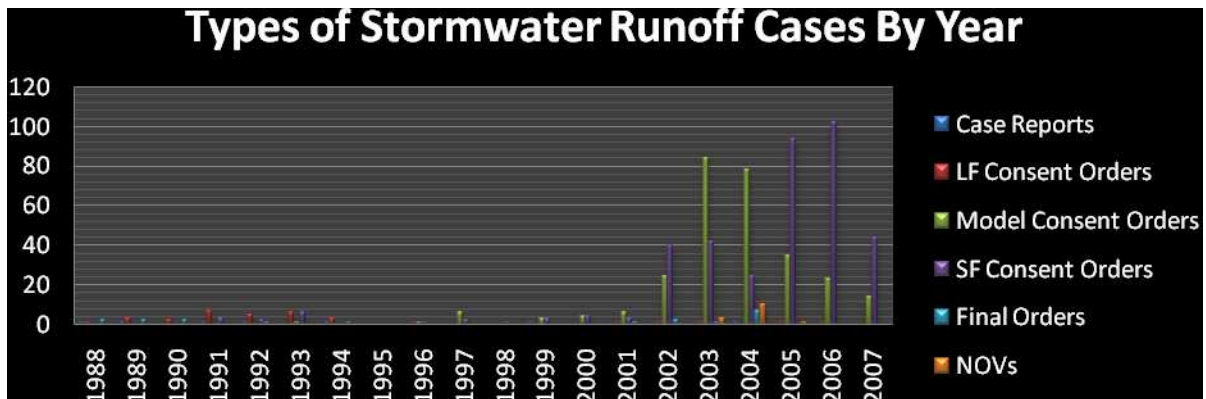
Stormwater Runoff

A. Enforcement Mechanisms

Significant enforcement of stormwater runoff cases did not begin until 2002. It declined significantly in 2007.

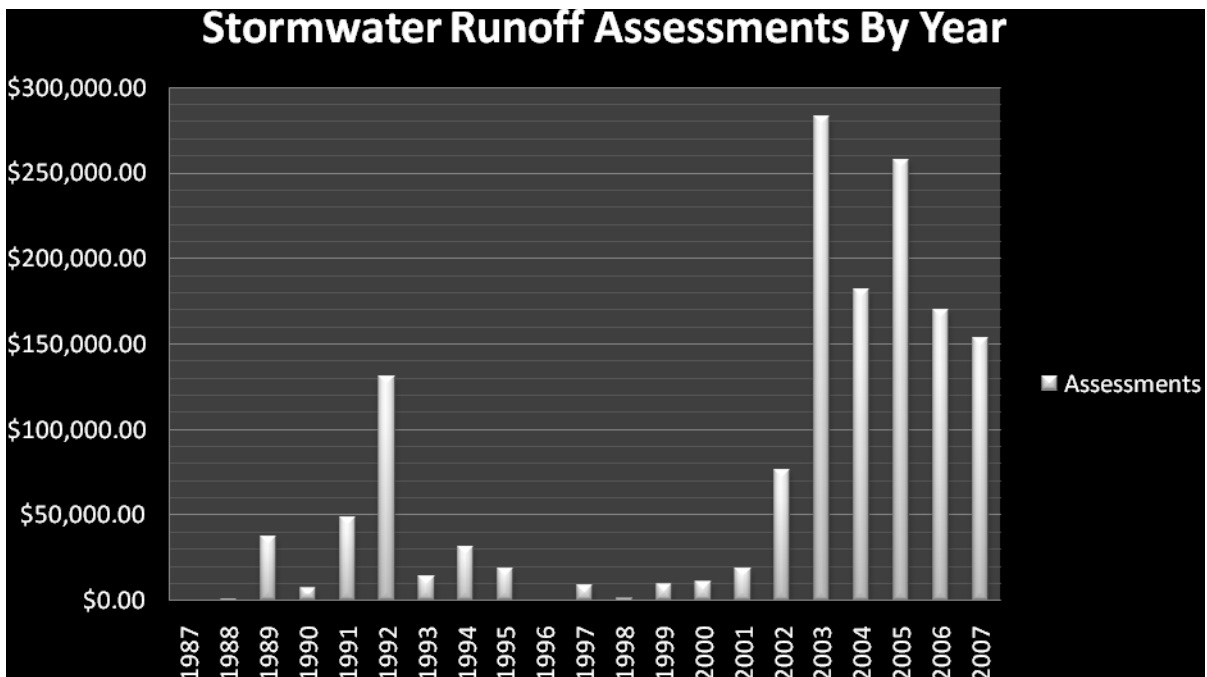


And until 2005 the use of short-form consent orders to resolve these cases was less significant. In 2006 and 2007, however, this was the clear mechanism of choice.

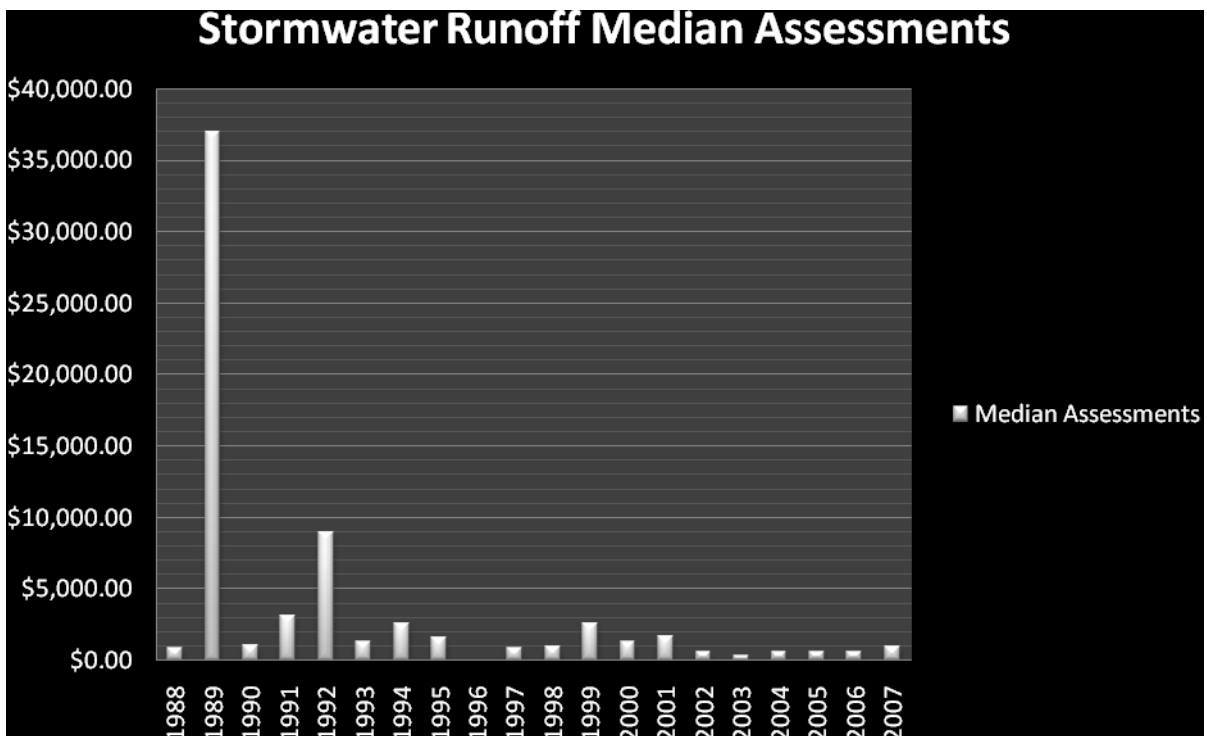


B. Assessments and Collections

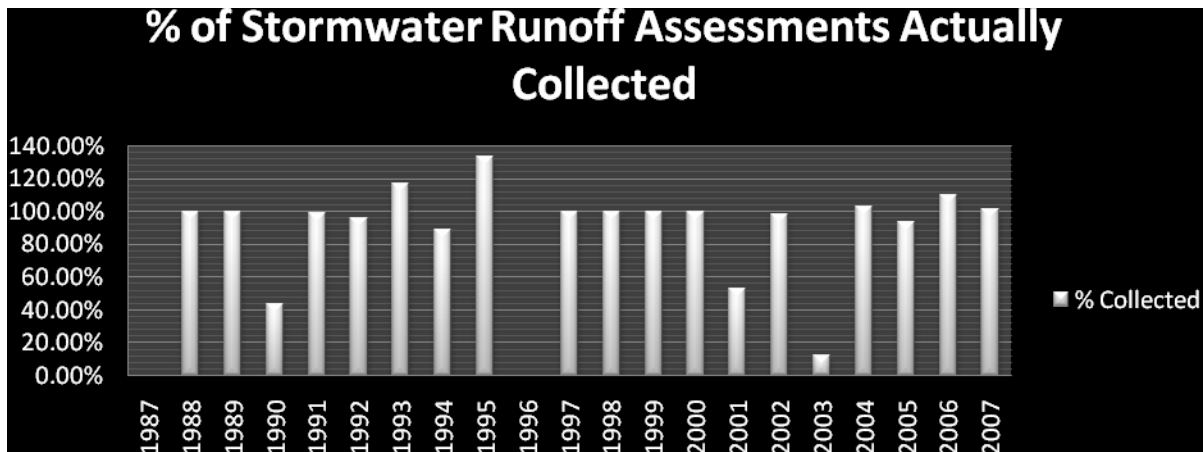
While it appeared as though the increase in the number of cases would be accompanied by a corresponding increase in the dollars assessed, the data shows a corresponding decrease in assessments.



The median of all assessments in this area is \$600.00. While the performance has generally been flat there is a slight upward trend over the past few years.



On the bright side, almost all civil penalty assessments are collected.

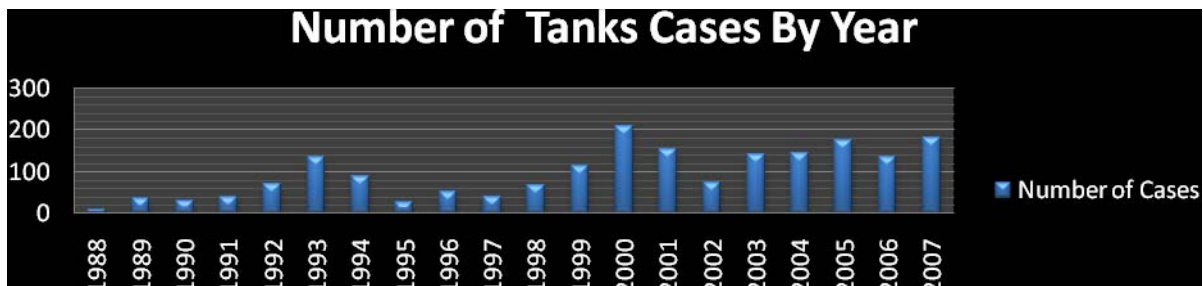


Tanks

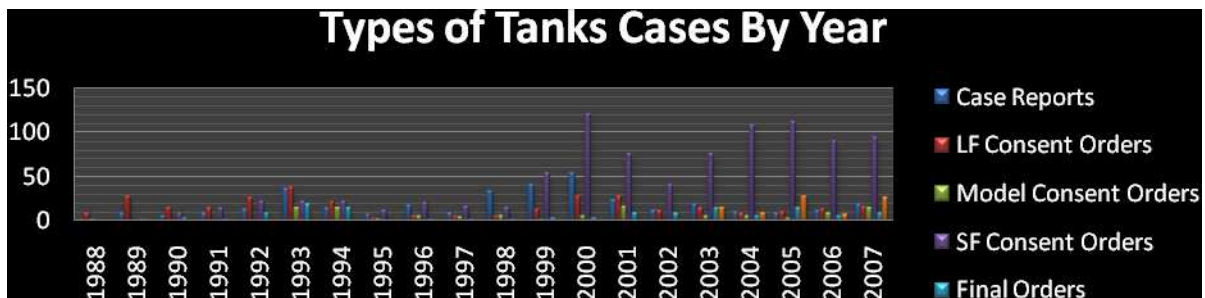
This program area regulates the use of underground storage tanks in Florida.

A. Enforcement Mechanisms

This program area seems to have repeated cycles beginning with low enforcement followed by gradual increases.

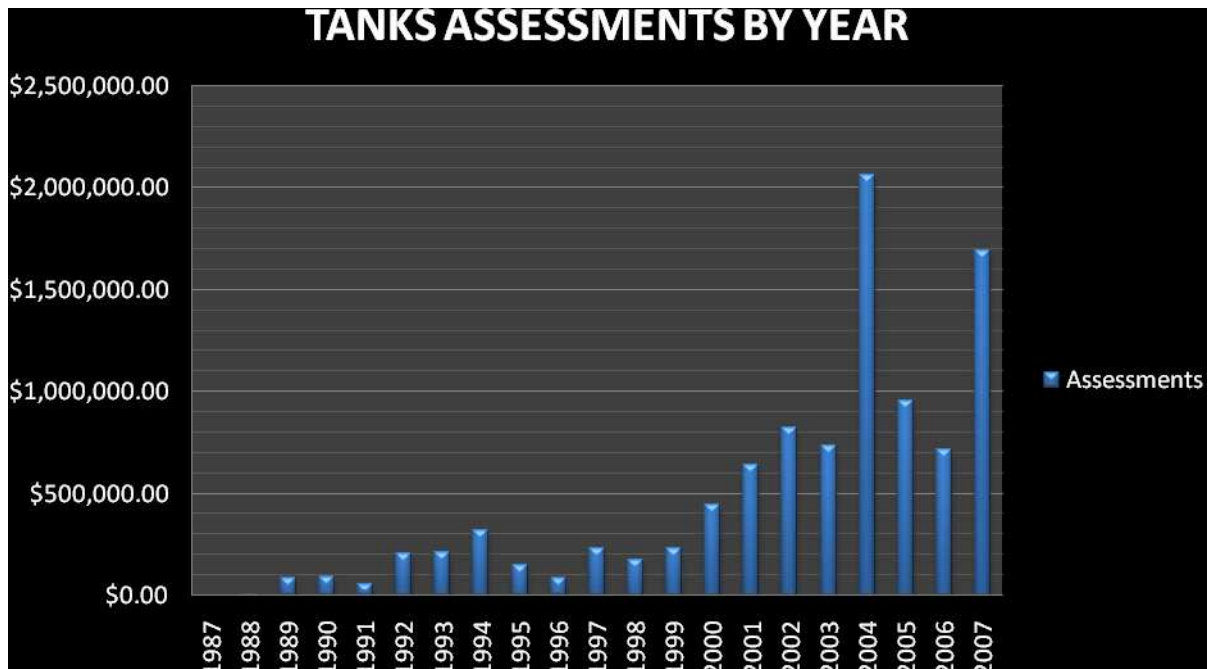


The data also show a significant reliance upon the use of short-form consent orders to resolve these cases.

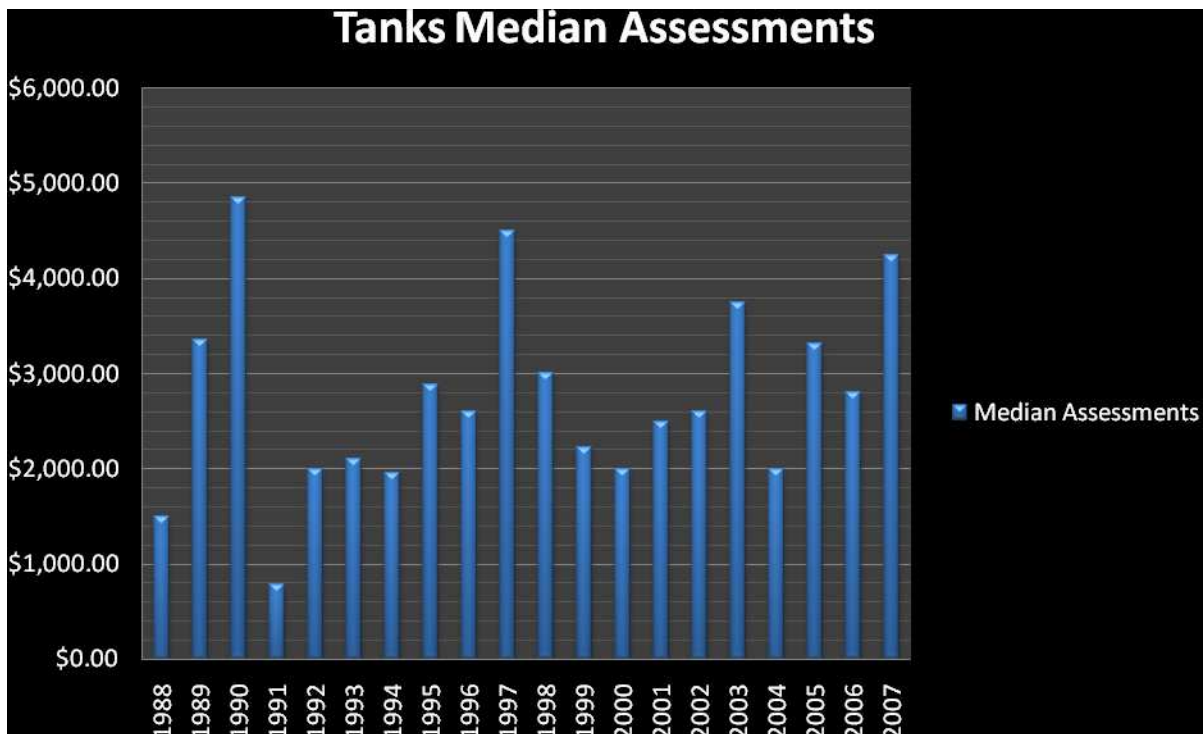


B. Assessments and Collections

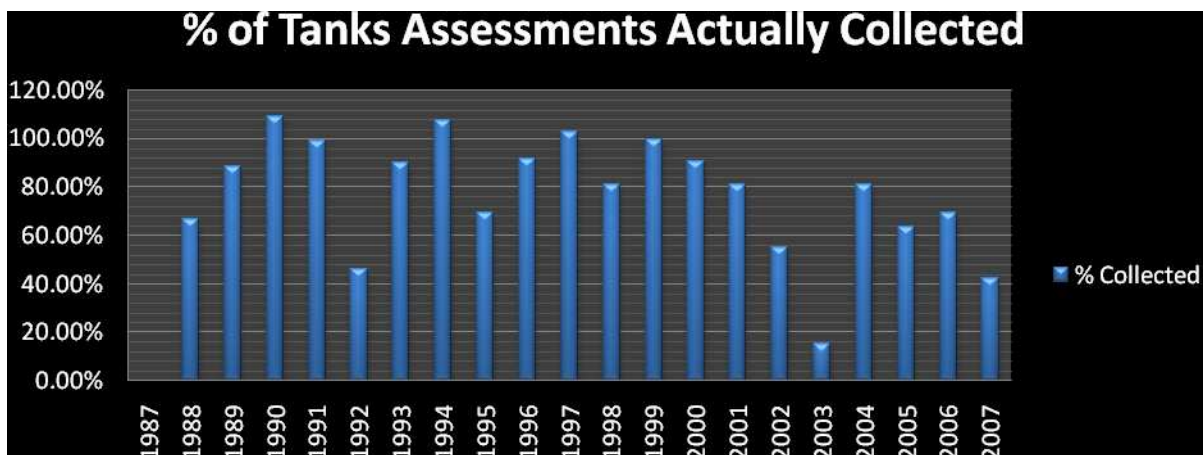
In spite of some years in which assessments declined, the recent trend has been for assessments to increase.



\$2,712.00 is the historical median assessment for the tanks program. The performance has been generally sporadic.



The increase in assessments has been accompanied by an equally gradual decrease in the percentage of penalties collected. This trend essentially began in 1995 and has continued more or less consistently since that time.

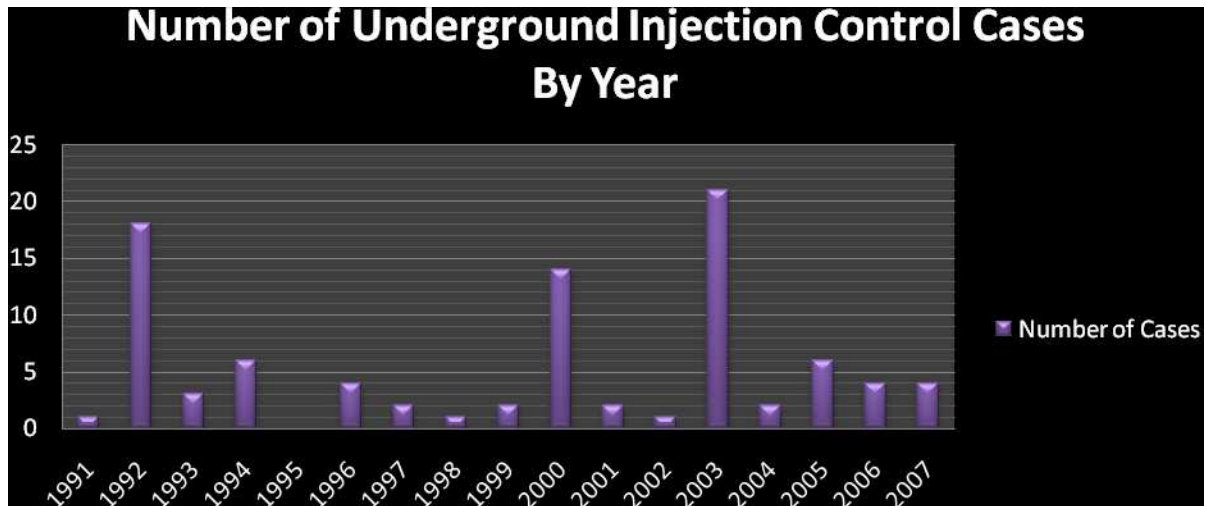


Underground Injection Control

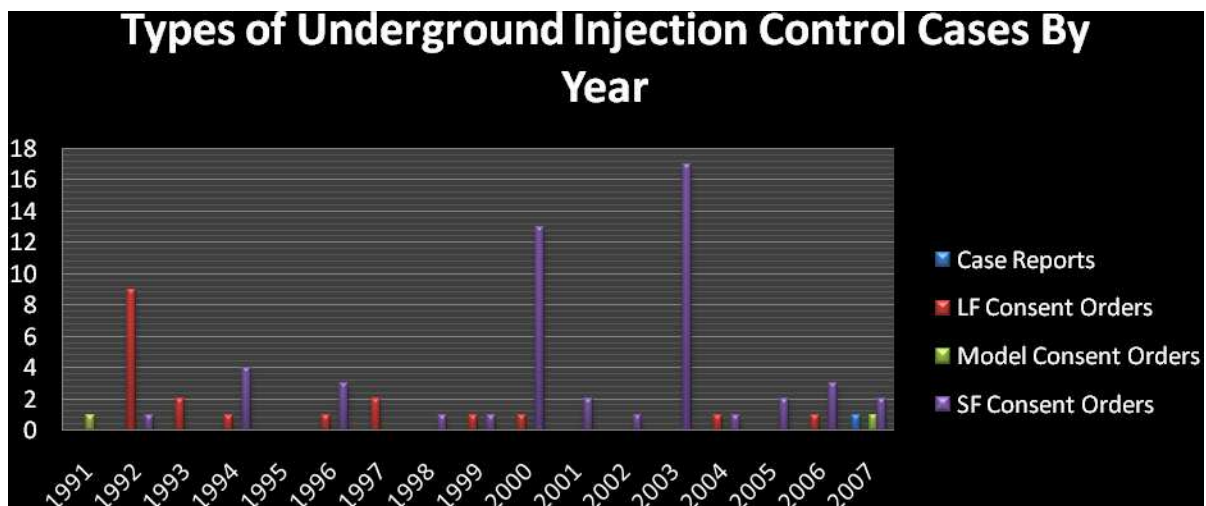
This program regulates the disposal of wastes into underground injection wells.

A. Enforcement Mechanisms

The underground injection control program has actually shown a rather consistent level of enforcement with some periods of significant increases.

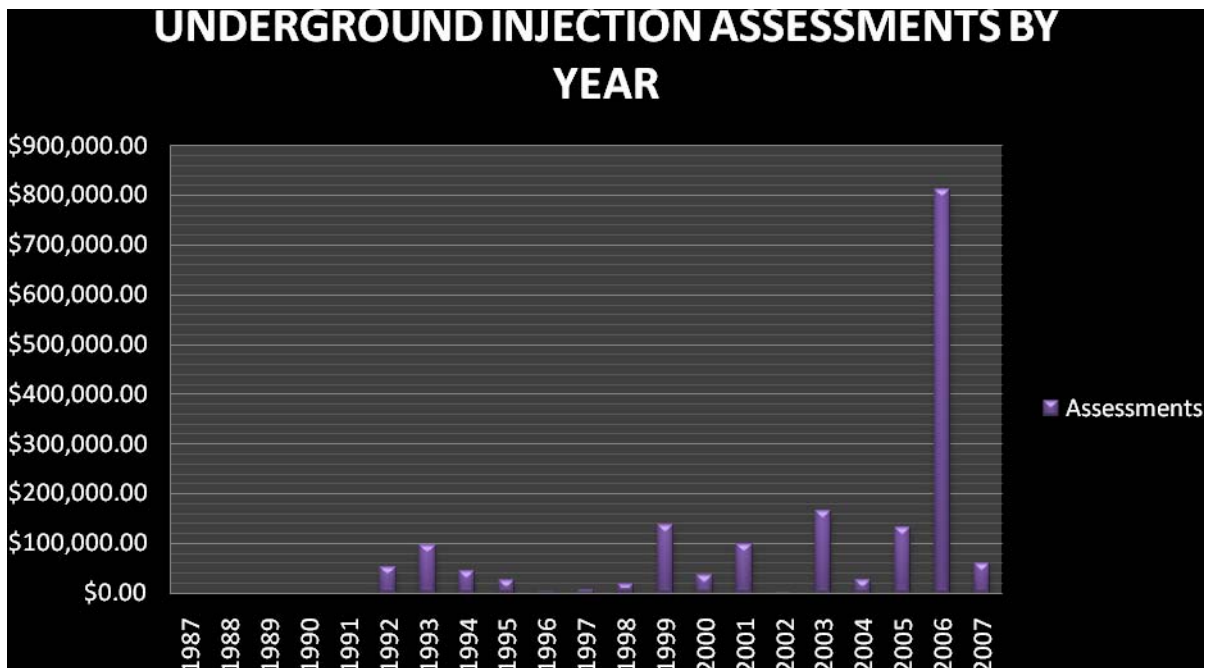


But there is a clear switch from the use of long-form to short-form consent orders beginning in 2000.

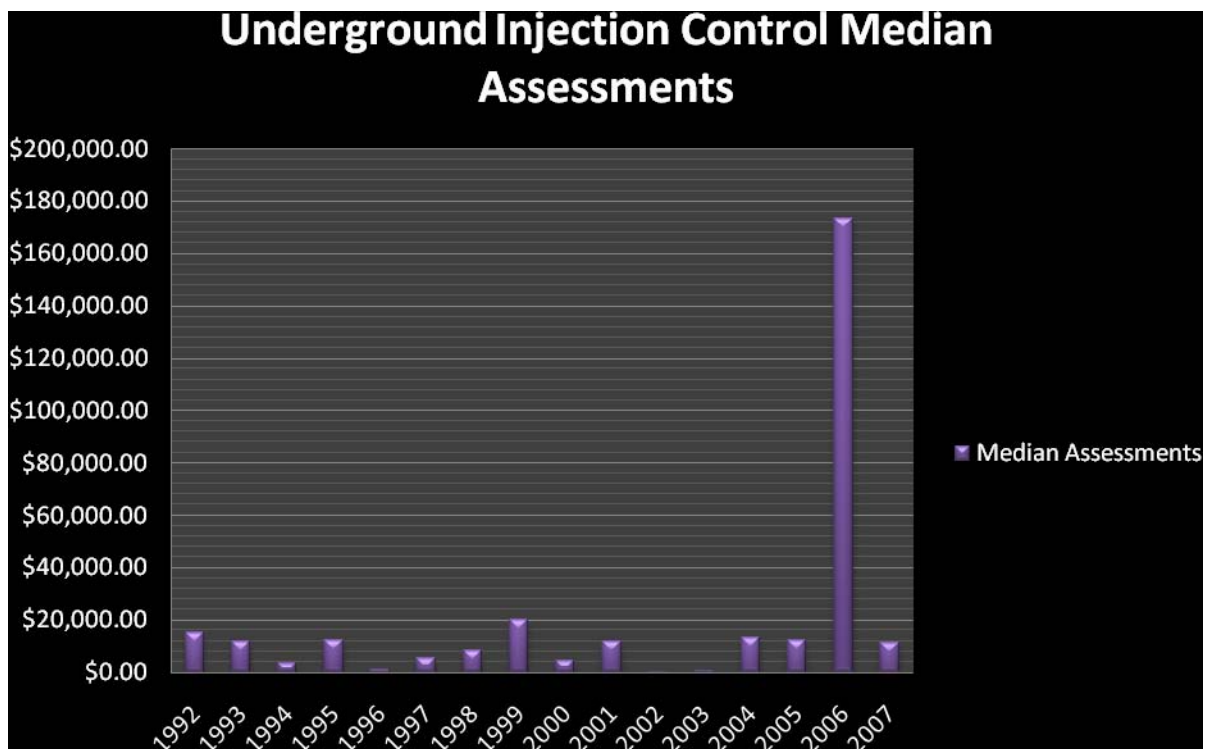


B. Assessments and Collections

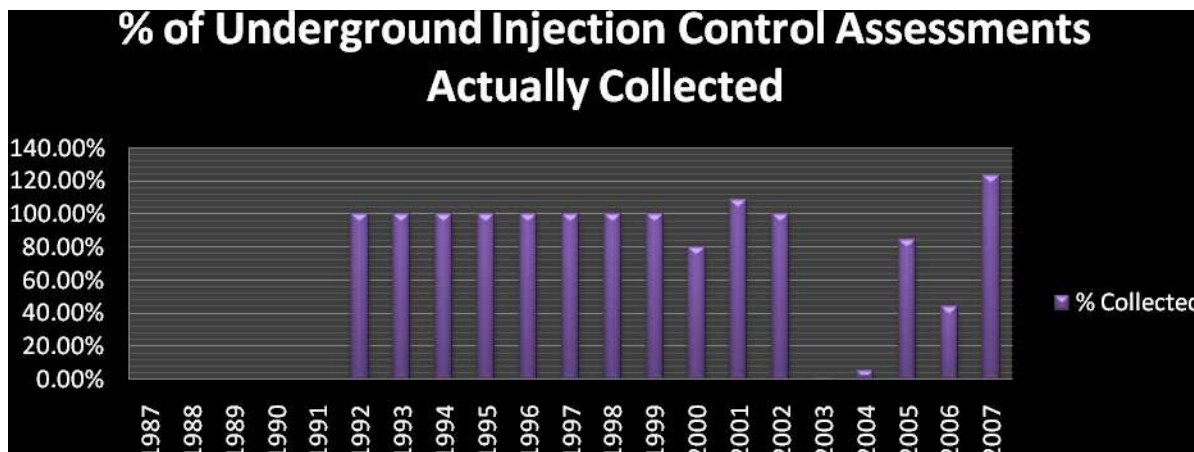
As with the number of cases brought, the amount of civil penalties assessed has remained fairly constant.



This program has an historical median assessment of \$6,850.00 and it, like many of the programs, has seen rather sporadic performance.



The program has a clear history of collecting a large percentage of the penalties that it assessed from 1992 through 2002. This abruptly changed in 2003, however, but now shows signs of recovery.



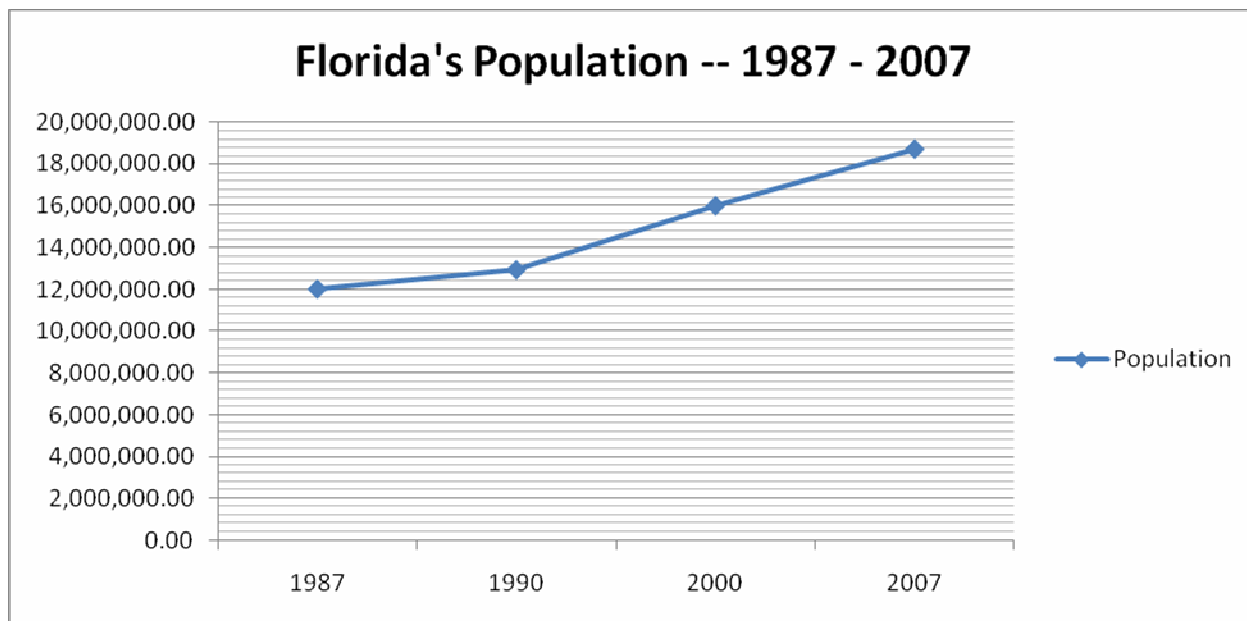
WHAT DO THE RESULTS INDICATE?

Section 403.021(6), Fla. Stat., states that:

“(6) The Legislature finds and declares that control, regulation, and abatement of the activities which are causing or may cause pollution of the air or water resources in the state and which are or may be detrimental to human, animal, aquatic, or plant life, or to property, or unreasonably interfere with the comfortable enjoyment of life or property be increased to ensure conservation of natural resources; to ensure a continued safe environment; to ensure purity of air and water; to ensure domestic water supplies; to ensure protection and preservation of the public health, safety, welfare, and economic well-being; to ensure and provide for recreational and wildlife needs as the population increases and the economy expands; and to ensure a continuing growth of the economy and industrial development. “

It is with the directives in this legislative mandate in mind that we offer the following points and generally conclude that the data maintained by the Florida, Department of Environmental Protection, shows a state agency that has had, at best, mixed results in enforcing Florida’s laws.

In 1987, it was estimated that the State of Florida had a population of 12.02 million people, thus vaulting the state to the fourth most populated state in the country.¹⁴ By 1990, the U.S. Census Bureau determined the population to be 12,937,926¹⁵. And in 2000, the U.S. Census Bureau concluded that the population was still rising and stood at 15,982,378.¹⁶ The Office of Economic & Demographic Research of the Florida Legislature estimates that the state's population stood at 18,680,367 as of April 1, 2007, an increase of 2,697,543 in just seven years.¹⁷ As depicted below, this 64.35% increase in just twenty years is staggering.



Over this same period of time, the number of enforcement cases handled by the Department has more than doubled, from 622 in 1988 to 1,450 in 2007. This is to be expected.

But at the same time that the sheer volume of cases has increased, the use of significant enforcement¹⁸ by the Department has dramatically decreased from 75.87% in 1990 to 34.55% in 2007. During the same time, the use of short-form consent orders to resolve enforcement cases has increased even more dramatically, from 24.13% in 1990 to 65.45% in 2007. The message from the Department's own data is crystal clear, a violator in today's world is most likely going to see his or her enforcement case resolved through payment of a fine and little else.

¹⁴ <http://query.nytimes.com/gst/fullpage.html?res=9B0DE1DE163DF933A05751C1A961948260>

¹⁵ http://factfinder.census.gov/servlet/DTTable?_bm=y&-context=dt&-ds_name=DEC_1990_SF1_U&-mt_name=DEC_1990_SF1_U_P001&-CONTEXT=dt&-tree_id=100&-all_geo_types=N&-geo_id=04000US12&-search_results=01000US&-format=&-lang=en

¹⁶ http://factfinder.census.gov/servlet/DTTable?_bm=y&-context=dt&-ds_name=DEC_2000_SF1_U&-mt_name=DEC_2000_SF1_U_P001&-CONTEXT=dt&-tree_id=4001&-redoLog=true&-all_geo_types=N&-geo_id=04000US12&-search_results=01000US&-format=&-lang=en

¹⁷ <http://edr.state.fl.us/population.htm>

¹⁸ Defined as the percentage of the total of case reports, NOV's, long-form and model consent orders to all enforcement cases.

Given that enforcement most often involves paying a fine, it is important to consider what has happened with civil penalty assessments. First, from 1988 to 2007, civil penalty assessments (including mitigation and pollution prevention projects) increased from \$1,007,542.16 to \$12,330,146.38 respectively. Again, an expected increase.

But a deeper look into the Department's performance shows troubling signs pertaining to median assessments. In 1988 (the first year in which a representative number of assessments occurred) the median civil penalty assessments was \$1400.00. In 2007 the figure had risen to \$2,000, a 70% increase over the period. While this increase appears significant, it has not been adjusted for inflation. In fact, when the 1988 median is adjusted for inflation we see that the \$1,400.00 in 1988 would be \$2424.33 adjusted to 2007 dollars. Thus, if we compare the two results (1988 adjusted to 2007 actual) there has actually been a significant **decline** of \$424.33 in median penalty assessments. Therefore, over the past 18-20 years, the Department has moved to resolving substantially more cases via payments of fines while at the same time failing to increase the fines to reflect today's financial reality.

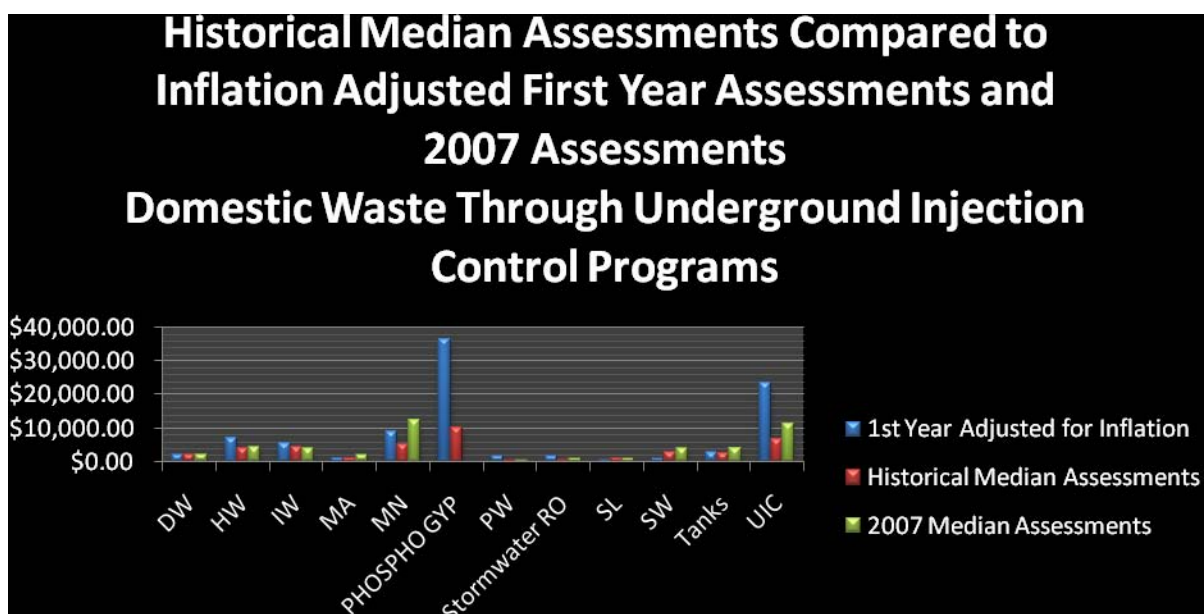
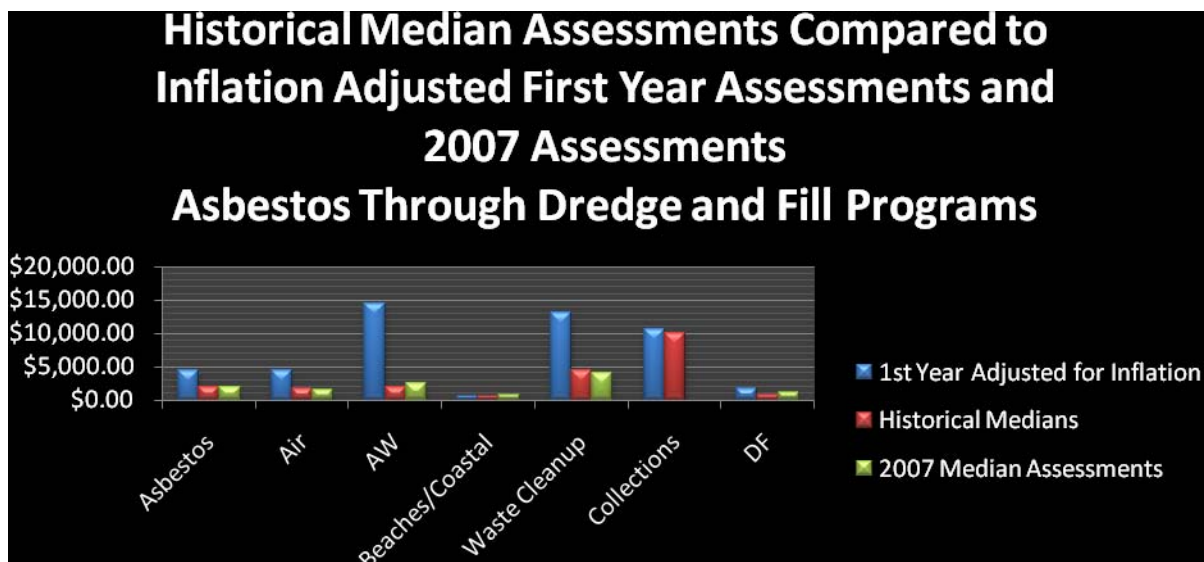
As has also been pointed out above, it is not enough to simply levy a fine. The fine must also be collected. The overall trend in collections is on the decline for the Department as a whole. In 1988 the Department collected 83.89% of its assessments. In 2007 it collected 67.00%.

It is also important to consider that the Department's position, particularly over the past decade, has been that it is less concerned with punishing violators and more concerned with improving Florida's environment. It has thus touted the use of in-kind offsets and penalty prevention projects as evidence of a movement in that direction. While on one level this is laudable, it is also significant that over the past decade the percentage of cases that were resolved through use of these alternate enforcement tools has actually declined from its high in 1998.

As for the individual program areas, the data presented throughout this report suggests a general trend towards less meaningful enforcement in most of the programs. Since most cases are now resolved through payment of a fine the issue of median assessments must be addressed. The following charts look at the numbers in terms of how the programs have historically performed. First, we determined the dollar value in today's equivalents, i.e. with inflation adjustments applied, for the first significant reporting year for each of the program area.¹⁹ Second, we calculated the median civil penalty assessment for each program for the entire period during which each program reported assessments.²⁰ Finally, we plotted the 2007 median civil penalty assessments for each program area using the green bars on the graphs. The following charts compare the results for each program area.

¹⁹ In other words, if a program area reported results for, e.g. 1987, but there were only a minimal number of cases so as not to be representative, we used the first year in which a significant number of cases were reported. The results are shown in the blue bars on the graph.

²⁰ The results are shown via the red bars on the graph.



As is evident from the above charts, when comparing the historical and current performance to the first year results adjusted for inflation, the asbestos, air, aquatic weed, waste cleanup, collections, dredge and fill, hazardous waste, industrial waste, phospho-gypsum, stormwater runoff, and underground injection control programs are all assessing civil penalties at rates lower than what were assessed in their first year of operation. There are some bright spots, however, e.g. the solid waste program.

The problems with FDEP's penalty assessments are well-known to its senior management. As is evident from an April 6, 2006, email from former Secretary Colleen Castillo to then Governor Jeb Bush, she acknowledged that the penalty policy "... make[s] little sense

across the board. . . .” (See, Appendix—B) This was followed in 2007 by the announcement by Michael Sole, the current Secretary, that the FDEP was embarking upon a new, stricter penalty policy. We reviewed that policy in detail when it was issued and concluded that, in effect, it was unlikely to have a significant overall impact on FDEP’s enforcement and environmental protection. See, http://www.peer.org/news/news_id.php?row_id=903 The actual results from 2007 confirm our concerns, protestations from the agency notwithstanding.

Of all of the programs, we feel that two areas bear mentioning for what we believe to be seriously troubling results. The first is the industrial waste program. The numbers clearly indicate that median assessments are on steady decline from 2000 to the present. Simply stated, this means that major polluters are risking less to their bottom line if they are caught in violation of their permits.

The second area of concern is the dredge and fill program. While there was improvement of late, the data clearly show that it costs less to violate these environmental laws today than it did 20 years ago. When this is coupled with the less than positive showing in stormwater runoff assessments it is a clear signal that the consequences of illegal development, i.e. dredging and filling of wetlands, in Florida have declined. Stated another way, developers have an easier time developing today than they did in 1987. In each of the three previous years the actual number of cases has declined in each program area.

The above results in the assessments levied by the Department also need to be considered in light of the actions of the Florida Legislature in 2001. It was in that year that the Legislature amended Section 403.121, Florida Statutes, to provide what was essentially a set penalty structure to be applied to environmental violations. The basic reasoning behind the amendment was to give violators (as well as the Department) a realistic understanding of the severity of fines that they would face in the event that they violated Florida’s environmental laws. While the amendment accomplished that goal, it also set in place a penalty structure that all but ensured that the Department’s penalty assessments would not surpass the levels that were in place 14 years earlier. In other words, no consideration was apparently given to the fact that the old penalty structure had not kept up with inflation. Thus, violators now know that the cost of violating Florida’s environmental laws has, for all intents and purposes, declined at a time when the population continues to rise and the effects of violations are arguably more widely felt.

Finally, it would be naïve to suggest that the reader should consider the results in a vacuum with little or no thought given to the administrations that have governed the FDEP during these past twenty years. With that said, however, we believe that the results should give little comfort to either the Democratic or Republican administrations that were in charge at one time or another. While it can fairly be said that the period of most aggressive enforcement and, we would argue, most stringent environmental protection occurred from 1987 through 1994, i.e. during the end of the Martinez administration through the first Chiles administration, it is equally clear that the darkest period for enforcement occurred during the beginning of Governor Chiles’ second term.²¹ Nevertheless, the subsequent eight years under Jeb Bush resulted in a steady decline in significant enforcement combined with an approach that simply (1) assessed civil penalties, (2) codified the penalty structure at antiquated levels, and (3) saw declines in the

²¹ This was also the period when the merger between the DNR and DER occurred, creating the FDEP.

overall collection rates of assessed penalties. There is more than enough blame to share on both sides of the aisle.

RECOMMENDATIONS & CONCLUSIONS

For years we have maintained that the Department needs to get serious with respect to environmental enforcement. We continue to believe that to be the case. And if that is to occur we believe that multiple changes need to be made. Those are:

- Career service protections need to be restored to employees who are in sensitive positions that impact enforcement. For example, program administrators. This would help to insulate these employees from political interference.
- A greater emphasis needs to be placed on oversight, i.e. strict enforcement, through use of mechanisms such as long-form and model consent orders as well as NOV's. When compliance is not likely, or the violator has a history of non-compliance, litigation should be pursued.
- The Department should rely less on short-form consent orders to resolve environmental cases.
- The penalty policy should be amended, through 403.121, Fla. Stat., to provide for civil penalties that are reflective of today's dollar. In other words, the civil penalties need to be increased so that inflation is taken into account. The new statutory penalties need to be indexed for inflation.
- Any increase in realistic enforcement necessarily means that additional personnel are needed, predominately at the career service level. We know that Florida's budget deficit is a serious problem, but it is the responsibility of Florida's leaders to maintain a functioning agency that will protect Florida's environment, consistent with the mandate of 403.021, Fla. Stat. The current structure is hardly fulfilling that mandate.

It is our fervent hope that the FDEP will somehow be able to reverse course and begin to take a path that leads to greater protections for Florida's environment. While it is obvious that we are in very challenging economic times, it would, we submit, be very unwise to short-change Florida's environment. Those in power should recognize that one of Florida's chief assets is its environment. It is what draws millions of tourists to this state every year. It is what many Floridians depend upon for their livelihood, not to mention recreation and relaxation. Equally significant is the impact that a polluted environment can have on the health of Florida's residents and tourists. If our leaders truly wish to preserve this environment it will be necessary for them to get beyond slogans and gimmicks and move down a path that tells the public that they are serious in their beliefs. That will likely mean stepping on toes, including those belonging to significant campaign contributors, but the results will be worth it.

APPENDIX—A

ENFORCEMENT HISTORICAL OVERVIEW

FDEP has long used an approach to enforcement that included a strong emphasis on the use of civil litigation in the state's circuit courts. This approach provided the FDEP with the ability to seek hefty civil penalty assessments against violators, while simultaneously sending a message to the community that environmental violations would not be taken lightly. The filing of such lawsuits was initiated by the filing of case reports that originated in the district offices and went to the FDEP's Office of General Counsel (OGC). However, the filing of lawsuits lost favor politically in the late 1990s. The result was a consistent decrease in the number of civil circuit court filings each year.

The FDEP's next strongest enforcement tool was the issuance of Notice's of Violation (NOVs). NOVs are also initiated in the district offices and are filed by the OGC. Once filed they are similar to circuit court lawsuits, though they are brought before an administrative law judge (ALJ) at the Division of Administrative Hearings. Until 2001, ALJs were unable to levy civil penalties in these cases. Thus, the NOVs were used by the Department to bring about direct environmental improvements—both long and short term. After implementation of legislation in 2001, the FDEP was authorized to seek civil penalty assessments via the issuance of NOVs and the ALJs were given statutory authority to impose assessments where warranted. This change in law stopped what had been a general decline in the issuance of NOVs. 2002 saw the first dramatic increase in their usage.

Historically, the most frequently used enforcement tool has, without question, been the use of Consent Orders, both long-form and short-form. Consent Orders (COs) are negotiated agreements between the FDEP and the violator wherein the violator agrees to undertake certain actions to reverse environmental damage caused by the violator's actions. In addition, COs most often require the payment of civil penalties. Consent Orders typically take the following form:

- Long-form COs are used in order to require corrective actions on the part of the violator, as well as to require increased monitoring of the violator's future activities. They also typically require the payment of civil penalties.
- Model COs are essentially long-form COs that have been pre-approved by the OGC, thus allowing the individual districts to issue the Model CO without prior consultation with the OGC. They also provide for the assessment of civil penalties.
- Short-form COs are, according to the FDEP "Enforcement Manual" to be used only in those cases in which the violations have ceased and no further follow-up is required by the Department. Thus, these COs only require the payment of civil penalties.

Historically, the FDEP relied heavily upon Long-form COs and Model COs in its enforcement cases. Thus, there was a demonstrable and measurable showing of its efforts to not

only require environmental remediation, but to also require increased monitoring of known violators.

The Department also tracks the number of final orders that it issues each year. These are administrative orders akin to the final orders issued by judges in state circuit courts. These final orders are binding upon the Department and the violators. They are enforceable in circuit court.

APPENDIX—B

Mussetto, Teresa

From: Jeb Bush [jeb@jeb.org]
Sent: Thursday, April 06, 2006 9:25 PM
To: FL_DEP
Cc: Dfinn@myflorida.com; Greer, Monica; deena.reppen@myFlorida.com
Subject: RE: Settlement agreements, consent orders and consent agreements

Follow Up Flag: Follow up
Flag Status: Flagged

good work, Colleen. I appreciate your engagement and recognition that we can do better.

jeb

-----Original Message-----

From: FL_DEP [mailto:FL_DEP@dep.state.fl.us]
Sent: Thursday, April 06, 2006 10:01 AM
To: Jeb Bush
Cc: Dfinn@myflorida.com; Greer, Monica; deena.reppen@myFlorida.com
Subject: Settlement agreements, consent orders and consent agreements

Governor,

Since I rescinded the delegation for the deputy secretaries to sign consent orders and consent agreement and settlement agreements, I have spent two to three hours a week going over proposed orders and agreements. Each week we have about 50 cases we review. The issues range from failure to keep adequate records for drinking water (we need to know that the appropriate level of chemicals are added to the system for consumer health reasons) to barrels of hazardous waste being stored inappropriately leading to potential impacts to groundwater. I have learned that our penalty policies are multiple and least understood by the regulated public. They make little sense across the board. It could be \$800 dollars for records violations and \$1000 for illegally filling a wetland. When you look at the three policies we have, one adopted by statute, two adopted by rule directed by statute, all developed separately without regard to the other. So we are embarking on a path to make them more consistent and have the penalty reflect the violation with regard to human and ecosystem health. When we have the draft far enough along I will work with your office to finalize.

Thank you

Colleen Castille
Secretary, DEP

CONSERVE ENERGY