



**Florida**  
**PEER**

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Public Employees for Environmental Responsibility

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Via Email to: [froneberger.dale@epa.gov](mailto:froneberger.dale@epa.gov)

Dale Froneberger  
Regional Coordinator  
U.S. Environmental Protection Agency  
Region 4, Drinking Water Section  
61 Forsyth Street SW.  
Atlanta, Georgia 30303.

**Re: Public Water System Supervision Program Revision for the State of Florida  
Agency/Docket Number: FRL-9949-83-Region 4**

Dear Mr. Froneberger:

Please accept the following comments concerning the EPA's proposal (Notice), document number 81 FR 49649, to grant greater supervisory authority over the Safe Drinking Water Act (SDWA) to the Florida, Department of Environmental Protection (FDEP).<sup>1</sup> According to the Notice, the EPA proposes to approve a revision to Florida's SDWA Public Water System Supervision Program concerning the implementation and enforcement of particular sections thereunder. Our concern with the EPA's proposal is that it would give even more authority to the FDEP at a time when the FDEP has shown an increasing resistance to enforcing the SDWA and Florida's potable water statutes and regulations that have been in effect for years and over which it has had continued responsibility. In light of its past performance it would be ill-advised to

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<sup>1</sup> The notice addressed by these comments is found at <https://www.federalregister.gov/articles/2016/07/28/2016-17898/public-water-system-supervision-program-revision-for-the-state-of-florida> under Agency/Docket Number: FRL-9949-83-Region 4.

increase the FDEP's authority in a program that is so crucial to protecting the environment and maintaining the public health.

The FDEP notified the EPA on March 20, 2013, that it was revising Florida's SDWA Program and that it was requesting authority to expand its federal oversight to cover 3 separate rules, the Stage 2 Disinfectants and Disinfection Byproducts Rule, Long-term Enhanced Surface Water Treatment Rule and the Ground Water Rule. In indicating its approval of the FDEP's request EPA's Notice cited several sections of the Code of Federal Regulations (CFR) including, but not limited to:

- 40 CFR part 141, subpart D (Reporting and Recordkeeping);
- 40 CFR part 141 subpart G (Maximum Contaminant Levels and Maximum Residual Disinfectant Levels);
- 40 CFR part 141 subpart O (Consumer Confidence Reports);
- 40 CFR part 141 subpart Q (Public Notification of Drinking Water Violations); and
- 40 CFR part 141 subpart S (Ground Water Rule).

In addition, the Notice states, in pertinent part, that "EPA determined that the Florida regulations are no less stringent than the corresponding federal regulations and is tentatively approving this revision."

A review of the CFR provisions cited by the EPA, particularly those identified above, is illuminating. The rules detail multiple requirements that water systems are required to ensure a safe drinking water supply, as well as to notify the public concerning the quality of the water that is being supplied. For example, 40 CFR 141.153 (f), places requirements upon community water systems to notify the public that they serve of known violations of the National Primary Drinking Water Regulations. These rules obviously place stringent requirements upon water systems. And it is fine if we presuppose that the regulated entities will comply with them. But they do not speak to the issue of whether or not the FDEP has shown the EPA that it has in the past, or will in the future, actually enforce the rules that it seeks authorization to administer.

#### The FDEP is not Enforcing Potable Water Rules that it Currently Administers

Particularly over the past 5 years the FDEP has been intent on telling the public that practically all of the permitted facilities under its regulatory authority are complying with state and federal regulations. Yet, the agency is silent when asked to produce evidence that supports such claims. Florida PEER has vigorously disputed the agency's claims and has done so using the FDEP's own data that shows an agency that has widely curtailed enforcement in virtually every program area.<sup>2</sup>

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<sup>2</sup> Florida PEER issues annual reports detailing the FDEP's enforcement performance. The report that we issued in July 2015 (covering calendar year 2014) revealed an 85% decline in enforcement cases in 2014 alone. <http://www.peer.org/news/news-releases/florida-environmental-enforcement-%E2%80%93-how-low-can-it-go.html>

This decline has been equally sharp in the potable water program that the FDEP administers. In 2012 there were 76 potable water cases opened across the state. One year later that number had dropped to 12 and 2014 posted just 13 such cases. The FDEP assessed penalties in just 5 of the 13 cases in 2014. What is astounding is that the FDEP submitted a report to the EPA for the same time period, i.e. 2014, in which it detailed the number of violations in Florida of which it was aware.<sup>3</sup> What it found was that 689 facilities were in violation and that among them there were a total of 1842 violations. 16% of those violations (295) were violations of Maximum Contaminate Levels. The remaining violations were monitoring and reporting in nature.

In 2015, the last year for which we have data, the number of cases fell yet again, this time to 6 cases and of those 6 cases the agency assessed penalties in just 2. In the FDEP's latest report to EPA the FDEP reported that of 5,275 active public water systems in Florida 702 were in violation and that those 702 facilities accounted for 1,839 violations.<sup>4</sup> Of the 1,839 violations 366 were MCL violations—a 4% increase over 2014. Meanwhile, in 2015, the last year for which we have enforcement data, the total number of potable water cases fell yet again, this time to 6 cases and of those 6 cases the agency assessed penalties in just 2. Looked at on a percentage basis, the FDEP took enforcement in 1.6% of the cases involving MCL violations and assessed penalties in .5%.

Many states, Florida included, have recently elected to demonstrate efforts aimed at working with permitted facilities in order to bring them into compliance. In Florida, the FDEP has chosen to utilize this approach by way of issuing what is called a “compliance assistance offer” as a means to resolving violations. This approach has now been included in Chapter 3 of the agency's *Enforcement Manual*.<sup>5</sup> What is important to understand is that compliance assistance offers are supposed to be used as a means of resolving *minor* violations (although the *Enforcement Manual* **does not** rule out their use in more serious issues, *see* Chapter 3, *Enforcement Manual*, page 15). Furthermore, these offers enable the violator **to avoid formal enforcement** if the violator does one of three things: (1) tells the Department what the violator has done to resolve the violation, (2) provides information to show the FDEP that the violation either didn't exist or wasn't that serious (a largely subjective determination), or (3) arranges for a Department inspector to visit the facility and show the violator how to return to compliance. If a compliance assistance offer is used the ultimate result is that there is no formal enforcement. The matter is resolved and the file closed.

Since compliance assistance offers are supposed to be extended only for minor violations and, if accepted, are not considered to be formal enforcement their issuance is not included in the enforcement data that *Florida* PEER receives from the FDEP each year. Consequently, we can safely say that the FDEP only addressed 6 of the 295 major violations that it identified as occurring in 2014 and reported to the EPA the following year.

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<sup>3</sup> The results are found in a report entitled The 2014 Annual Report on Violations of the U.S. Safe Drinking Water Act in the State of Florida located online at <http://www.dep.state.fl.us/water/drinkingwater/docs/2014-ACR-Florida.pdf>. This report was issued on July 1, 2015.

<sup>4</sup> <http://www.dep.state.fl.us/water/drinkingwater/docs/2015-ACR-Florida.pdf>

<sup>5</sup> This Chapter may be found at <http://www.dep.state.fl.us/legal/Enforcement/chapters/chapter3.pdf>.

On December 8, 2009, then Assistant EPA Administrator Cynthia Giles issued a new Drinking Water Enforcement Response Policy that superseded prior guidance.<sup>6</sup> This new policy was designed to set out a procedure for working with facilities to bring them into compliance. However, the new procedure was not meant to be a mechanism that could be used in order to allow states to look the other way when violations were identified. Rather, it was meant to institute a process for identifying (and assigning points to) those violations that were more serious in nature—in particular those that involved Maximum Contaminant Levels such as what the FDEP identified in 2014. For those violations the guidance makes clear that enforcement is expected, especially in those cases in which the violations have continued or recurred. And where the violations are “very serious and pose an immediate risk to public health” immediate action such as injunctive relief is expected, *see*, guidance at page 6. Frankly, it defies logic to suggest that only 6 of the 295 cases identified by the FDEP in 2014 rose to the level justifying formal enforcement under this guidance, much less according to the FDEP’s own guidelines published in its *Enforcement Manual*.

#### FDEP’s Recent Changes to Water Quality Criteria

The FDEP has failed to enforce potable water violations at a time when the agency is asking the EPA for more administrative authority over the SDWA programs. But the extent of the agency’s efforts to weaken environmental and health safety in Florida is not limited to enforcement. Indeed, the FDEP has now initiated controversial rulemaking at the state level that would, if approved by the EPA, update 43 current criteria while adding criteria for 39 additional contaminants.<sup>7</sup> A review of the proposed rule<sup>8</sup> indicates that its adoption would increase the contaminant levels of 23 chemicals that are allowed in Florida’s waters. In addition, contaminant levels would be set for 39 previously unregulated chemicals and decreased in 17 others. Meanwhile 25 toxic chemicals are not being addressed by the new rule. The bottom line is that the FDEP is proposing to increase, not decrease, the level of carcinogens such as benzene (from 1.18 ppb to 2 ppb—the federal standard is 1.14 ppb) in Florida’s surface waters. Such an increase will hardly improve the odds that organic and inorganic compounds will not make their way into Florida’s potable water supply.

Even the manner in which this proposed rule was approved was controversial. Florida’s Environmental Regulation Commission (ERC) is the body that was charged with the final state review of such rules. This is a commission that is made up of 7 commissioners representing varying interests, 2 of which are supposed to be environmentally friendly. However, Florida’s governor has failed to fill those 2 seats, leaving the ERC with a pro-business majority. Instead of waiting for the governor to fill the two vacancies the ERC moved up its vote to July 26, 2016, thus all but ensuring that the proposed rule, which is pro-business in nature, would be approved.

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<sup>6</sup> [https://www.epa.gov/sites/production/files/documents/drinking\\_water\\_erp\\_2009.pdf](https://www.epa.gov/sites/production/files/documents/drinking_water_erp_2009.pdf)

<sup>7</sup> <http://www.dep.state.fl.us/water/wqssp/docs/health/Class-ITreated-Supplemental-Info.pdf>

<sup>8</sup> [http://www.dep.state.fl.us/water/wqssp/docs/health/HH\\_TSD.pdf](http://www.dep.state.fl.us/water/wqssp/docs/health/HH_TSD.pdf),  
[http://www.dep.state.fl.us/water/wqssp/docs/health/Coded\\_62-303\\_072616.pdf](http://www.dep.state.fl.us/water/wqssp/docs/health/Coded_62-303_072616.pdf) and  
[http://www.dep.state.fl.us/water/wqssp/docs/health/Coded\\_62-302\\_072616.pdf](http://www.dep.state.fl.us/water/wqssp/docs/health/Coded_62-302_072616.pdf)

Not surprisingly the rule was passed on a 3-2 vote.<sup>9</sup> It will therefore be submitted to the EPA for final approval.<sup>10</sup>

#### Boca Raton—An Example of Enforcement in Florida

As a result of complaints concerning violations occurring in the water program at Boca Raton (City) *Florida* PEER reviewed that City's compliance history. That review revealed a pattern of violations both in the wastewater and potable water programs. Specific to the potable water program were violations involving multiple cross-connections. In addition, the City was using single check backflow preventers at properties connected to reclaimed water lines. Furthermore, there was at least one known instance in which the public had been allowed to drink reclaimed water because of system failures associated with improper cross connections. There were other potable water violations committed by the program, including, but not limited to, repeated drops in water pressure below the 20 psi requirement. The FDEP simply ignored the multiple violations found in both programs. Consequently, on August 12, 2010, *Florida* PEER petitioned (Overfile Petition) the EPA's Region 4 to assume jurisdiction over the situation and to initiate appropriate enforcement against the City.<sup>11</sup> Despite providing Region 4 with copious documentation of these violations the Overfile Petition was never responded to by EPA. An appeal filed on August 19, 2011, by *Florida* PEER was also ignored. A subsequent Freedom of Information Act request submitted by *Florida* PEER to the EPA was met with a response that the documents would not be produced because they involved the deliberative process. Thus, so far as the FDEP and EPA were concerned the City would be allowed to violate the Safe Drinking Water Act with impunity.

The only agency that seemed to care about the City's pattern of violations within the potable water program was the Palm Beach County Health Department (PBCHD). Ultimately the PBCHD reviewed the documentation and accelerated its own investigation into the City's activities. That investigation substantiated the overwhelming majority of claims. Consequently, on September 19, 2012, as a result of their investigation the PBCHD filed an administrative notice of violation (NOV) against the City.<sup>12</sup> When the City contested the NOV the matter was transferred to the State of Florida, Division of Administrative Hearings (FDOAH) for trial where it was assigned case number 12-3496.

The case was set for trial and was to begin within a matter of days when, on March 22, 2013 the parties suddenly and inexplicably reached a settlement. *While it is not known if there is a connection, The PBCHD withdrawal of its case against the City occurred just 2 days after the FDEP applied to the EPA requesting the increase in its oversight responsibility that is the subject of the EPA's July 28, 2016 notice in the Federal Register which is the subject of these comment.* Regardless, as a result of the settlement the PBCHD dropped its enforcement action in

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<sup>9</sup> The new rule passed just two days before the EPA filed its Notice that it was approving FDEP's application to assert more authority over the SDWA.

<sup>10</sup> As of this writing the Seminole Tribe of Florida has filed an administrative challenge to the rule in the Florida, Department of Administrative Hearings. It has been assigned case number 16-004431RP and the petition may be viewed at [https://www.doah.state.fl.us/DocDoc/2016/004431/16004431\\_408\\_08052016\\_17025004\\_e.pdf](https://www.doah.state.fl.us/DocDoc/2016/004431/16004431_408_08052016_17025004_e.pdf)

<sup>11</sup> [http://www.peer.org/assets/docs/fl/8\\_12\\_10\\_Boca\\_Raton\\_Overfile\\_Complaint.pdf](http://www.peer.org/assets/docs/fl/8_12_10_Boca_Raton_Overfile_Complaint.pdf)

<sup>12</sup> Palm Beach County Health Department file no.: WP-098-12

exchange for the City agreeing to abide by the law and agreeing to pay \$2,500.00 in costs and expenses. The City did not agree to pay any civil penalties.

The FDEP's Request for Greater Authority Should be Denied

Florida is a state whose population is growing and with that growth comes increased challenges, not the least of which is the provision of safe, clean drinking water to the public. Yet, the numbers generated by the FDEP show us an agency that over the course of the past 5 years has all but fully dismantled the enforcement arm of the potable water program. Its own reporting to the EPA shows that hundreds of known enforcement cases involving drinking water contamination never get off the ground under its current policies. Moreover, documents in at least one whistleblower case have shown that even before the current changes, the agency has been willing to go out of its way to punish employees who take their job seriously and try to protect the public from unscrupulous local governments that simply do not care about protecting the health, safety and welfare of the public. The EPA's decision to grant greater administrative authority to the FDEP, if approved, would put both the environment and the public's health at risk. Accordingly, we urge you to rescind your preliminary consent.

Public Employees for Environmental Responsibility (PEER) is a national alliance of local state and federal resource professionals. PEER works nation-wide with government scientists, land managers, environmental law enforcement agents, field specialists and other resource professionals committed to responsible management of America's public resources. Resource employees in government agencies have unique responsibilities as stewards of the environment. PEER supports those who are courageous and idealistic enough to seek a higher standard of environmental ethics and scientific integrity within their agency. Our constituency represents one of the most crucial and viable untapped resources in the conservation movement. *Florida* PEER is the local chapter of PEER and works to fulfill PEER's mission in the State of Florida on behalf of Florida's public employees and residents.

Thank you for your kind attention to this matter. Should you have any questions about these comments please feel free to contact us. In the meantime, we request that these comments be included in the Federal Register in their entirety.

Sincerely,

/s/

Jerry Phillips  
Director, *Florida* PEER