



FLORIDA PEER

Report On Enforcement Efforts By The Florida, Department Of Environmental Protection For Calendar Year 2013

FORMAL ENFORCEMENT ACTIONS

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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) in calendar year 2013. The information provided herein was obtained from raw data provided to Florida PEER by the FDEP in response to a public records request made to the FDEP by Florida PEER under Chapter 119, Florida Statutes.

OVERVIEW

The Florida, Department of Environmental Protection (FDEP) is charged, by Chapter 403, Florida Statutes, with enforcing the state's environmental laws. These laws were adopted by Legislatures that recognized the need to protect and preserve Florida's environment. After those statutes were enacted the FDEP adopted formal administrative rules in order to carry out the intent of the statutes, an endeavor that was also meant to reassure the regulated community that they would not be prosecuted if they would abide by the rules that the FDEP adopted. At the same time Florida's residents and tourists would benefit by living and recreating in a state with a clean and safe environment.

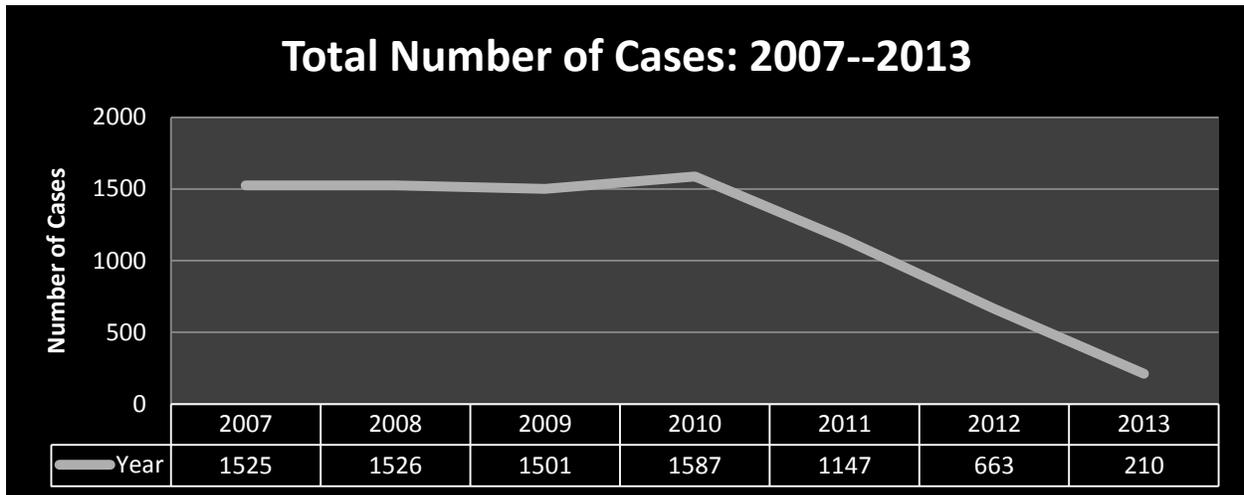
Each year Florida PEER has obtained data directly from the FDEP in order to evaluate the FDEP's performance in administering Florida's environmental statutes and regulations. Over the course of the past decade we have reported on our findings each year with detailed reports that set forth the numbers of cases filed, the types of cases, the penalties and the amounts collected.

This report delves exclusively into the number and types of cases that the FDEP pursued in 2013. The results are not promising. Yet, they help to clarify the dubious reason for FDEP's repeated assertion both last year and now that the number of facilities in compliance with Florida's regulations is at an all-time high—a claim that few people who actually are aware of the how the system operates would believe. The numbers also tend to shed light upon the reason for the Governor's recent efforts to assert that he is working to protect Florida's environment. After all, the easiest way to take the bite out of poor performance is to tell the audience in advance about your alleged efforts to do the job that you were elected to do.

A. Statewide Results

For the past two years we have reported on data that shows that the FDEP was marching towards a state of almost total dysfunction. 2013 appears to have further closed the door on the FDEP's effectiveness. The following results should be considered juxtaposed against the FDEP's

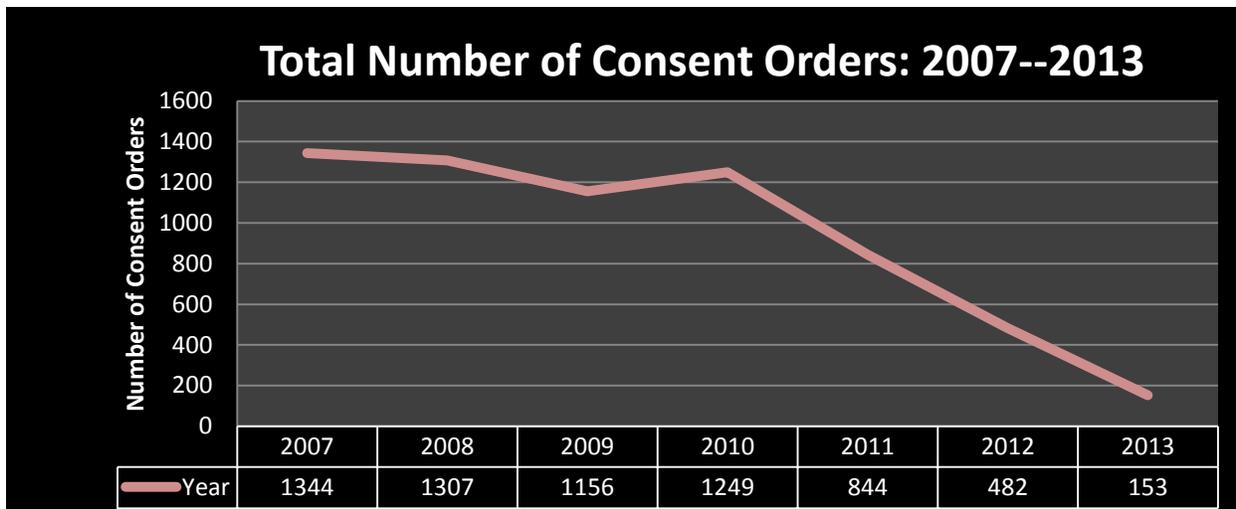
claim in March 2014 that it regulates “roughly 75,000 facilities statewide.”¹ With that said, statewide the FDEP opened a mere **210 cases for the entire year**. For a bit of perspective, 663 cases were initiated in 2012, 1147 in 2011 and 1587 in 2010, the year before Secretary Vinyard took over the agency. **Put another way, the total number of cases opened by the Department in 2013 fell 68% when compared with 2012’s performance. They are down a staggering 87% from 2010.** If we plot the numbers from 2007 through 2013 we get the following visual:



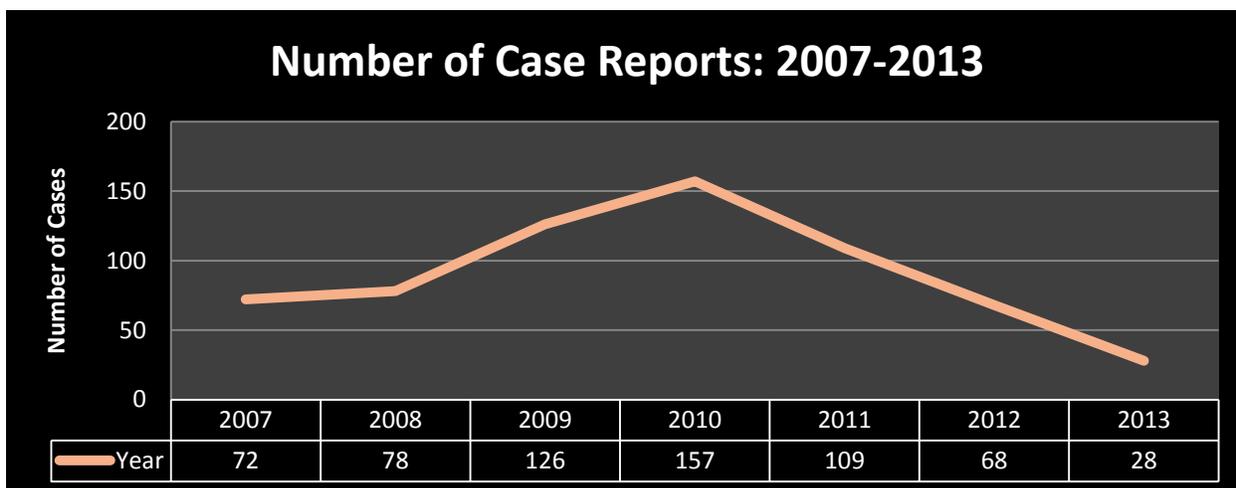
Interestingly, of the 210 cases opened in 2013, November and December saw the fewest number of new cases. Seven cases were opened in each of those months, suggesting that 2014’s results could be even worse.

Each year the bulk of enforcement at the FDEP is carried out through the Consent Order process. 2013 was no different. Of the 210 cases opened by the FDEP in 2013, 153 were resolved via Consent Orders. This represents a 64% decline from 2012, 82% worse than in 2011 and 88% worse than in 2010. Comparing the results from 2007 through 2013 yields the following results:

¹ <http://content.govdelivery.com/accounts/FLDEP/bulletins/ad8180>



Virtually every enforcement mechanism, NOV's, Final Orders, Long-Form Consent Orders, Short-Form Consent Orders, Model Consent Orders and Case Reports saw significant declines in 2013. Case Reports received in the Office of General Counsel dropped from a total of 68 in 2012 to 28 in 2013. Case Reports are the documents used by the districts to initiate more serious enforcement, up to and including litigation. Over the past few years their usage has plummeted:



The percentage of cases that were settled via short-form consent orders is perhaps the only area of positive news in this report. The use of the mechanism to settle cases is the lowest that it has been since its use was initiated in 1990! The following table demonstrates the history of the use of these and other enforcement mechanisms from 1988 to the present by showing the percentage of all enforcement cases each year that were resolved via short-form consent orders versus all other consent orders.

Year	% Short-Form Consent Orders	% Long-Form, Amended & Model Consent Orders
1988	0.00%	81%
1989	0.00%	80%
1990	24.13%	55%
1991	38.74%	42%
1992	36.32%	47%
1993	46.84%	37%
1994	47.73%	36%
1995	52.60%	37%
1996	49.39%	37%
1997	48.29%	38%
1998	50.05%	35%
1999	48.90%	37%
2000	54.77%	32%
2001	56.38%	34%
2002	55.67%	30%
2003	58.46%	30%
2004	55.23%	30%
2005	60.20%	27%
2006	60.41%	30%
2007	62.23%	25%
2008	58.13%	25%
2009	54.03%	22%
2010	45.68%	32%
2011	46.29%	23%
2012	41.63%	24%
2013	20.48%	52%

The data is promising for 2013 only in the sense that a higher percentage of the enforcement cases involves the usage of more involved mechanisms, i.e. long-form, amended & model consent orders. However, given the extremely small number of total cases that were filed we suspect that the reason for the increase is that the FDEP elected to only pursue enforcement in the more serious cases (or cases in which they could not look the other way) which, by their very nature, would require more involvement by the FDEP in the final case resolution.

B. District Results

As in 2012, the total number of cases fell in every district with the greatest decline being in the Southwest District, which had 164 cases in 2012 but fell to just **34** in 2013. The following

table shows the gradual and ultimately disastrous decline that has been seen in every district with respect to the total number of cases generated each year:

<i>District</i>	<i>2010</i>	<i>2011</i>	<i>2012</i>	<i>2013</i>
<i>Headquarters</i>	134	67	88	15
<i>Northwest</i>	167	156	60	37
<i>Northeast</i>	230	133	116	41
<i>Central</i>	208	161	109	32
<i>Southeast</i>	206	128	56	18
<i>South</i>	187	145	70	33
<i>Southwest</i>	455	357	164	34

There are nine different enforcement mechanisms that we track for each district. In 2013 counting the six districts and headquarters there were gains in only 8 of those mechanisms **in total** when compared with 2012. The use of virtually every major enforcement mechanism, e.g. NOVs, Consent Orders (Long, Short, Amended and Model) and Case Reports dropped in 2013. In short, the performance was a mere shell when compared to years past. The decline is readily apparent if we break down the most commonly used enforcement tool, Consent Orders, by district over the past few years. The following table shows the number of Consent Orders recorded by each district since 2010:

District	2010	2011	2012	2013
Headquarters	122	45	73	11
Northwest	134	126	50	31
Northeast	162	90	75	34
Central	159	130	75	22
Southeast	145	80	39	9
South	145	104	53	20
Southwest	382	269	117	26

As stated above, there are nine different enforcement mechanisms that we track for each district. Rather than providing the results for each one this year it is frankly easier to simply report that all of them declined in every district, except for the following eight categories:

- Headquarters issued a total of 5 long-form consent orders—3 more than in 2012;
- The Northwest District issued a total of 5 amended consent orders—2 more than in 2012;
- The Northwest District issued a total of 17 model consent orders—11 more than in 2012;
- The Northwest District issued a total of 3 case reports—2 more than in 2012;
- The Central District issued one general final order—1 more than in 2012;
- The Southeast District issued one general final order—1 more than in 2012;
- The Southeast District issued 3 amended consent orders—3 more than in 2012;
- The South District issued 9 long-form consent orders—2 more than in 2012.

As a percentage of all enforcement the usage of long-form consent orders increased in every district, except for the Southeast District, although in terms of raw numbers, the Southeast District was the only district to actually issue more long-form consent orders in 2013 than it did in 2012.

C. Program Area Performance

Not surprisingly, significant declines in enforcement were seen in all but one program areas. Only underground injection control managed to equal its 2012 performance. It had one case all year. But the other program areas did not perform as well. The number of cases² brought in each key program area is as follows:

Program Area	Total No. of Enforcement Cases--2009	Total No. of Enforcement Cases--2010	Total No. of Enforcement Cases--2011	Total No. of Enforcement Cases--2012	Total No. of Enforcement Cases--2013
Asbestos	36³	21	20	10	0
Air (Excluding Asbestos)	99	145	80	10	7
Beaches/Coastal	24	15	21	17	10
Waste Cleanup	24	17	19	14	12
Dredge & Fill⁴	277	236	148	93	26
Domestic Waste	144	125	108	75	26
Hazardous Waste	178	166	119	52	21
Industrial Waste	85	58	62	39	10

² Defined as the sum of case reports, all consent orders, NOV's and final orders.

³ Results in red represent declines from the previous year's values.

⁴ This includes Environmental Resource Permitting.

Potable Water	142	166	110	76	12
Stormwater Discharge	93	121	55	71	5
Solid Waste	50	38	63	22	14
Tanks	232	341	251	129	14
UIC	6	1	0	1	1

These results are nothing less than evidence of what amounts to an across the board slash and burn policy when it comes to enforcement. In terms of percentages:

- Air enforcement has declined 93% since 2009;
- Dredge and fill enforcement has declined 91% since 2009;
- Domestic waste enforcement has declined 89% since 2009;
- Hazardous waste enforcement has declined 88% since 2009;
- Industrial waste enforcement has declined 88% since 2009;
- Potable water enforcement has declined 91% since 2009;
- Stormwater discharge enforcement has declined 95% since 2009;
- Solid waste enforcement has declined 72% since 2009;
- Tanks enforcement has declined 94% since 2009; and
- Underground injection control enforcement has declined 83% since 2009.

The following table sets out the average number of cases initiated by the Department on an annual basis and then compares those averages to the performance in 2010 through 2013 with respect to the same key program areas listed above. The results are as follows:

Program Area	Historical Averages⁵	2010 Results	2011 Results	2012 Results	2013 Results	2013 Difference from Average
Asbestos	13	21	20	10	0	13
Air (Excluding Asbestos)	93	145	80	15	7	(86)
Beaches/Coastal	14	15	21	17	10	(4)
Waste Cleanup	4	17	19	14	12	8
Dredge & Fill	216	236	148	93	26	(190)
Domestic Waste	119	125	108	75	26	(93)
Hazardous Waste	132	166	119	52	21	(111)
Industrial Waste	47	58	62	39	10	(37)
Potable Water	112	166	110	76	12	(100)
Stormwater Discharge	35	121	55	71	5	(30)
Solid Waste	39	38	63	22	14	(25)
Tanks	72	341	251	129	14	(58)
UIC	5	1	0	1	1	(4)

⁵ The Historical Averages shown are for the twenty year period of 1987 through 2007.

The results for 2013 were the worst results in this comparative study since we began issuing these reports in 2003.

D. Conclusion

2013 is the first year since we've been reporting on FDEP's enforcement results in which the cumulative data unequivocally points to an across the board dismantling of the enforcement program at FDEP. What seems to be left is a skeletal program that is in place solely for the purpose of initiating enforcement only in those situations in which the Department cannot look the other way. Thus, enforcement may have been reserved for those situations in which the polluters refused to take the Department up on its offer to forego enforcement if the polluters would just agree to have the Department representative come and talk to them about compliance.⁶ Whatever the reason, the end result is that out of 75,000 permits, the Department only found violations worthy of enforcement in 210 cases. A result that is laughable except for the short and long term implications of such ineptitude.

While there appears to be little doubt that Secretary Vinyard and his senior management team would like to be able to dismantle the system entirely (these results speak to such an attitude), we believe that ultimately such a scenario would be unlikely because to do so would risk millions of dollars of federal grant money that the Department receives each year in order to administer federal programs such as the Clean Air Act, the Clean Water Act and the Safe Drinking Water Act. Federal oversight, such as it is, precludes a wholesale abdication of FDEP's responsibilities to the EPA. Thus, the FDEP can continue to limp along so long as the EPA remains silent when faced with numbers such as these. We would expect this trend to continue until Secretary Vinyard and his senior management team are replaced with managers who actually care about protecting Florida's environment.

⁶ <http://www.peer.org/news/news-releases/2014/05/28/scott-environmental-success-claims-cut-out-of-whole-cloth/>

APPENDIX

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 Notices 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 demonstrable and measurable evidence 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 2007 report on the FDEP's history over the past 20 years, the use of long-form COs began waning in the 1990s. There was also a sharp increase in the number of Short-form COs.

http://www.peer.org/docs/fl/08_25_11_fl_rpt_on_historical_enforcement.pdf

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.