

DECADES OF VIOLATIONS

The Manner In Which Wastewater Facilities In Florida Are Regulated By The State DEP

August 2014

The following report concerns the manner in which the Florida, Department of Environmental Protection (FDEP) has been administering one aspect of Florida's wastewater program since 1999. The report is the result of reviews of reports that the FDEP has submitted to the Environmental Protection Agency (EPA) over the course of that time. The reports were obtained by *Florida PEER* directly from the EPA pursuant to the U.S. Freedom of Information Act.

Background

The Florida, Department of Environmental Protection (FDEP) has been administering the federal National Pollutant Discharge Elimination System (NPDES) for the Environmental Protection Agency (EPA) since the Florida Legislature approved the process in the mid-1990s. See, § 403.0885 Fla. Stat. That administration has been pursuant to a formal Memorandum of Agreement that was originally reached between the FDEP and the EPA on May 1, 1995 (Original MOA) and renewed on November 30, 2007 (2007 MOA).

A central part of the administration of the NPDES Program is the issuance of NPDES permits to wastewater facilities that discharge wastewater into the surface waters of the United States and Florida. Pursuant to §§ II. **Scope of Authorization**, III. Policies (Paragraphs A. and C.), and IV. **Permit Review and Issuance**, of the Original MOA, when FDEP assumed the delegated authority to administer the NPDES Program it adopted formal rules governing the issuance of such permits. Since then, the State of Florida, through the FDEP issues NPDES permits to all facilities needing such permits in Florida.

The Original MOA further obligates the FDEP to adopt and maintain a compliance program to ensure that wastewater facilities permitted to discharge wastewater in the State of Florida are abiding by the terms of their permits. The FDEP is specifically required under § III., **Policies**, A. 4. of the Original MOA to “[m]aintain a vigorous program of taking timely and appropriate enforcement actions in accordance with Florida Statutes and the CWA.”

Because neither federal or state agency are staffed sufficiently to be able to routinely inspect permitted NPDES facilities a mechanism must be in place to enable the regulatory agencies to effectively monitor compliance. *Therefore, enforcement of environmental laws across the United States, Florida included, are largely dependent upon the prompt and accurate reporting of discharge and other data by the NPDES facilities to the permitting agency.* In Florida that agency is the FDEP. NPDES facilities report their discharge data on a monthly basis to the FDEP via forms that are called Discharge Monitoring Reports (DMRs).

When the EPA delegated its responsibilities under the NPDES Program to the FDEP it authorized the FDEP to administer the NPDES Program in Florida. As part of that administration the EPA also required the FDEP to utilize the data that it received from the NPDES facilities via their DMRs. These requirements are set forth in § V., **Compliance Monitoring**, of the Original MOA. Among other things, the FDEP is required under the Original MOA to upload the DMR data into a central database and to ensure that the data contained therein is 95 percent accurate. § V. B., **Review of Self-Monitoring Reports**, 3. The FDEP is then required to advise the EPA about the overall compliance situation of NPDES facilities under the regulatory authority of the FDEP—particularly those facilities that are permitted to discharge one million gallons per day (or more) into receiving water bodies.¹ The FDEP is to inform the EPA about the compliance status of Florida’s NPDES facilities by way of what is known as Quarterly Noncompliance Reports (QNCRs) which are to be submitted on a quarterly basis to the EPA. These reports are required to be submitted to EPA for all “major” facilities, i.e. those facilities permitted to discharge at least 1 million gallons of effluent per day. Any such facility with violations during that quarter is to be listed. 40 CFR § 123.45 (b).

The purpose of the QNCRs is twofold. First, they notify the EPA about those facilities that are not in full compliance with their NPDES Permits. But more than that, they advise the EPA of the actions being taken by the FDEP to take enforcement against such facilities. More specifically, § V. B. **Review of Self-Monitoring Reports**, 8., states that:

8. The DEPARTMENT shall initiate appropriate enforcement actions whenever required performance is not achieved or when reports are not received. In the case of violation by a major discharger the DEPARTMENT shall initiate appropriate enforcement action within 30 days of the date such report was or should have been received by the DEPARTMENT. Enforcement actions will take into account frequency, severity, and analytical error in determining where limitations have been exceeded.

¹ These facilities are commonly referred to as Major Dischargers.

The Original MOA further describes EPA's expectations of how and when the FDEP should undertake enforcement against noncompliant facilities:

8. In the case of major permittees, by the time a major permittee appears on the QNCR and is determined to be in noncompliance, the DEPARTMENT is expected to have already initiated enforcement actions to achieve compliance. Prior to a permittee appearing on the subsequent QNCR for the same instance of noncompliance, the permittee should either be in compliance or the DEPARTMENT should have taken formal enforcement action (generally within 60 days of the first QNCR) to achieve final compliance. For the State of Florida, these formal actions are defined as Notice of Violations, Final Orders of Compliance, or Consent Orders or initiation of civil action under Section 403.131 or 403.141, F.S.

§ VI. Enforcement, A. 8., Original MOA

And when the FDEP has failed to initiate proper enforcement, it is the duty of EPA to notify the FDEP of such and to move forward with its own enforcement against the subject facilities:

2. Failure by the DEPARTMENT, when a discharger fails to submit either a schedule-date-related report or a discharge monitoring report, to determine the reason for noncompliance and to initiate appropriate enforcement action to correct the noncompliance may be the basis for EPA determination that the DEPARTMENT has failed to take timely enforcement action.

§ VI. Enforcement, B. 2., Original MOA

In those cases in which the FDEP failed to take proper enforcement the EPA is obligated to ensure that proper enforcement is initiated. §§ VI. Enforcement, B. 3. through 5., Original MOA. The EPA is supposed to require that the FDEP has taken appropriate enforcement on more than 95 percent of the worst offenders, i.e. those facilities that have been elevated to what is known as Significant Non-complier status. §VI.

Enforcement, A. 10., Original MOA

The Original MOA was amended by the FDEP and EPA on November 30, 2007. The 2007 MOA maintained the same essential requirements for the FDEP to fulfill, although it modified the some of the essential language. Most significantly, the two agencies eliminated the requirement that enforcement should have been initiated by the time a facility is listed on the QNCR. § VI. **Enforcement, A. 8.,** of the Original MOA was modified to read:

3. In the case of a violation by a major discharger, or other dischargers or types of dischargers identified in the State 106 Workplan, or for a violation that would cause the facility to be in SNC, the FDEP will determine within thirty (30) days the appropriate initial response to the violation. Where the FDEP has determined an enforcement action is appropriate, it shall commence such appropriate enforcement action within thirty (30) calendar days of its determination of the initial response. This response shall be documented in the compliance and/or enforcement file within sixty (60) days of identification of the violation. It is recognized that a definition for SNC has not been developed for conventional minors, storm water, CAFOs, SSOs or CSOs. Therefore, as definitions for SNC are developed for these categories, the timelines for initial response will be established in the State 106 Workplan. The date of identification of the violation is the point at which the FDEP enforcement staff learns of the violation. The FDEP shall make every effort to pursue and complete all the enforcement actions it takes within a reasonable amount of time.

§ VI. Enforcement, ¶ A. 3. Nevertheless, the 2007 MOA, still obligates the FDEP to address all permit violations:

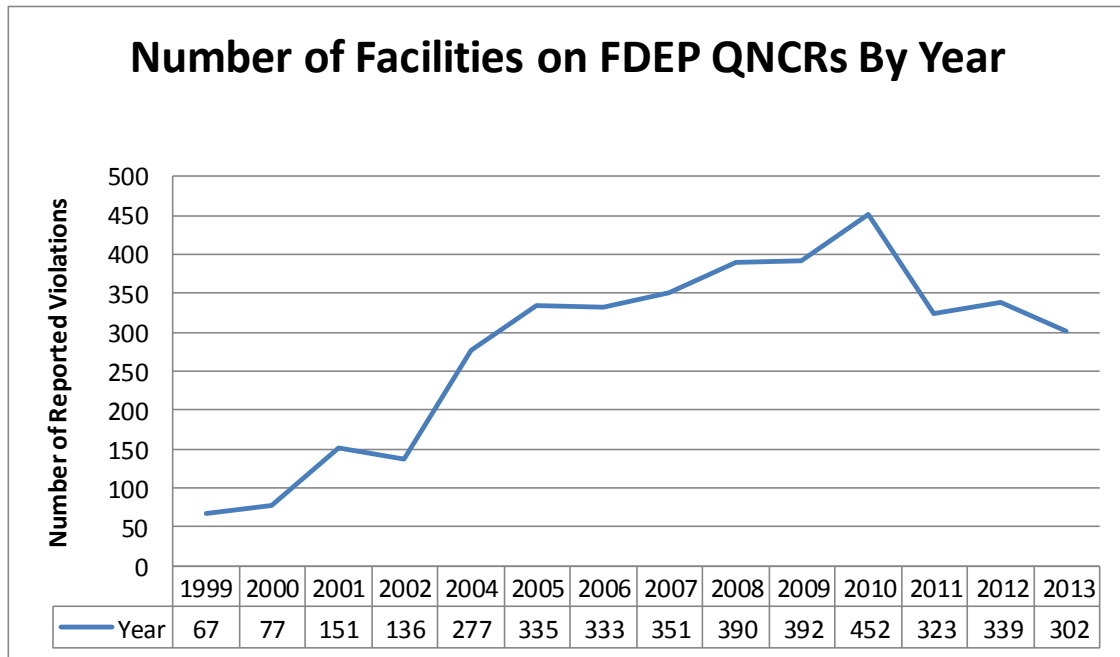
2. A FDEP enforcement action shall be considered timely and appropriate if it:
 - a. Addresses all identified violations of the laws and regulations constituting the State NPDES program and Sections 301, 302, 306, 307, 308, 318, 402, or 405 of the CW A including, without limitation, discharging without a required permit and violations of effluent limitations, pretreatment standards and requirements, compliance schedules, all other permit conditions, or any previous administrative or judicial enforcement action

§ VI. Enforcement, ¶ A. 2.a.

The Historical Data—Generally

The EPA provided Florida PEER with copies of QNCRs submitted by the FDEP to EPA in fulfillment of requests made by Florida PEER over multiple years under the Freedom of Information Act. These QNCRs date back to 1999 and are complete through the fourth quarter of 2013, the sole exception being 2003, a year whose records have apparently been misplaced by EPA. Therefore, we had fourteen years of data upon which to base this report.

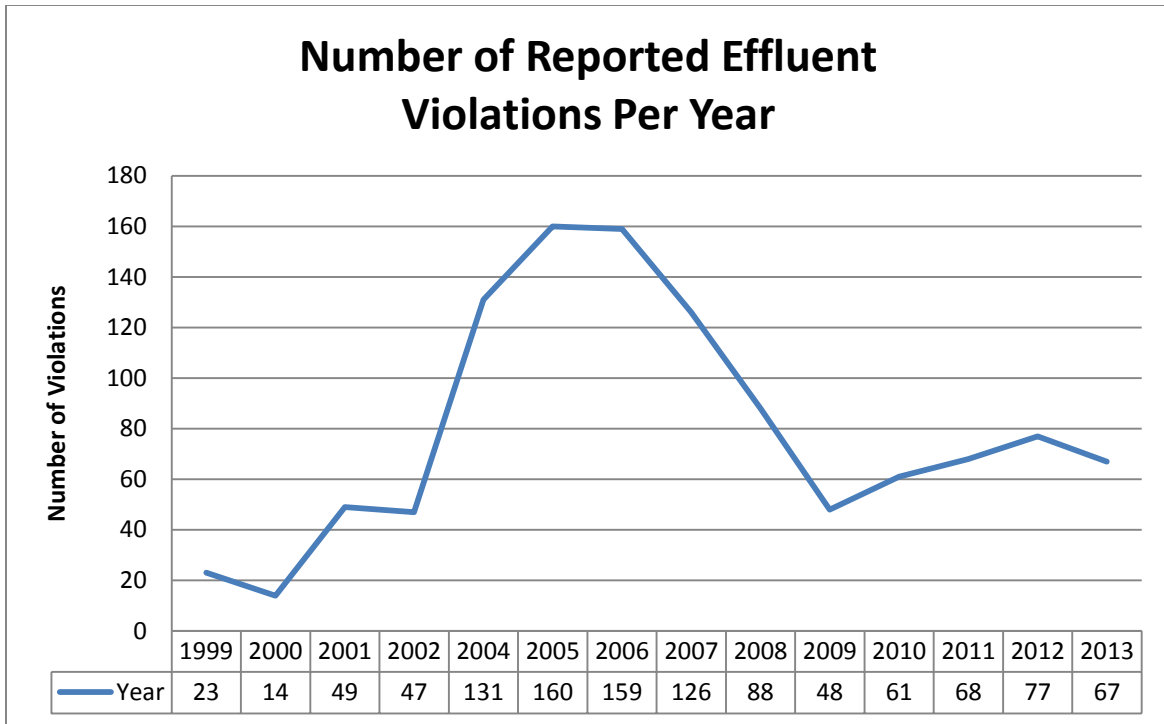
The reports submitted by FDEP to EPA over the course of the 14 year period show a dramatic increase in the number of facilities that were out of compliance. The rise began in 2001 with 151 reported instances of violations. It culminated in 2010 with 452 such instances. The following chart shows the escalation:



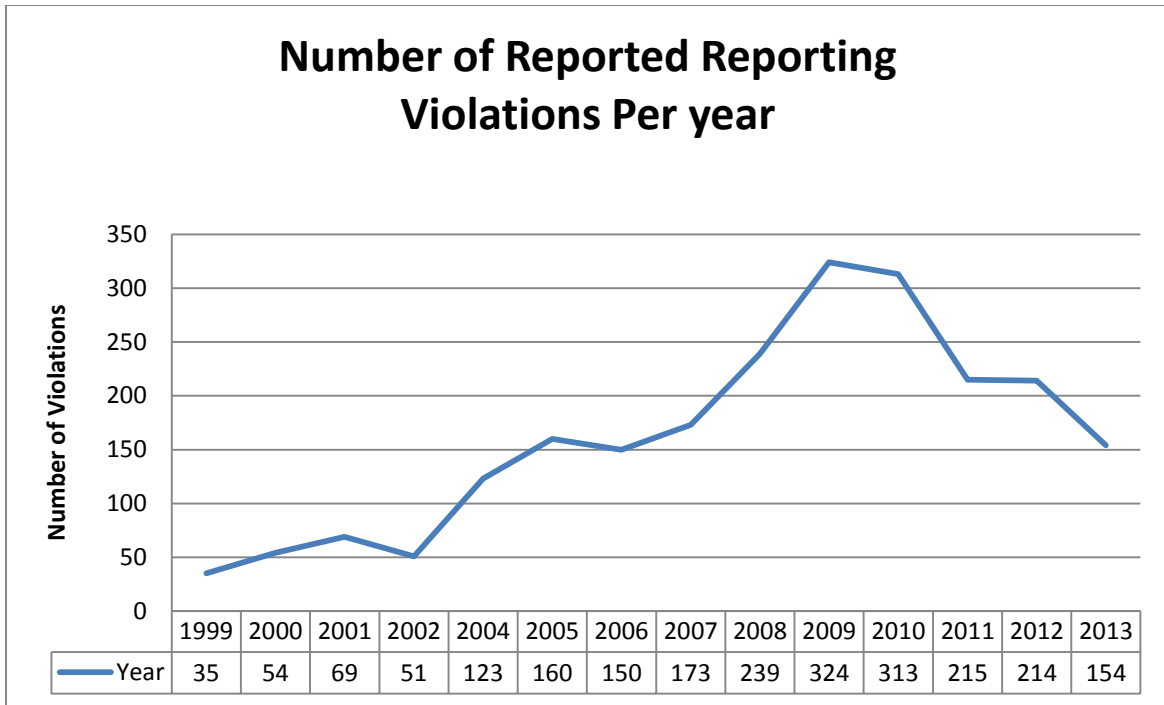
The median number of reportable noncompliance is 328 events per year and an average of 280 such events each year.

The QNCRs do more than just report on the facilities that have permit violations. They also include information as to what type of violations were identified. Generally, they categorize the violations as effluent, reporting or schedule. However, in some instances the information is less than complete, leading to a fourth category that we have termed “Other.”

Effluent violations are those instances in which the facility has discharged greater amounts of pollutants into surface waters than are allowed under its permit. These types of violations were at their lowest in 1999 and 2000, but then surged until reaching their peak in 2005. They then began dropping until 2009 when they reached their lowest level since 2001. They have begun rising again, however. The actual numbers are as follows:



Reporting violations are those violations in which the facility has failed to submit discharge records to the FDEP in a timely fashion. The reader may recall that the FDEP has publically asserted that it considers reporting violations to be minor in nature. However, the fact of the matter is that the FDEP has, by agreement with the EPA, obligated itself to take enforcement against those facilities that are not reporting on time. See, § V. B. **Review of Self-Monitoring Reports**, 8. (Original MOA) Once again we see that the number of reporting violations was relatively small in the beginning, only to be followed by dramatic increases:

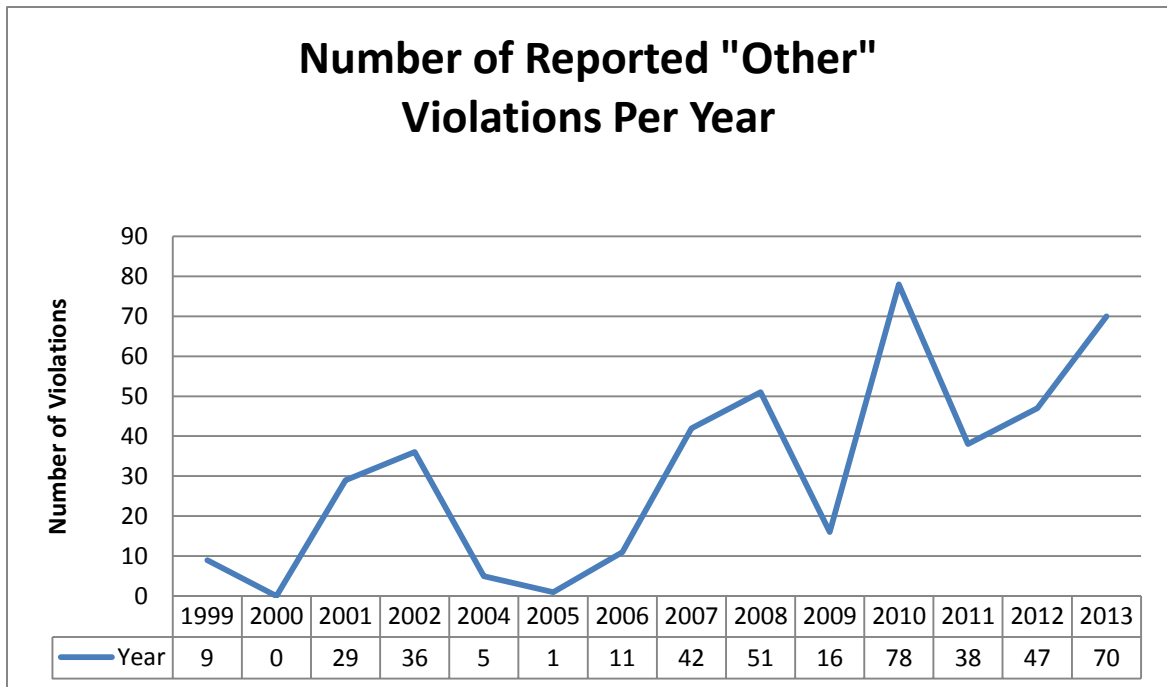


The interesting thing about the data is that there appears to be a direct correlation between the number of reporting violations in 2008-2010, and then FDEP Secretary Michael Sole’s announcement that the agency would dramatically crack down on effluent violations. Frankly, it appears as though the facilities got the message and, in order to avoid enforcement, simply began delaying submission of the reports. While the number of reporting violations has now subsided, it corresponds to an increase in the number of effluent violations. Inasmuch as the FDEP’s current policies are to avoid any type of enforcement, whatever the nature it looks as though permittees see little to be feared by sending in reports that show problems.

Schedule violations are those violations in which a permittee has agreed to undertake facility upgrades over a certain period of time, or has agreed to abide by modified limitations on its pollutant discharge. These agreements typically are agreed upon through a consent order culminating in formal enforcement. When the facility fails to live up to that agreement it is termed a “schedule” violation. These violations do not appear to have followed any particular pattern over the years:



The final category is that of “Other” violations. These types of violations are of a nature that the FDEP, for whatever reason, has decided not to label it as more serious. They, like effluent and reporting violations, are on the increase:



Over the years the agency has been fairly good at providing comments on each QNCR that explain the FDEP's position vis-à-vis each facility's violation(s). Typically the FDEP would include a note that it is investigating the violation, is considering entering into a consent order, or considers the violation to be atypical or erroneous. This practice is in keeping with the requirements of 40 CFR § 123.45 (a)(1)(C) that obligate the FDEP to inform the EPA about what measures the FDEP has taken to bring each facility back into compliance. *One problem that we have seen since 2011, however, is that the QNCRs now include no verbiage about how the FDEP intends to resolve the noncompliance. This aspect is noticeably silent and reverses a trend of being more open about the agency's intentions.*

Finally, QNCRs also provide information as to the facility's compliance status by listing each facility's status as one of "non-compliance," "resolved," or "resolved pending." In other words, if a facility has been out of compliance at any time during the quarter it is listed as in a state of non-compliance. If the facility is back in compliance with its permit the status is listed as resolved. In some cases, however, the facility may be under an enforcement order and has not yet met all conditions of the order which would bring it into a state of full compliance. In those situations the facility's status is marked, by rule, as resolved pending. 40 CFR § 123.45 (a)(2)(i)

The data on the QNCRs shows that over the 14 year period 87% of the facilities that were listed for effluent violations were listed as either non-compliant or resolved pending. Only 13% were resolved. 14% of the reporting violations were listed as resolved; the rest were either non-complaint or resolved pending. 1% of the schedule violations were resolved and 13% of "Other" violations were resolved.

The Historical Data—Enforcement

Without delving into each facility's record, a review of the FDEP's track record vis-à-vis specific facilities would be largely speculative. However, we believe that it is fair to report on those facilities that have made appearances on the QNCRs on multiple occasions. Unfortunately, what we found is that when the data is assembled it points to a significant number of multiple repeat offenders. *In fact, from 1999 through 2013 there were just 8 facilities that appeared on the QNCRs only once.* The rest had multiple appearances. In some instances the multiple appearances were beyond excessive. For example, over the 14 year period² there were 56 quarters of reporting data. We therefore decided to look into the number of facilities that were listed on QNCRs for a minimum of 28 quarters, i.e. 7 years of violations. What we found was a staggering **46** facilities, most of which are located in the

² Excluding 2003

northern part of the state. 15 are located in the Northeast part of the State and 12 are in Florida's Panhandle.

Another way of looking at the data is to consider whether or not there were any facilities that have been listed on the QNCRs for which no enforcement has ever been taken by the FDEP. According to the QNCRs we received there are **113** such facilities. The number of facilities by district is as follows:

District	Number of Facilities with No Enforcement
Central	13
Northeast	30
Northwest	11
South	1
Southeast	13
Southwest	45

Of the 113 facilities on the list, 3 have been listed 11 times on QNCRs for effluent violations. Those facilities are NAS Mayport WWTP (federal facility in the Northeast District), FL Cities Water Company near Sarasota, and the Hillsborough County facility at Tampa. A complete listing of all of the 113 facilities is included in Appendix A.

Over the course of the 14 years for which we have data effluent violations have accounted for 29% of the listings, schedule violations account for 3%, reporting violations have accounted for 58% and the remainder accounts for 11% of said listings.

The QNCRs show that no enforcement was taken³ in 49% of the actions listed because of effluent violations, compared with 77% of the reporting violations going unpunished. Schedule violations

³ The mere fact that a QNCR shows that enforcement was taken in a particular quarter does not necessarily mean that a new enforcement action was initiated. In fact, the typical case is that the QNCR simply lists a former enforcement action as evidence that enforcement has been taken. Thus, one listing that shows an enforcement case having been pursued would result in that same instance being listed multiple times for future that and future violations. In other words, the numbers showing that enforcement was taken are inflated and the numbers showing no enforcement are equally deflated.

went unpunished 42% of the time and 31% of the time in those categories that we have termed “Other.”

Conclusion

The data supplied by EPA shows a clear pattern of some facilities being in a state of perpetual violation once they become listed as permit violators by the FDEP. Most of these facilities have problems with timely and/or accurate reporting of discharge data. And the FDEP hardly ever takes enforcement against them, choosing instead to be content with chronic problems—even though federal regulations require them to be proactive in curtailing such conduct. Thus it is easy to see how 46 facilities could be listed as having compliance problems for the equivalent of 7 years, or 113 facilities could be listed, most of them on multiple occasions, and never be the subject of enforcement.

As recently as May 28, 2014, Florida PEER , brought attention to the FDEP’s categorization of reporting violations as being essentially insignificant. <http://www.peer.org/news/news-releases/2014/05/28/scott-environmental-success-claims-cut-out-of-whole-cloth/> The fact is that such violations are not insignificant, at least not according to the federal code, which the FDEP is supposed to be enforcing. It is only fair then to ask why the facilities should take these requirements seriously if the agency to which they report considers them to be so insignificant that they do not take enforcement in 77% of such cases. Equally so when the EPA, which is supposed to ensure that the federal code is followed doesn’t bother to correct the FDEP’s inactivity.

The FDEP’s failure to enforce effluent violations is even more troubling than its failure to enforce reporting violations. The QNCRs show enforcement actions being taken in, at most, only 49% of instances in which violations are reported. Keeping in mind that the enforcement numbers are essentially inflated, coupled with the fact that enforcement can mean as little as an agreement to increase reporting with no payment of any penalties, it is astounding that the EPA puts up with such poor performance.