

FLORIDA PEER

REPORT ON ENFORCEMENT EFFORTS

BY THE FLORIDA, DEPARTMENT OF

ENVIRONMENTAL PROTECTION

CALENDAR YEARS 2003 & 2004

**Florida PEER
P.O. Box 14463
Tallahassee, Florida
(850) 877-8097
(850) 942-5264 (Fax)
Email: flapeer@peer.org**

PRELIMINARY STATEMENT

This report addresses the enforcement results of the State of Florida, Department of Environmental Protection (FDEP or the Department) in calendar years 2003 and 2004. The information provided herein was gleaned from raw data provided to Florida PEER by the FDEP in December 2004 and January 2005 in response to a public records request made to the FDEP by Florida PEER under Chapter 119, Florida Statutes.

EXECUTIVE SUMMARY

A. Statewide Results

1. 2003 Results

2003 saw a continued decline in the number of case reports filed by the Department. Thus, the Department continues to rely less on circuit court litigation. NOV's continued at a higher rate following the 2001 legislation that allowed for them to be used in a meaningful way.

The Department continues to rely less on long-form consent orders to resolve enforcement cases, opting for short-form consent orders that require the payment of a civil penalty with no site remediation or increased monitoring.

Civil penalty assessments continued to exceed historical averages. In 2003 the Department assessed \$10,886,870.34, an increase of \$2,606,601.90 over the previous year. Assessments fell below average in dredge and fill, and hazardous waste cases.

The Department assessed civil penalties in 1087 cases in 2003. There was a significant decline in the number of civil penalty assessments in dredge and fill cases.

Civil penalty collections also increased. . In 2003, the FDEP collected \$3,370,357.29, an increase over the amount collected in 2002.

2. 2004 Results

The Office of General Counsel received only 51 case reports in 2004, the fewest that it has received since the Department began collecting this data. However, it increased the number of NOV's filed. 78 such enforcement mechanisms were filed in 2004, an increase over 2003.

While the issuance of long-form consent orders marginally improved in 2004, the improvement was insignificant when judged by historical standards. The Department continues to rely heavily upon short-form consent orders to resolve its enforcement cases.

While civil penalty assessments continued to be higher than historical averages, the Department assessed fewer civil penalties than it did in 2003. The FDEP assessed \$9,670,670.46 in civil penalty assessments in 2004.

The Department assessed civil penalties in 1158 cases in 2004. Dredge and fill cases declined for the second straight year, however. The average penalty per case also dropped in 2004 for dredge and fill and industrial waste cases.

The Department improved upon its collection of civil penalties in 2004. It collected \$5,846,109.59. This increase is likely attributable to the sharp increase in civil penalty assessments in 2003.

B. District Results

1. Northeast District

The Northeast District filed 23% of the NOV's filed on behalf of the Department in 2003 and 27% in 2004. The district also accounted for 49% of all civil penalty assessments in 2003, due largely to one case. In 2004 it accounted for 17% of all civil penalty assessments.

2. Northwest District

The Northwest District issued a total of 15 NOV's for 2003 and 2004 combined. This is less than the Northeast District issued in 2003 alone. In 2004 it issued a mere 9% of all case reports issued by the Department for that year. It accounted for 11% of the civil penalty assessments in 2003 and just 7% in 2004.

3. Central District

The Central District issued 20% of all consent orders in 2003. Interestingly, however, it accounted for only 7% of all civil penalty assessments for that same year. In 2004 it issued 15% of all consent orders and accounted for 10% of all civil penalty assessments.

4. Southwest District

The Southwest District easily outperformed the remaining districts in the Department. It accounted for 25% of the case reports sent to the OGC in 2003 and 18% of all consent orders in that same year. In 2004 it accounted for 18% of all case reports and 26% of all consent orders. The district accounted for 12% of all civil penalty assessments in 2003 and 28% in 2004.

5. Southeast District

27% of all case reports sent to the OGC in 2003 came from the Southeast District. It also produced 13% of all consent orders in that same year. In 2004 it sent 19% of the case reports and produced 12% of all consent orders. It contributed 11% and 15.97% of the civil penalty assessments in 2003 and 2004 respectively.

6. South District

While this district accounted for 18% of all NOV's and 16% of all consent orders in 2003, it sent only 3% of all case reports to the OGC during that same year. While it improved on case reports (8%) in 2004, it produced but 10% of all NOV's and 17% of the consent orders during that year. The district accounted for just 6% of the civil penalty assessments in 2003 and 13% in 2004.

7. All Other Enforcement

This category typically involves Beaches and Coastal Systems categories and Stormwater Runoff cases. It is noteworthy in that it issued 29% of all Final Orders issued by the Department in 2003 and a staggering 40% in 2004. Case reports are virtually non-existent, accounting for just 3% in 2003 and 0% in 2004. 4% of all civil penalty assessments originated under this category in 2003. It contributed 16% of civil penalty assessments in 2004.

STATEWIDE RESULTS

A. ENFORCEMENT OVERVIEW

As was pointed out in PEER's 2003 historical analysis of FDEP's enforcement approach, the agency had 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). The filing of lawsuits lost favor politically in the second half of the previous decade. 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 (NOV's). NOV's are also initiated in the district offices, though they 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 recently, i.e. 2001, ALJ's were unable to levy civil penalties in these cases. Thus, the NOV's were used by the Department to bring about direct environmental improvements—both long and short term. After implementation of the 2001 legislation, the FDEP was authorized to seek civil penalty assessments via the issuance of NOV's and the ALJ's were given statutory authority to impose assessments where warranted. This change in law

stopped what had been a general decline in the issuance of NOV's. 2002 saw a significant increase in their usage.

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 require the payment of civil penalties.
- Model COs are typically 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. However, as was pointed out in Florida PEER's 2003 historical assessment of FDEP enforcement, the use of Long-form COs began waning in the second half of the last decade. There was also a sharp increase in the number of Short-form COs.

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.

The trend for civil penalty assessments is clearly discernable from a historical perspective. Generally, the four years from 1987 through 1990 saw by far the fewest total dollars in such assessments (\$8,452,727.56), while the five year period from 1991 through 1994 saw the largest dollar assessments (\$39,792,904.76). The average annual civil penalty assessments for the period of 1987 through 1992 was \$6,534,859.27.

The Department has historically assessed civil penalties in 761 cases on average each year. It's historical median for all program areas is 805 cases each year. The Department's average annual performance with respect to the number of cases in which it assesses civil penalties in various key program areas is shown below:

Program Area	Historical Average	Historical Median
Air (Excluding Asbestos)	90	90
Beaches/Coastal	17	17

Waste Cleanup	4	3
Dredge & Fill	217	215
Domestic Waste	114	112
Hazardous Waste	116	119
Industrial Waste	46	43
Potable Water	95	97
Stormwater Runoff	8	7
Solid Waste	36	30
Tanks	48	35
Underground Injection Control	4	4

The above data represents the period of 1988 through 2002, based on calendar year performance. Only two program areas assessed civil penalties in 1987, therefore, the inclusion of that year's negative results would improperly skewer the data for the remaining programs.

As for the average and median dollars assessed on each case during the same time period the Department has performed as follows for the same key program areas:

Program Area	Historical Averages	Historical Medians
Air (Excluding Asbestos)	\$6,227.09	\$5,323.72
Beaches/Coastal	\$786.63	\$538.89
Waste Cleanup	\$25,940.05	\$7,989.00
Dredge & Fill	\$3,287.42	\$2,966.12
Domestic Waste	\$10,751.37	\$5,684.30
Hazardous Waste	\$15,986.22	\$10,514.61
Industrial Waste	\$19,506.60	\$13,150.86
Potable Water	\$1,379.30	\$1,168.31
Stormwater Runoff	\$5,768.34	\$1,860.71
Solid Waste	\$6,867.80	\$4,880.99
Tanks	\$4,934.64	\$4,824.97
Underground Injection Control	\$9,755.91	\$8,878.80

Here again, the results are based on calendar years 1988 through 2002.

Historically, the agency has never collected all civil penalties that it has assessed. This is not surprising when it is considered that a certain percentage of violators routinely take active measures to avoid paying the fines that they owe, and a certain percentage also lack the financial resources to be able to pay the fines. Over the period from 1987

through 1992 the average dollars collected each calendar year has been \$3,270,983.42, or 50.05 percent of the fines assessed. Interestingly, the initial four years, i.e. 1987-1990 had the highest collection percentage, 89.95%, while the period from 1999-2002 had the lowest collection percentage, 42.84%.

B. 2003 RESULTS

1. Case Reports, NOVs, Consent Orders, Final Orders

As previously stated, case reports are a dying breed at FDEP, with a clear discernible downward trend over the past few years. Over the period from 1987 through 2002 the Department issued on average 89.47 case reports each year. 79 case reports were issued in 2002. In 2003, the Department issued only 65 statewide.

NOVs have gained favor with the FDEP since the 2001 legislative changes. From 1987 through 2002 the annual average has been 58 such filings. The Department issued 73 NOVs in 2002. 68 were issued in 2003.

The Department has historically issued 262.47 long-form consent orders each year from 1987-2002. In 2002 it issued 118, well below its historical average. In 2003 it issued even less, with a total of 91 for the entire state.

An average of 140.53 model consent orders were issued each year from 1987-2002. 203 were issued in 2002. 272 were issued in 2003, a significant increase over past years.

Short-form consent orders, as indicated above, are reserved for those cases in which the Department intends to only collect a civil penalty. 404.93 such orders are historically issued each year from 1987 through 2002. The Department issued 594 such orders in 2002. It issued 698 short-form consent orders in 2003.

The Department also issued 48 Final (Enforcement Related) Orders in 2003.

2. Civil Penalty Assessments

As previously indicated, the average annual civil penalty assessments for the period of 1987 through 1992 was \$6,534,859.27. In 2002 the FDEP assessed \$8,280,268.44 in civil penalties against violators. In 2003 the Department assessed \$10,886,870.34, an increase of \$2,606,601.90 over the previous year.

The Department assessed civil penalties in 1087 cases statewide in 2003. With respect to the major program areas it assessed civil penalties as follows:

Program Area	Total No. of Cases
Air (Excluding Asbestos)	74
Beaches/Coastal	15
Waste Cleanup	4
Dredge & Fill	174
Domestic Waste	112
Hazardous Waste	148
Industrial Waste	36
Potable Water	145
Stormwater Runoff	132
Solid Waste	41
Tanks	104
Underground Injection Control	17

Compared to the historical baseline, the Department performed as follows in the same key areas:

Program Area	Difference
Air (Excluding Asbestos)	(14)
Beaches/Coastal	(2)
Waste Cleanup	0
Dredge & Fill	(43)
Domestic Waste	(2)
Hazardous Waste	32
Industrial Waste	(10)
Potable Water	50
Stormwater Runoff	124
Solid Waste	5
Tanks	56
Underground Injection Control	13

Thus, it is evident that there was a significant drop-off in civil penalty assessments for dredge and fill cases, as well as industrial waste.

The dollars assessed in the same key program areas compared as follows to the historical baseline:

Program Area	Averages	Historical Averages
Air (Excluding Asbestos)	\$24,785.23	\$6,227.09
Beaches/Coastal	\$843.33	\$786.63
Waste Cleanup	\$704,990.63	\$25,940.05
Dredge & Fill	\$3,036.34	\$3,287.42
Domestic Waste	\$17,191.78	\$10,751.37
Hazardous Waste	\$6,643.33	\$15,986.22
Industrial Waste	\$55,620.21	\$19,506.60
Potable Water	\$1,028.62	\$1,379.30
Stormwater Runoff	\$2,147.79	\$5,768.34
Solid Waste	\$5,188.41	\$6,867.80
Tanks	\$7,101.29	\$4,934.64
Underground Injection Control	\$9,705.29	\$9,755.91

3. Civil Penalty Collections

The Department generally collects 50.05 percent of the civil penalties it assesses. Over the period from 1987 through 1992 the average dollars collected each calendar year has been \$3,270,983.42. In 2002, it collected \$3,325,481.75, slightly over its annual average. In 2003, the FDEP collected \$3,370,357.29, an increase over the amount collected in 2002.

C. 2004 RESULTS

1. Case Reports, NOVs, Consent Orders, Final Orders

The downward trend in the number of requests for serious enforcement through the filing of complaints in civil circuit courts continued in 2004. Statewide, a total of 51 case reports were received by the Office of General Counsel. This is the lowest number of case reports submitted by the districts since 1988.

The number of NOVs filed by the FDEP rose in 2004. A statewide total of 78 NOVs were filed in 2004—10 more than in 2003.

2004 did see an increase in the number of long-form consent orders. Statewide, 117 such orders were issued, an increase of 26 over 2003.

Model consent orders continued to be issued at an increased rate over the historical average of 140.53. 250 were issued in 2004, 22 fewer than in 2003.

The usage of short-form consent orders continues to be high. 713 such orders were issued in 2004, 15 more than in 2003. This is still significantly higher than the statewide average of 404.93 issued each year across the state.

The Department issued 50 Final (Enforcement Related) Orders in 2004. This is 2 more than in 2003.

2. *Civil Penalty Assessments*

The FDEP assessed \$9,670,670.46 in civil penalty assessments in 2004. While this is higher than the annual average of \$6,534,859.27, it represents a \$1,216,199.88 drop-off from the \$10,886,870.34 in fines that was assessed in 2003. It is also somewhat unexpected in light of the increase in the number of NOV's, long-form consent orders and short-form consent orders issued by the Department in 2004.

The Department assessed civil penalties in 1158 cases in 2004, significantly higher than in 2003. The key program areas performed as follows:

Program Area	Total No. of Cases
Air (Excluding Asbestos)	79
Beaches/Coastal	12
Waste Cleanup	1
Dredge & Fill	206
Domestic Waste	140
Hazardous Waste	157
Industrial Waste	50
Potable Water	132
Stormwater Runoff	105
Solid Waste	47
Tanks	135
Underground Injection Control	2

Compared to the historical averages, the same key program areas performed as follows:

Program Area	Difference
Air (Excluding Asbestos)	(11)
Beaches/Coastal	(5)
Waste Cleanup	(3)
Dredge & Fill	(11)
Domestic Waste	26
Hazardous Waste	41
Industrial Waste	4

Potable Water	37
Stormwater Runoff	97
Solid Waste	11
Tanks	87
Underground Injection Control	(2)

Accordingly, 2004 saw a significant decline in the number of cases brought in the air, beaches and dredge and fill programs. 2004 represents the fourth straight year in which the Department has assessed civil penalties at a rate below its baseline average. However, there were also significant increases in domestic waste, hazardous waste, potable water and, most notably, stormwater runoff.

The key program areas also saw average dollars assessed on a per case basis as follows:

Program Area	Averages	Historical Averages
Air (Excluding Asbestos)	6,324.16	6,227.09
Beaches/Coastal	591.67	786.63
Waste Cleanup	2,500.00	25,940.05
Dredge & Fill	2,109.71	3,287.42
Domestic Waste	18,936.78	10,751.37
Hazardous Waste	12,610.94	15,986.22
Industrial Waste	16,621.50	19,506.60
Potable Water	862.44	1,379.30
Stormwater Runoff	1,734.94	5,768.34
Solid Waste	7,812.72	6,867.80
Tanks	15,269.73	4,934.64
Underground Injection Control	0.00	9,755.91

Once again, dredge and fill cases are not being assessed in keeping with their historical averages. Industrial waste cases also saw a decline in the amount assessed for each case on average. This is the second straight year that the average civil penalty assessment in hazardous waste cases is below the baseline average. According to the Department's records, it did not assess civil penalties in either of the two underground injection control cases in 2004.

3. *Civil Penalty Collections*

A statewide total of \$5,846,109.59 in civil penalties was collected by the FDEP in 2004. This is well above the historical average of \$3,270,983.42, as well as 2003's total collections of \$3,370,357.29. The sharp increase in collections is most likely reflective of the increase in civil penalty assessments in 2003.

DISTRICTS

A. Northeast District

1. 2003 Results

A. Case Reports, NOVs, Consent Orders, Final Orders

Since 1988 the Northeast District (NED) has averaged 18 case reports per year. In 2003 it sent 11 to OGC. This represents 17% of all case reports filed by the Department. The district has averaged 16 NOVs per year. It filed 16 NOVs, or 23% of all NOVs filed by the Department, in 2003. It issued 121 Consent Orders (17% of all Consent Orders filed) and 8 Final Orders (11% of all Final Orders entered) in this 12 month period.

B. Civil Penalty Assessments

The NED assessed \$5,297,326.26 in civil penalties in 2003. This amount represents a staggering 49% of the civil penalty assessments for the entire Department. It is also aided, in large part, by one case, a waste cleanup case, *DEP vs. C. GAIL TAYLOR AS PR FOR THE ESTATE OF TAYLOR, T. RANDALL, ET AL*, OGC Number 982864, in the amount of \$2,800,000.00. This assessment was entered on December 17, 2003. It represents 52.86% of the total assessments levied by the district for the year. In another case, *DEP vs. E.I. DUPONT DE NEMOURS & COMPANY, INC.*, OGC Number 30390, the district assessed a fine of \$1,050,000.00. This case was an industrial waste case. It was entered on July 31, 2003, and represents 19.82% of the district's annual total for 2003. Thus, these two cases represent 72.68% of the total district output for the year.

C. Civil Penalty Collections

In 2003, the NED collected \$634,897.76 of the civil penalties that it had assessed. This represents 18.37% of all monies collected by the Department in 2003.

2. 2004 Results

A. Case Reports, NOVs, Consent Orders, Final Orders

The district submitted 10 case reports to OGC in 2004. This is 1 less than the year before, thus continuing the downward descent. Even so, this represents 18% of all case reports sent to OGC throughout the state. During the same time period 21 NOVs (27% of all statewide) were issued, five more than in 2003 and more than its historical average. The district issued 132 Consent Orders (12% of all statewide), a slight increase over the

past year. It entered even fewer Final Orders, however, managing just 4 for the entire year. This represents just 8% of all Final Orders entered statewide.

B. Civil Penalty Assessments

Unaided by the large cases it saw in 2003, the NED assessed civil penalties totaling \$1,664,028.60 in 2004. This equates to 17% of all assessments levied statewide.

C. Civil Penalty Collections

2004 saw a rise in collections by the NED with a total of \$1,156,020.45. As a percentage, the NED collected 20% of all collections by the FDEP in calendar year 2004.

B. Northwest District

1. 2003 Results

D. Case Reports, NOVs, Consent Orders, Final Orders

The Northwest District (NWD) sent 9 Case Reports to OGC in 2003, representing 14% of all Case Reports submitted statewide. Historically it has averaged 11 Case Reports per year. It issued 8 NOVs (or 12% of all statewide). It typically issues 12 NOVs per year, based on its average from 1988 through 2002. In 2003 it also issued 8 Final Orders (17% of all statewide) and 112 Consent Orders (10% of all statewide).

E. Civil Penalty Assessments

In 2003 the NWD assessed civil penalties totaling \$681,045.30. It therefore accounted for 11% of all assessments levied by the Department in 2003.

F. Civil Penalty Collections

\$281,741.05 in civil penalties were actually collected by the NWD in 2003. This represents just 8% of all monies collected by the Department in civil penalties during this calendar year.

2. 2004 Results

A. Case Reports, NOVs, Consent Orders, Final Orders

The NWD again sent 9 Case Reports to OGC in 2004. It issued only 6 NOVs, during the same time period, however. It issued 2 Final Orders and 104 Consent Orders.

When compared to the production of other districts the NWD clearly is at the bottom, signaling a significant lack of enforcement. While it issued 18% of all Case Reports statewide, it managed only 8% of the NOV's and 4% of all Final Orders. 9% of all Consent Orders were issued by the NWD in 2004.

B. Civil Penalty Assessments

The district assessed civil penalties totaling \$704,105.30 in 2004. While this is a slight increase over the 2003 results, it still equals only 7% of all civil penalty assessments levied by the FDEP statewide. This is the lowest percentage of all the districts

C. Civil Penalty Collections

\$367,167.59 in civil penalties were collected by the NWD in 2004. This amount equals 6% of all civil penalties collected by the FDEP statewide. Once again, this is the lowest percentage of all the districts in the state.

C. Central District

1. 2003 Results

A. Case Reports, NOV's, Consent Orders, Final Orders

The Central District (CEN) sends, on average, 11 Case Reports to the OGC each year. It typically issues 5 NOV's each year. In 2003, the CEN only submitted 7 Case Reports to OGC. It did, however, issue 10 NOV's, double its annual average. It also issued 5 Final Orders and 207 Case Reports. Compared to the other districts it issued 11% of the Case Reports, 15% of the NOV's, 10% of the Final Orders and 20% of the Consent Orders.

B. Civil Penalty Assessments

\$756,253.00 in civil penalty assessments were levied by the CEN in 2003. This represents 7% of all such assessments statewide.

C. Civil Penalty Collections

15% of all civil penalty collections statewide, i.e. \$496,432.66, was collected by the Central District in 2003.

2. 2004 Results

A. Case Reports, NOVs, Consent Orders, Final Orders

The district submitted 9 Case Reports to the OGC in 2004. It issued 8 NOVs, 8 Final Orders, and 172 Consent Orders. The latter represents a significant drop from the 207 Consent Orders issued by this district in 2003. When looked at on a percentage basis the district submitted 18% of all Case Reports, 10% of all NOVs, 16% of all Final Orders, and 15% of all Consent Orders.

B. Civil Penalty Assessments

The CEN levied \$924,846.00 in civil penalty assessments in 2004. The assessments totaled 10% of all assessments statewide.

C. Civil Penalty Collections

\$508,518.36 was collected by the CEN in 2004, representing 9% of all collections statewide.

D. Southwest District

1. 2003 Results

G. Case Reports, NOVs, Consent Orders, Final Orders

The Southwest District (SWD) historically leads all other districts in enforcement. This remains the case. The district averages 19 Case Reports and 18 NOVs each year. In 2003 it sent 16 Case Reports to OGC. It issued 9 NOVs, 7 Final Orders and 198 Consent Orders. The district thus accounted for 25% of all Case Reports statewide, as well as 13% of all NOVs, 15% of the Final Orders and 18% of all Consent Orders.

H. Civil Penalty Assessments

The SWD levied \$1,259,291.74 in civil penalty assessments in 2003. This is 12% of all assessments statewide. What sets this district apart from the remaining districts is the fact that its sizeable total dollar amount of assessments is not the result of one overly large case, as occurred in the NED this year. Instead, there are a significant number of cases spread across many program areas.

I. Civil Penalty Collections

Once again, the SWD collected more civil penalties, \$809,626.26, than any other district in the state. This dollar amount represents 24% of all monies collected by the Department.

2. 2004 Results

A. Case Reports, NOVs, Consent Orders, Final Orders

9 Case Reports were submitted by the district in 2004, representing 18% of all such reports submitted statewide. The district also issued 11 NOVs, or 14% of all such filings. It issued 8 Final Orders (16%). 282 Consent Orders were issued out of this district, which represents 26% of all Consent Orders issued by the Department in 2004.

B. Civil Penalty Assessments

The SWD levied civil penalties totaling \$2,669,914.35 in 2004. It therefore increased its assessments, compared to 2003. It accounts for 28% of all assessments by the Department in 2004.

C. Civil Penalty Collections

The \$1,392,247.88 in civil penalties collected by the SWD in 2004 easily makes it the lead district in this category. Its collections accounted for 24% of all the monies collected by the Department across the state.

E. Southeast District

1. 2003 Results

J. Case Reports, NOVs, Consent Orders, Final Orders

The Southeast District (SED) sends, on average, 16 Case Reports to the OGC every year. It has not been typically active in issuing NOVs; it averages just 3 per year since 1988. In 2003, the SED bettered its historical average by sending 18 Case Reports to the OGC. It also issued 9 NOVs, 6 more than was the case in 2002. The district also issued 3 Final Orders and 147 Consent Orders over the course of 2003. Overall, the SED accounted for 27% of all Case Reports, 13% of NOVs, 6% of Final Orders and 13% of all Consent Orders.

K. Civil Penalty Assessments

In 2003, the SED assessed \$1,238,873.00 in civil penalties, which puts it third among the districts for the year. These assessments accounted for 11% of the total dollar assessments for the Department in 2003.

L. Civil Penalty Collections

15% of all monies collected by the Department in civil penalties in 2003 were collected by the SED. The \$497,684.21 it collected places it third among the six districts for 2003.

2. 2004 Results

A. Case Reports, NOVs, Consent Orders, Final Orders

The SED issued 13 NOVs in 2004, 2 more than in 2003. 10 Case Reports were sent to the OGC in 2004. The district issued 5 Final Orders, which was a slight improvement over 2003. However, it also issued 137 Consent Orders, 10 fewer than in 2003. The SED, along with the NED district, accounted for 19% of all Case Reports sent to the OGC in 2004. It also issued 17% of the NOVs, 10% of the Final Orders and 12% of all Consent Orders.

B. Civil Penalty Assessments

\$897,715.46 in civil penalty assessments were levied by the SED in 2004, accounting for 9% of all civil penalty assessments levied by the Department in 2004. This represents a 15.97% decline in actual dollars assessed from 2003.

C. Civil Penalty Collections

The SED collected \$573,381.82 in civil penalties in 2004. This accounted for 10% of all dollars collected by the FDEP in civil penalties in 2004.

F. South District

1. 2003 Results

M. Case Reports, NOVs, Consent Orders, Final Orders

Between 1988 and 2002, the South District (SD) averaged 11 Case Reports and 3 NOVs per year. In 2003, only 2 Case Reports were sent to the OGC by the district. 12

NOVs were issued by the SD in that same year, however. It also issued 3 Final Orders and 178 Consent Orders during this 12 month period. Accordingly, the SD accounted for 3% of all Case Reports, 18% of all NOVs, 6% of all Final Orders and 16% of all Consent Orders.

N. Civil Penalty Assessments

In 2003, the SD levied the fewest dollar amount (\$684,936.42) in civil penalties of all of the six districts, accounting for just 6% of the total dollars assessed.

O. Civil Penalty Collections

\$540,598.85 was collected by the SD in civil penalties, representing 16% of all monies collected by the Department in 2003. This places the district third among the six FDEP districts in terms of dollars collected in 2003.

2. 2004 Results

A. Case Reports, NOVs, Consent Orders, Final Orders

The SD showed some improvement in 2004 in the area of Case Reports. It sent 4 Case Reports to the OGC in 2004. In all other areas it underperformed, or equaled its 2003 results. It issued 8 NOVs during 2004. It also issued 3 Final Orders and 177 Consent Orders. The SD therefore accounted for just 8% of all Case Reports, 10% of the NOVs, 6% of the Final Orders and 17% of all Consent Orders.

B. Civil Penalty Assessments

Civil penalty assessments levied by the SD amounted to 13% of all assessments levied by the FDEP in 2004. In addition, the \$1,301,617.25 in penalties assessed by the district represents a 31.04% increase over the dollars it assessed in 2003.

C. Civil Penalty Collections

\$718,547.49 was collected by the SD in 2004, significantly more than it collected in 2003. This amount represents 12% of all dollars collected by the Department in civil penalties in 2004 and places the district third among the six.

G. All Other Enforcement

The Department also initiates enforcement cases out of the headquarters in Tallahassee. In addition, some cases handled by the Districts may also be handled jointly with Tallahassee, or coded such that they fall under one of two other categories identified

as “All” or “None” in the Department’s database. This is particularly true in cases involving stormwater enforcement or enforcement of laws involving the beaches and coastal systems programs. The following results for 2003 and 2004 represent the combination of the “All” and “None” categories. They are referred to cumulative as the “remaining categories.”

1. 2003 Results

A. Case Reports, NOVs, Consent Orders, Final Orders

Between 1988 and 2002, the remaining categories averaged 46 Case Reports and 8 NOVs per year. In 2003, they sent only 2 Case Reports to the OGC by the district. 4 NOVs were issued by them in that same year, however. They also issued 14 Final Orders and 127 Consent Orders during this 12 month period. Accordingly, they accounted for 3% of all Case Reports, 6% of all NOVs, 29% of all Final Orders, and 12% of all Consent Orders.

P. Civil Penalty Assessments

In 2003, the remaining categories levied \$480,907.75 in civil penalties, accounting for 4% of the total dollars assessed.

Q. Civil Penalty Collections

\$109,376.50 was collected by the remaining categories in civil penalties, representing 27% of all monies collected by the Department in 2003.

2. 2004 Results

A. Case Reports, NOVs, Consent Orders, Final Orders

The remaining categories sent 0 Case Reports to the OGC in 2004. They issued 11 NOVs, 20 Final Orders, and 108 Consent Orders. The remaining categories therefore accounted for 0% of all Case Reports, 14% of the NOVs, 40% of the Final Orders and 9% of all Consent Orders.

B. Civil Penalty Assessments

Civil penalty assessments levied by the remaining categories amounted to 16% of all assessments levied by the FDEP in 2004. They assessed \$1,508,443.50 in penalties.

C. Civil Penalty Collections

\$1,130,226.00 was collected by the remaining categories in 2004, significantly more than they collected in 2003. This amount represents 19% of all dollars collected by the Department in civil penalties in 2004.

CONCLUSION

The Department has clearly chosen an enforcement path that relies less and less on circuit court litigation. At the same time, the vast majority of consent orders that it issues are short-form consent orders that require no remediation and no increased monitoring on the part of Department personnel. That said, at present the Department is assessing civil penalties in a greater number of cases than it has historically.

In earlier years the FDEP did not assess civil penalties as often as it does now. However, that was not the only difference, for, as the agency's data clearly shows, when the Department did elect to enforce Florida's environmental laws it typically relied heavily on long-form consent orders that required more of the violators than simply paying a civil penalty. In addition, the very nature of those consent orders provided increased assurances that the environmental violations that had been perpetrated would be rectified. Furthermore, the Department was, in its earlier years, far more likely to initiate litigation in the state circuit courts.

There are three program areas that bear mention.

- First, the data clearly show that less of an emphasis is being placed on dredge and fill cases. In each of the past two years the Department assessed civil penalties at a rate below its historical averages. In addition, the average amount of each civil penalty also declined—by over one third in 2004 alone. The annual average assessment also fell below the baseline average in 2000 and 2001. This sends a clear signal to would-be perpetrators, especially commercial development interests, that they risk less if they violate this aspect of Florida's environmental laws.
- Second, industrial waste cases rose sharply in 2003, and in 2004 the Department assessed civil penalties again at a rate again above the historical average. However, the average civil penalty dropped by approximately 15 percent in 2004 compared to the baseline average. Indeed, in only one year (2003) since 2000 has the annual average for industrial waste case assessments exceeded the baseline average of \$19,506.60. This bears watching in the future—particularly since industrial waste violators often have the ability to cause significantly greater environmental harm and also have the ability to pay the civil penalties that should be associated with such actions. Furthermore, many, if not most, of these violations are part of the National Pollutant Discharge Elimination (NPDES) program, which is a federally delegated program

that the Department is responsible for implementing. The Department receives federal grant money for this purpose. There should be no financial reason for the continued underperformance.

- Third, the median baseline assessment for hazardous waste violations is \$10,514.61. Since 1999, the Department's annual average assessment in this program area has underperformed every year, except for 2004. This trend is especially troubling, given that the hazardous waste program is a federally delegated program with higher statutory fines allowed, i.e. \$50,000.00 per day per violation. Once again, the Department is receiving federal grant money to administer this program.

If one considers the number of cases in which civil penalties are assessed, together with the amount of civil penalties assessed and the amount collected, then it must be said that the Department is generally performing above its historical average in each area on a statewide basis. It is certainly performing at a higher level than it did in the mid-1990s when all records indicate abysmal performance. The question that remains is whether this performance will result in an improved environment for Floridians. The jury remains out on that crucial question. If the increase in assessments means that meaningful steps are being taken to remediate the harm caused by violators, then there will be significant improvement. The result could be increased environmental harm, however, if what is occurring is a transition to a "traffic ticket" mentality in which violators know that they can commit violations and only be required to pay a civil penalty. Moreover, the adverse trends in dredge and fill, hazardous waste, and industrial waste cases would seem to indicate an increasing laxness in civil penalty efforts against big businesses and development interests.

The individual districts perform generally in accordance with the Department as a whole. The Southwest District, located in Tampa, is by far the most aggressive of the six FDEP districts. This district has historically been known for its aggressive posture in enforcing Florida's environmental laws—and that has not changed. However, the Northwest District stands in sharp contrast to the Southwest District.

The Northwest District, which is located in Pensacola, has consistently underperformed in practically every area that can be measured. It is evident that the District has not heeded the recommendations brought by a state grand jury less than a decade ago. Indeed, it would appear from the data provided by the Department that enforcement in this district has all but ceased on a meaningful level. Significant changes will be necessary at upper management levels if the situation is to be remedied.