Public Employees for Environmental Responsibility

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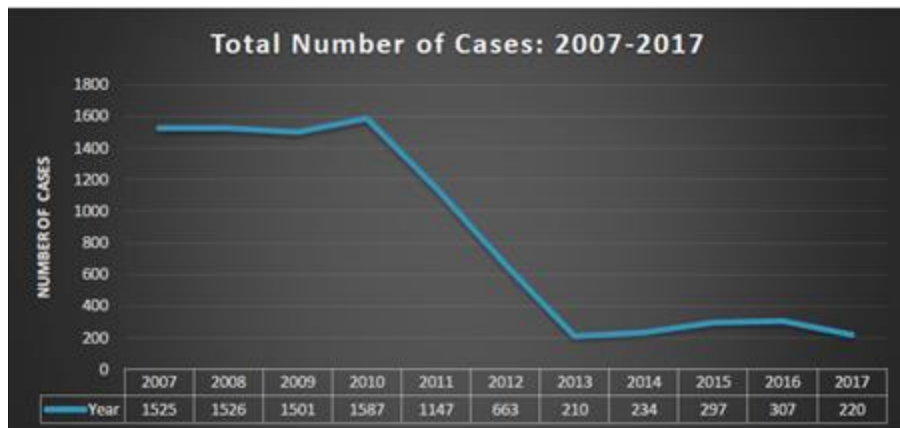
Necessary Changes to Restore the Florida, Department of Environmental Protection to Relevancy

Under Governor Scott's administration the Florida, Department of Environmental Protection has seen significant deterioration in its ability to enforce Florida's environmental laws. The negative impacts have been so severe that in 2017, the last full year for which we have enforcement data, the agency took enforcement in 86% fewer cases than it did in 2010, the year before Governor Scott took office. 2017 was not the sole year in which the FDEP's enforcement efforts were miniscule under this administration. As the following graph shows, since 2010, the agency has consistently failed to vigorously enforce Florida's environmental laws.



Prior to the election, Governor-elect DeSantis toured the Everglades, and during the tour stated that he views himself as part of a "Teddy Roosevelt-style Republican Party." He further alleged that he would aggressively work to protect Florida's environment. We welcome this needed change in philosophy and, offer the below-listed recommendations in order to assist the new administration in its efforts to turn around the FDEP so that the agency can begin enforcing Florida's environmental laws.

Changing the Culture and Empowering Staff

1. The first order of business should be to resurrect enforcement. For the past 8 years, the FDEP has relegated the idea of enforcement to the status of an afterthought. It has reached the point that a review of the FDEP's district webpages shows that they have all but eliminated the term "enforcement" from their sites. It has been replaced with kinder and gentler "compliance assurance." The positions held by the staff are no longer under the umbrella of environmental enforcement. Instead, we see staff titles that include "environmental consultant" in both the "compliance assurance" and permitting sectors. If the Department is to regain any respect as a steward of Florida's environment, it must remind the business community (and the rest of the state) that it is a first and foremost a regulatory agency, and that as such, it is charged with enforcing the laws that the legislature has passed.
2. To be sure, not all environmental specialists at the FDEP have succumbed to the current administration's efforts to curtail enforcement, and as a result they have faced significant risks to their own jobs in trying to enforce the law. However, such is not the case throughout the FDEP. Consequently, part of promoting enforcement so that it once again has a seat at the table involves retraining staff, e.g. environmental specialists, so that they understand that they are not paid consultants for the regulated community. They need to also be assured that their efforts to enforce the law will not be held against them. It is incredibly difficult for any environmental specialist to initiate necessary enforcement proceedings against an entity that he or she has been required to placate in the past, particularly if the environmental specialist also fears that FDEP management will look negatively upon any efforts by the employees to hold the regulated community accountable for permit violations.
3. The administration must assure its employees that it is not afraid to tackle the tough issues confronting Florida. This means that employees should not be afraid to research issues such as climate change, or to utter terms such as "climate change" or their equivalent in front of their supervisors or other employees.
4. Scientists and engineers should be given the abiltiy to conduct thorough reviews of permit applications, including the ability to require applicants to respond to all needed requests for information before the FDEP is obligated to render a decision on approving or denying a permit application.

5. FDEP's program administrators have significant influence on the manner in which permitting and enforcement is handled in each district. Prior to 1995 these administrators enjoyed career service protections; since that time, however, their positions have been classified as select exempt, meaning that they could be terminated at will, should they render decisions that are not entirely in line with the wishes of politicians, or even FDEP senior management. The administration should protect program administrators from political influence by restoring their previous protections afforded under the career service system.
6. The new administration should require each district office and division to submit assessments of the ability of their staff to comply with the new approach to both compliance and enforcement, including the number of environmental specialists realistically needed to ensure that FDEP inspection timetables are met. These assessments should then be included in the FDEP's funding requests to the Florida Legislature.

Needed Changes to Enforcement Guidance

7. Returning facilities to compliance without formal enforcement in cases involving so-called "minor harm" may generally be the best path to follow. However, the FDEP needs to remember that in today's regulatory environment these permittees often have engineers and attorneys who routinely advise them on such things as completing permit applications and the subsequent operation of permitted facilities. Consequently, the FDEP should not need to provide significant technical assistance to its permittees. To the extent that the FDEP does engage in providing "environmental education" courses to its permittees the same should only be provided after the permittee has reimbursed the FDEP for the costs of presenting each course.
8. The FDEP's attitude towards enforcement is documented in its policy directive known as Directive 923, which is a comprehensive document that sets forth the administration's expectations insofar as enforcement is concerned. Section 3, Introduction, of DEP Directive 923 should be revised to reestablish the policy that the imposition of civil penalties is to be included in all formal enforcement actions, unless good cause is shown by the violator why said penalties should be waived.
9. Recovery of economic benefit of noncompliance must be pursued in every case in which the amount of realized benefit can be determined. Currently, Section 5.B.4. of DEP Directive 923 gives complete discretion to the FDEP's enforcement staff in the implementation of economic benefit recovery. We have found through file reviews that in most cases the recovery of economic benefit is either not mentioned, or waived.
10. Penalties for exceedances of permit limits in wastewater cases should include every exceedance, e.g. both TSS and CBOD, even if the exceedances were found in a single discharge of wastewater. The same principal needs to apply to air and other waste discharges.
11. Multi-day penalties must be assessed for violations that continue over multiple days, consistent with the language of § 403.141(1). Fla. Stat., and § 403.161(3), Fla. Stat., both

of which unequivocally establish that each new day in which a violation occurs is considered to be a new violation. Section 7. Multiple and Multi-Day Penalties, of DEP Directive 923 should be revised to reflect this change in approach. To the extent that the calculations of said penalties would result in excessive amounts, the amount can be adjusted in other sections of the penalty calculation worksheet that allow for adjustments based upon the violator's cooperation with the FDEP. By ignoring (or minimizing) the assessment of multi-day penalties the FDEP is giving both the permittee and the public an unrealistic assessment of the legal consequence of continually violating Florida's environmental laws.

12. The Department's current policy towards permittees who have a history of noncompliance, as stated in § 8 of Directive 923, only allows the FDEP to consider the permittee's history of noncompliance if the prior history of noncompliance occurred within 5 years of the current violation(s) and resulted in formal enforcement being taken by the Department. The problem with this policy is that from 2011 through 2018, the Department's policy was to avoid formal enforcement in most cases, including situations that previously would have been met with swift, strict enforcement. Consequently, if the current policy in Directive 923 is maintained the applicability of this adjustment factor will be largely non-existent—even with polluters who have demonstrable histories of non-compliance. We therefore recommend that this section be amended to include permittees whose facilities were inspected within the past 5 years *and the result of those inspections* was that the facility was found to be in non-compliance, regardless of whether the FDEP took formal enforcement.
13. Once penalties are imposed the FDEP authorizes the polluter to offset the payment of penalties by undertaking in-kind or pollution-prevention projects. These projects have historically been intended to allow polluters to undertake projects that would have a beneficial impact upon Florida's environment as a whole. They were not intended, however, to enable the polluter to write-off facility upgrades that would be necessary to comply with the polluter's own FDEP permit. These projects have, however, grown to the point that the FDEP now allows permittees to include such facility upgrades as a means of paying civil penalties. We recommend that §§ 9 and 10 of Directive 923 be revised to specifically exclude such projects from consideration as in-kind and pollution-prevention projects.
14. The enforcement process should be restructured so that decision-making is largely returned to District Directors. One of the things that the Scott administration did was to insert a new layer of bureaucracy into the enforcement process. The concept is known as "peer review" and it was touted as necessary so that similar enforcement approaches would be used across the state. § 5.C. of Directive 923 implemented this approach by providing for "peer review" to be utilized for all cases in which a proposed ELRA civil penalty exceeded $10,000.00. In § 9 of Directive 923, the same approach was put in place for all situations in which adjustment factors were to be applied to change the amount of the penalty that the FDEP would impose. To be clear, there needs to be a certain amount of uniformity in the manner in which the FDEP handles enforcement across the state. *However, the agency already has an enforcement manual that applies to all enforcement*

actions brought by the FDEP in Florida. What this "peer review" process has done is that it has sent a signal to staff that their assessments of violations and the willingness of permittees to cooperate with the FDEP are secondary to the desire of senior management to ensure that permittees and politicians are not upset. Consequently, the peer review process has taken the authority (and accountability) for penalty assessment out of the hands of District Directors and placed it in the hands of the Divisions, thereby ensuring that senior management in Tallahassee has control over the penalty assessment process. At the same time, it has resulted in concerns among environmental inspectors/specialists that they would be targeted by management should they propose assessment of high civil penalties that could be seen as unfriendly to an otherwise known approach of being soft on polluters. We recommend that this impediment to enforcement be halted entirely.

15. Each district office should be required to inspect each facility in its region at least once every three years. Facilities that are found to be in noncompliance during an inspection should, at minimum, be re-inspected annually until fully restored to compliance.

Climate change, red tide, blue-green algae and deteriorating surface waters and springs are but some of the current threats to Florida's environment. They will not be eliminated overnight or with simplistic political platitudes. The above recommendations are not meant to be an exhaustive listing of the necessary changes to be implemented at the FDEP. Rather, it is intended to provide a guide to the incoming administration in its efforts to protect Florida's environment. If these changes are implemented, we expect that significant advancements will be made in reaching the goal of a healthier environment that can be enjoyed by all Floridians and the visitors who come here each year.