PEER

WHITE PAPER

Number Forty-seven

Dropping the Ball:

FDEP's Continuous Efforts to Obfuscate it's Lack of Performance in the Matter of Big Wheel Recycling

The Florida, Department of Environmental Protection ("FDEP") has consistently denied that there has been any failure on the part of the agency to enforce Florida's environmental laws. These denials follow the issuance of three (3) reports by Florida PEER pertaining to the operation of a construction and debris landfill in Bay County, Florida. A shell company called Big Wheel C & D Disposal Facility was originally granted a permit to operate on the property; however, the name of the permittee was later changed to Aztec Environmental, Inc. ("Aztec"). It is Aztec that now operates the construction and debris facility ("Facility").

The three prior White Papers issued by Florida PEER detail permit violations involving groundwater, asbestos, training, reporting and illegal dumping at the Facility. The third White Paper discusses the history of the company that owns the property upon which the Facility is operating, as well as the political ties of its board of directors to Governor Jeb Bush and President George W. Bush. All three of these White Papers may be found at PEER's website, www.peer.org

The FDEP's response to the White Papers has been a steadfast denial that it has been ineffective in its enforcement activities in this case. The agency has also denied that some violations even occurred. Moreover, it steadfastly denies that senior management pressured the staff to disregard any of the environmental violations.

Given the FDEP's response it is therefore important to consider, not only its performance, but also how its actions compare to the guidance provided by the agency's Enforcement Manual. The Enforcement Manual is the FDEP's guidebook that is to be

used by its personnel in determining how to handle non-compliance situations that are discovered by field personnel and other witnesses.

As this White Paper will demonstrate, although the FDEP's Northwest District issued a warning letter ("Warning Letter") to Aztec, the Warning Letter entirely failed to identify the asbestos violations, as well as the ongoing groundwater violations—both of which the agency knew had taken place at the site. According to the agency's own Enforcement Manual, the violations were major violations.

With that in mind, this White Paper will address the issues involved in this case. We begin with the FDEP's enforcement policies and then deal with the violations observed at the site.

A. POLICIES GOVERNING THE FDEP'S ACTIONS

I. Witnesses

Talking to witnesses is fundamental to any investigation. While it is critical to go to a site to observe a company's performance first-hand, when building an enforcement case it is equally important to speak to witnesses. This is even more important when the agency's first knowledge of violations comes from people who actually work for the company and want to report activity that is suspected to be illegal and designed to be hidden from the public.

The Enforcement Manual speaks to the importance of witnesses to the FDEP's case:

> The investigation report should contain the name, address and telephone number of the person who reported the violation unless the report is anonymous. If the person responsible for the violation is the person reporting it, this

> should be indicated. Include a **detailed description of what the person saw and to the extent possible a step-by-step account of what happened.**
>
> A list of other witnesses who have knowledge of the violation should be prepared and made part of the report. This list should include at least: the investigator and the person reporting the violation; **names of any other non-affected persons who have firsthand information of the violation which may assist the Department in substantiating the violation; its duration; and applicable times of episodes.** It also helps to note what each witness knows and what each has said. Addresses and telephone numbers should be included. **Be sure to take very specific notes about what the violator himself/herself said to you; this could be used against him/her at a hearing or trial.**

4.5.1 Witnesses, November 1997. (Emphasis added) In contrast, the FDEP's file in the Big Wheel case was noticeably silent on anything more than each witness' name and phone number coupled with a bare recitation of the general concern relayed by each witness. Moreover, there is no indication in the FDEP's files that the violator was even confronted with the allegations, much less what was specifically said that could have assisted the FDEP "at a hearing or trial." The impression is left that there is no genuine concern about even getting to the bottom of the accusations—the concept of actually going to the point of a hearing or trial seems to be an absurdity.

II. Inspections

Once the FDEP had been apprised of problems at the Facility the next step was to conduct an investigation into the allegations made by the witnesses. The inspectors needed to retrieve any evidence and preserve it for possible use at any later hearings. The Enforcement Manual also speaks to the investigative process to be employed by the FDEP:

The inspection and investigation is the most crucial step in the compliance and enforcement process. All of the information that will be used in the decision making process that follows is based upon the information gathered during the investigation.

A determination of non-compliance is made through a process of evaluation of information gathered from a diverse variety of sources. **The Department files, databases and personnel as well as site inspections and eye witnesses are all valuable sources of information and should be thoroughly examined at the onset of the investigation.**

A thorough review of the files and databases will often reveal a history of interaction with the agency that can be a valuable tool during the compliance and enforcement process. Site specific information is equally as valuable and provides the foundation upon which the case will be built. Detailed notes, photographs and conversation records documenting the inspection play a critical role in the development of the case.

The discovery of a violation can come to the Department's attention in a number of ways. **It may be discovered upon examination of periodic reports submitted by a permit holder in accordance with terms of the permit.** A permit holder may report its own violation as required by the permit and rules. **A violation may be discovered after a private citizen complains to the Department, either informally or by verified (sworn) complaint filed with the Department pursuant to Section 403.412, Florida Statutes.** Inspections (routine, aerial, or otherwise) by Department staff may uncover a violation, or a violation may be reported to the Department by some other local, state or federal agency personnel.

In making an investigation and documenting the inspection, care should be taken to ensure that there is sufficient evidence to prove every element of the violation. The elements of a violation are contained in the applicable statutes. For example, Section 403.161, Florida Statutes, defines the activities that constitute a violation of Chapter 403, Florida Statutes. That section provides that anyone committing any of the prohibited acts is liable for any damage caused and for civil penalties. Other relevant

> statutes that include the elements of violations are Chapter 161 (Beaches and Coastal Systems), Chapter 253 (State Lands), Chapter 373 (Dredge and Fill), Chapter 376 (Petroleum, Dry Cleaners, and Hazardous Substances), and Chapter 370 (Saltwater Fisheries).

4.0 Determining Non-Compliance, November 1997 (Emphasis added). Thus, we see that the FDEP's policies require a thorough investigation be undertaken and that the investigation be documented. Again, the basic concept is that the evidence is being gathered for later use in formal proceedings. And, even if those proceedings are not needed, the careful documentation of violations is crucial to the FDEP's ability to successfully resolve the matter with the violator in such a fashion that advances the public's interest.

III. Responsible Parties

Another aspect of conducting a thorough investigation involves determining who is responsible. The Enforcement Manual speaks to that as well:

> Identify the persons, firm, corporation, partnership, trust or trustee responsible for the violation. **This includes all individuals responsible by operation of law and individuals who may be directly responsible for the specific act which resulted in the violation.** These will consist of the owners of the company and the employees immediately responsible. Contractors or engineers who constructed or designed the facilities may also be involved. Court actions are most often filed against owners and may sometimes name the employees, corporate officers, engineers or contractors responsible for operation of the equipment, depending on the circumstances. The investigator, therefore, should report the name of the company, its form of ownership (company, partnership, individual, corporation, etc.), the highest authority contacted, and the name and description of the employee or person operating the equipment at the time of the violation.

> Phone numbers of these persons should be listed when available. This is also a good time to check with the Office of the Secretary of State on the status of the corporation. **In later stages of the enforcement action it is necessary to verify the current ownership of any property involved and the current status of any corporations *because these may have changed since the initial investigation*.**

4.8 Responsible Parties, November 1997 (Emphasis added). Section 4.9 of the same Enforcement Manual also directs the employees to check corporate ownership through the State of Florida, Department of State.

The Enforcement Manual requires that the investigators identify all parties who may be responsible for the violations identified. Moreover, it is clear that the Enforcement Manual places an obligation upon the investigators to reconfirm the owner of the property. Notice that the Enforcement Manual does not indicate that the latter stages of an investigation should be the first time that the FDEP undertakes to identify the property owner. To the contrary, it is assumed that the property owner is already known to the agency. In the case of Big Wheel, however, it is clear that the FDEP had no idea (or even cared) who the actual property owner was.

IV. Warning Letters

Once the inspections are completed and witnesses interviewed, the next step in the enforcement process is to determine the type of enforcement that the FDEP will pursue. In this case, the FDEP opted to issue a warning letter. The Enforcement Manual provides that:

> 2. Issue a warning notice. The warning notice is normally used if the Department does intend to pursue a consent order and/or penalties.

3.1 (2) First Step Options, October 2003, November 1997. Thus, the decision to issue a warning letter in the first instance is one that indicates the FDEP's decision that formal enforcement, i.e. legal action, is necessary to address the environmental violations documented by the agency. What is a warning letter? The Enforcement Manual describes it as follows:

> Whether judicial or administrative, usually the first step in initiating any formal enforcement action is the issuance of a Warning Letter. The Warning Letter is used by DEP to further investigate potential violations and to initiate settlement discussions. The Warning Letter should not make any conclusions about the liability of the recipient; those are made in an NOV. The Warning Letter should follow the model format and should be specific enough to inform the respondent of the alleged violation **and should at least refer to the applicable statutes and rules.** A request for a conference should also be included in the Warning Letter. The letter should be sent certified mail, return receipt requested so you can be sure the recipient has been put on notice.
>
> The Warning Letter has no statutory or rule origin. It is merely a mechanism created by DEP to give the recipient a chance to work out a settlement of the violations without an NOV or court case being filed. Since it has no statutory or rule basis, it is not required that a Warning Letter be sent. In some cases is advisable to skip the Warning Letter and go directly to an NOV or court case. Reference should also be made to the applicable program specific manual to determine what program guidance has been provided concerning the timing and use of Warning Letters and NOVs.

5.1 The Warning Letter, November 1997. As the above passage points out, the warning letter can be used as a precursor to settlement of the violations. What needs to be understood, however, is that settlement is by way of a formal Consent Order that places legally enforceable obligations on the violator. See, Section 3.1 (2), above. Such orders typically require remediation, stricter reporting requirements, the payment of civil

penalties and the payment of stipulated penalties in the event that the violator violates the terms of the Consent Order.

Once the warning letter is issued, it is up to the violator to respond. The FDEP's reaction is, in part, determined by the nature of that response:

> If the responsible party responds to the issuance of a Warning Letter by agreeing to negotiate a Consent Order, a meeting or series of meetings by phone or in person should be held in an attempt to reach agreement on the terms of a Consent Order. If agreement is reached between the parties, a model Consent Order, short form Consent Order, or OGC reviewed Consent Order should be executed by the parties.
>
> If the responsible party fails to agree to the terms of a Consent Order, or fails to respond to the issuance of a warning letter, a decision should be made to either issue an NOV or submit a standard Case Report to OGC requesting a complaint be filed in circuit court seeking corrective actions, penalties, costs, or damages or a combination thereof.

3.3 Options Following the Issuance of a Warning Letter, October 2003. Thus, the Enforcement Manual makes clear that even if the violator responds to the warning letter favorably, i.e. agreeing to rectify the violations, the next action on the part of the FDEP is supposed to be the issuance of a Consent Order. If the violator refuses to cooperate the agency's response is to be one of formal legal action in the form of an Administrative Notice of Violation or a complaint against the violator to be filed in circuit court.

V. Settlement Guidelines

The FDEP's Office of General Counsel provides settlement guidelines ("Settlement Guidelines") for the agency's district personnel to use when assessing civil penalties against a violator. These guidelines provide for characterizing the nature of the

violations identified by the FDEP. Characterizations must be made for (1) The extent of environmental harm caused by the violation, and (2) the extent of deviation from the legal requirements of the permit, or the FDEP's rules. Characterization is carried out on a "matrix", e.g. a finding of minor/minor would mean that the there is little environmental harm and a minor deviation from the permit. Conversely, a finding of major/major means that there is major environmental harm and major deviation from the permit.

With this in mind, the Settlement Guidelines also state:

> In determining whether the Department should settle a case, file a notice of violation, or go to court for a judicial assessment of penalties, the Department will not only look at the statutory authorizations and requirements, but also at the following: **does enforcement result in the elimination of any economic benefit gained by the violator as a result of the violation; and beyond that, does enforcement provide enough of a financial disincentive to discourage future violations not only from the violator but from others contemplating similar activities?** At the same time, this policy should not be used to try to obtain more without litigation than could be obtained as civil penalties in an administrative or a judicial action. It must also be recognized that in some cases the benefits to the Department and public are not worth the costs and effort necessary to recover a penalty. The District and Division Directors are authorized to deviate from these guidelines **consistent with state law in raising or lowering the penalties** when doing so will result in better compliance and better capability for carrying out the mission of the agency.

Settlement Guidelines, January 2002 (Emphasis added) Thus, the agency's own guidance instructs the Districts to consider, not only the nature of the violation, but also whether the violator has derived any economic benefit from his/her illegal activities. Further, while District Directors are authorized to deviate from the guidelines, the deviation must be consistent with state law.

B. OVERVIEW OF FDEP'S FAILURE TO ENFORCE THE PERMIT

The history of the Permit is one of relative calm that precedes an escalation of noncompliance. As noted above, in August 2002, an FDEP inspection revealed relatively minor deficiencies. Three months later the situation had changed significantly. A November 12, 2002, inspection discovered actionable failures to properly handle asbestos. It is this report that was leaked to the Emerald Coast Insider after FDEP attempted to shield the report from public view. Then, nine days later, another inspection was conducted that also demonstrated a clear state of noncompliance that prompted the issuance of the Warning Letter a month later. The problems further escalated in late December when Charlie Reyes concluded that groundwater monitoring reports showed violations of water quality standards for aluminum. In early 2003, yet another FDEP inspection found the Facility to still be in noncompliance—and prohibited asbestos-containing material was identified. No warning letter was issued as a result of this inspection. Then, on July 10, 2003, yet another FDEP inspection yielded far different results, and FDEP pronounced the Facility to be in full compliance. Charles Goddard, FDEP's Program Administrator, as well as Marshall Seymore and Henry Hernandez attended this inspection.

Figure 1, below, summarizes the activity that was taking place from 2002 until July 10, 2003:

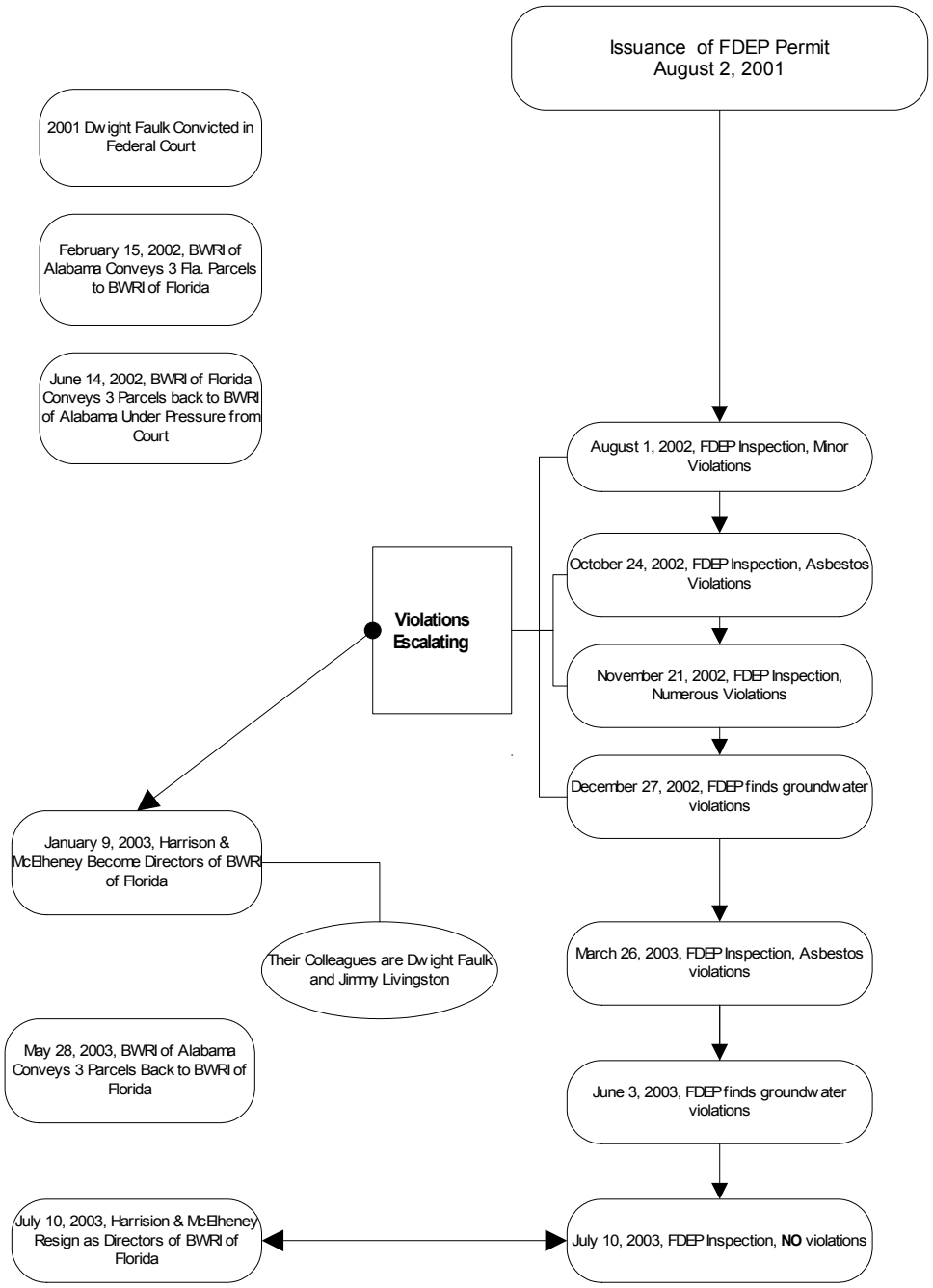

Figure 1

As of July 10, 2003, it appeared that the Facility's problems had been contained.

The July 10, 2003, inspection appeared to give the Facility a clean bill of health—

particularly in light of the participants in the inspection. Charles Goddard is a FDEP Program Administrator. In his position he reports directly to Northwest District Director, Mary Jean Yon. Marshall Seymore was Charlie Reyes' supervisor. His title is the Solid Waste Section Supervisor. Henry Hernandez was the Panama City Branch Office Manager for FDEP.

The four months following the July 10 inspection were quiet. Then, on November 10, 2003, Charlie Reyes' again identified aluminum violations in the Facility's monitoring wells. This was followed a month later by a report that there were potable wells within 500 feet of the Facility, a particular problem in light of the groundwater contamination at the site. This inspection coincided with the December 16, 2003, FDEP letter suddenly confirming that the July 10, 2003, inspection had produced a clean bill of health for the Facility. Then, a month later, Charles Goddard sent the Facility a letter informing it of the potential violations associated with having potable water wells within 500 feet of the Facility. No formal enforcement has been taken to date.

C. THE FDEP'S STEADFAST REFUSAL TO ACKNOWLEDGE GROUNDWATER PROBLEMS AT THE FACILITY

Florida PEER's first White Paper concerning this Facility was entitled *The Big Wheel Construction and Debris Landfill in Bay County, a Tale of FDEP Enforcement*. This White Paper dealt with and exposed the groundwater violations at the Facility. In response to the White Paper, the FDEP had this to say:

> "The public water supply is not at risk from disposal activities at this facility," Cooey said. "As far as enforcement, our regulatory enforcement is up 19 percent

> in the state and 30 percent in the Northwest District over the last four years."

Sally Cooey, FDEP spokeswoman, as quoted in the Panama City News Herald, May 20, 2004. According to the same article the agency's position is that "We didn't have a noncompliance situation." according to Ms. Cooey.

Protestations to the contrary, the files and the permit speak for themselves, and they do not validate the agency's position.

Simply stated, Florida's Maximum Contaminate Level ("MCL") for Aluminum in groundwater is 200 ug/l. This standard is set in Table 6 of Chapter 62-550, Florida Administrative Code. Rule 62-550.320 identifies these levels as the maximum contaminate level that is allowed. According to the FDEP's files the aluminum concentrations in the background well (MW-1) were as follows:

March 2002 – 36,400 ug/l
September 2002 – 34,000 ug/l
March 2003 – 10,140 ug/l
September 2003 – 1,310 ug/l

All of these results exceed the state standards by extremely high amounts. One compliance well, MW-2 showed the following results:

March 2002 – 4,000 ug/l
September 2002 – 2,500 ug/l
March 2003 – 426 ug/l
September 2003 – 5,766 ug/l

All of these results exceed state standards. The second compliance well (MW-3) posted these results:

March 2002 – 200 ug/l
September 2002 – <100 ug/l
March 2003 – 212 ug/l
September 2003 – <100 ug/l

Thus, with the exception of one month, March 2003, this well was in compliance.

Finally, the fourth compliance well showed the following results:

March 2002 – 400 ug/l
September 2002 – 300 ug/l
March 2003 – 268 ug/l
September 2003 – 305 ug/l

Once again, every reading exceeded state standards.

The Permit that governs the operation of the Facility in this case addresses the groundwater issue under a number of Specific Conditions. Specific Condition 30 states:

> Compliance with water quality standards of FAC Rule 62-520.420 and as contained in FAC Rules 62-550.310 and 62-550.320 shall be met at and beyond the edges of the ZOD. Within and beyond the edge of the ZOD, compliance with minimum groundwater criteria of FAC Rule 62-520.400 shall be met. Surface water criteria in accordance with FAC Rules 62-302.500, 62-302.510 and 62-302.560, shall be met beyond the ZOD [Permit application dated June 4, 2001]

As is clear from the Permit language, compliance with 62-550.320, F.A.C. is mandatory. Failure to do so constitutes a violation of the Permit and is actionable by the FDEP. In that regard, General Condition 1 of the Permit states that:

> The terms, conditions, requirements, limitations an restrictions set forth in this permit are "permit conditions" and are binding and enforceable pursuant to the authority of Sections 403.141, 403.727, or 403.859 through 403.861, Florida Statutes. The Permittee is placed on notice that the Department will review this permit periodically and may initiate enforcement action for any violation of these conditions.

The monitoring wells themselves are an issue in this case. Those wells may or may not be functional—in fact, that is the best case scenario for the FDEP. After all, if the wells are not functioning correctly then there may be no violation of water quality

standards. However, non-functioning wells, if such be the case, do not constitute compliance with the Permit. Indeed, General Condition 6 of the Permit states that:

> The Permitee shall properly operate and maintain the facility and systems of treatment and control (and related appurtenances) that are installed and used by the Permittee to achieve compliance with the conditions of this permit, as required by Department rules. This provision includes the operation of backup or auxiliary facilities or similar systems when necessary to achieve compliance with the conditions of the permit and when required by Department rules.

If the wells are not functioning there is no way that the Permittee, Aztec, can provide accurate groundwater samples as required under Specific Condition 33 of the Permit. In addition, as was noted in Mr. Reyes' many memoranda on this subject, Specific Condition 35 governs procedures to be followed by the Permittee if a well is determined not to be functioning properly. The burden is on the Permittee to fix the problem. Until the problem is corrected the permit holder remains in violation of the permit.

Specific Condition 38 of the Permit was likewise mentioned in Mr. Reyes' memoranda. This provision states, in pertinent part, that:

> In the event that water quality monitoring shows a violation of the applicable water quality standards, the Permittee shall arrange for a confirmation resampling within 15 days after the Permittee's receipt of laboratory results. **In the event that the Permittee chooses not to conduct the reconfirmation sampling, the Department shall consider the initial analysis to be representative of the current water quality conditions at this facility. If the initial results demonstrates or the resampling confirms the ground water and/or surface water contamination, the Permittee shall notify the Department in writing within 14 days of this finding.** Upon notification by the Department, the Permittee shall be (sic) conduct slug or pump tests on each permitted well to determine site-specific hydraulic conductivity and site-specific ground water flow rates and shall initiate assessment monitoring

> and corrective actions in accordance with FAC Rule 62-701.510(7).

(Emphasis added) Simply put, it was incumbent upon Aztec, if it did not agree with the water sample results, to arrange for resampling within 15 days of receipt of the initial laboratory results. If not done, the FDEP, under the terms of the Permit, must assume that the initial results are accurate.

It is now June 2004. This Permit was issued on August 2, 2001. At the present time groundwater results show aluminum contamination at the site and there is no solid evidence to contradict that fact. At one point the contamination was 182 times the state maximum contaminate level. Under the terms of the Permit the FDEP is required to accept that fact unless the Permittee shows otherwise within a matter of days, not years, of learning of the results showing contamination.

The FDEP simply cannot, with any credibility, maintain that there are no groundwater violations at this site. The Permit that they issued and the administrative rules that they adopted say otherwise.

In spite of what continue to be clear violations of the Permit, Mary Jean Yon, the District Director for the FDEP Northwest District advised the Tampa Tribune that the landfill is in compliance.[1] She further asserted that "the groundwater contamination might be due to naturally occurring aluminum in the soil." With all due respect to Ms. Yon, her job is to enforce compliance with the Permit. It is not to act as an industry apologist. The Permit that her agency issued compels her to accept the test results submitted by the Permittee, Aztec. If Aztec wants to allege that the groundwater violations are somehow erroneous, or a result of naturally occurring aluminum in the soil, then it is up to Aztec,

not FDEP, to make that case. However, there is nothing in the FDEP compliance and enforcement files provided to Florida PEER that suggests that Aztec was taking such a position. The public would be better served if the FDEP would cease acting as though it worked for one company at the public's expense.

D. THE WARNING LETTER

As discussed in the previous White Papers released by Florida PEER, on December 18, 2002, the FDEP sent a Warning Letter to Aztec. The Warning Letter advised Aztec that the letter was "…part of an agency investigation, preliminary to agency action in accordance with Section 120.57(5), Florida Statutes…"[2] Thus, the FDEP was formally putting Aztec on notice that it was preparing to initiate agency action against the company as a result of the alleged violations identified in the Warning Letter.

An analysis of the Warning Letter reveals that the FDEP, the agency charged with enforcing Florida's environmental laws, took the extraordinary steps of eliminating both the groundwater violations and the asbestos violations from the Warning Letter. These were the strongest charges that could have been leveled. The elimination of these violations from the official notice to the Permittee, i.e. Aztec, is not insignificant. Simply stated, for all intents and purposes it prejudiced the FDEP by substantially preventing it from relying on those violations in the future if it had elected to litigate the case in a formal enforcement action.

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[1] Tampa Tribune, Watchdog Hammers Pollution Oversight, June 8, 2004.
[2] §120.57(5), Fla. Stat., is part of Florida's Administrative Procedure Act ("APA"). This provision simply advises that an agency investigation is not conducted under the terms of the APA, and thus, the rights afforded by the APA do not apply.

The limitations placed on the enforcement action were evident even in the first paragraph, which stated:

> The purpose of this letter is to advise you of possible violations of law for which you may be responsible and to seek your cooperation in resolving the matter. **A field inspection was conducted on November 21, 2002** at the Big Wheel C&D Disposal Facility (construction and demolition debris disposal facility, DEP Permit No. 01611334-002-SO), located on the north side of Steelfield Road, immediately southwest of Steelfield Road Landfill, West Bay, in Bay County. The inspection indicated that violations of Florida Statutes and Rules might exist at the facility. Department inspectors observed the following: …

(Emphasis added) The opening paragraph includes no mention of Richard Brookins' October 21, 2002, inspection that revealed the existence of airborne asbestos. Mr. Brookins' typed report on the inspection was dated November 12, 2002, nine days before the subsequent inspection identified in the Warning Letter. The asbestos violations identified in Mr. Brookins' report were extremely serious violations that had been discovered as a result of multiple citizen complaints during the course of September 2002. Yet, it is obvious from the opening paragraph of the Warning Letter that the FDEP had no intention of taking any action on those violations. Likewise, there is no mention of any expectation that groundwater violations will be addressed.

What problems were identified in the Warning Letter? The problems, were specified in detail. As the Warning Letter states:

> Department inspectors observed the following:
>
> - Non-construction and demolition (C&D) debris was deposited throughout the active disposal area. These materials included: automobile seat cushion, metal cart, plastic container, lawn chair, clothing, hub cap, vinyl

> window blinds, part of plastic cooler, child's swimming pool, plastic duffel bag, blankets, plastic 5-gallon container, dishwasher, deep frying basket, pillow, tire hub, large bag of household garbage, refrigerator, window air conditioning unit, whole waste tire, and air conditioning compressor.
> - Debris was in contact with water at the active disposal area. Equipment operator attempted to remove the debris but was not able at the time.
> - No trained operator was on site. 24 hours of initial training by an independent third party is required.
> - Copies of the permit and operation/training plan were not available at the facility.

Once again, the groundwater and asbestos problems are not mentioned.

The Warning Letter further identified the exact rules that the agency believed were violated:

> Florida Administrative Code (FAC) Rule 62-701.730(6) and Specific Condition Number 25 of the permit requires that materials other than C&D debris be removed from the waste stream and placed into appropriate containers or storage areas for disposal at facilities authorized to receive such wastes. FAC Rule 62-701.300(2)(e) specifically prohibits the disposal of solid waste in any natural or artificial body of water including ground water. FAC Rule 62-701.730(8) and Specific Condition Number 28 of the permit requires that spotters and operators employed at the facility be properly trained. Specific Condition Number 28 of the permit requires that operator/spotter training records be kept for a minimum of five years and be made available for inspection. Specific Condition Number 12 of the permit requires that the permit be kept at the work site of the permitted activity. FAC Rule 62-701.730(7)(a) requires that an operation plan be kept at the facility at all times and be made available for inspection. The activities observed during the Department's field inspection and any other activities at your facility that may be contributing to violations of the above-described statutes or rules should be ceased.

The above rule and Permit citations constitute the sum total of the legal citations made by the FDEP in the Warning Letter.

The files in the FDEP's Panama City Branch Office contain the above-referenced Warning Letter. The files also included the draft warning letter ("Draft") that was sent from Panama City to Pensacola. A review of the Draft reveals that staff personnel in Panama City intended that additional rule citations be included in the final product. Those rule citations were removed in Pensacola and not included in the final Warning Letter that was sent to Aztec.

Three rule violations that were in the draft warning letter were eliminated in the final version. First, "white goods" are not to be disposed of in landfills. F.A.C. 62-701.300(8)(d). This violation was identified in the draft. It is not present in the final version.

Whole tires are likewise prohibited in landfills under F.A.C. 62-701.300(8)(e). The violation is addressed in the draft. Again, it is absent in the final version.

Further, the draft warning letter states, in pertinent part, that:

> FAC Rule 62-701.730(7)(d) and paragraph 25 of the permit requires that materials other than C&D debris be removed from the waste stream and placed into appropriate containers or storage areas for disposal at facilities authorized to receive such wastes.

This rule violation has been removed from the final version that was sent to the Permittee.

Neither the Draft or the Warning Letter mention any violations pertaining to asbestos or groundwater. It is as if they didn't exist.

E. ACTION THAT THE FDEP COULD HAVE TAKEN

According to the FDEP's rules, the Facility is designated as a Class III Landfill. The Settlement Guidelines include significant guidance on the handling of violations at such facilities. That said, the compliance and enforcement file for Aztec contains no indication that civil penalties were ever calculated by the FDEP.

I. Asbestos

The Settlement Guidelines characterize the improper disposal of friable asbestos as causing major environmental harm. Depending upon the amount of asbestos being illegally dumped, the deviation from the permit is characterized as either major or moderate.[3]

According to the Settlement Guidelines, when assessing civil penalties involving asbestos violations, the Environmental Litigation Reform Act (ELRA) restrictions on civil penalty assessments do not necessarily apply.[4] Thus, the statutory cap of $10,000 per violation per day[5] can be applied by the Department. Nevertheless, the FDEP has taken the position that it will normally apply the ELRA to friable asbestos violations.[6] The result is a lowering of civil penalties. If the ELRA were applied to this case, the Settlement Guidelines reflect a $4,000 civil penalty for a single violation.

II. Groundwater

[3] FDEP Settlement Guidelines, Solid Waste Facilities, August 2002, Page 13.
[4] FDEP Settlement Guidelines For Civil And Administrative Penalties, Section 5, January 2002.
[5] §403.121, Fla. Stat.
[6] FDEP Settlement Guidelines, Solid Waste Facilities, August 2002, Page iii. However, the guideline also states: "This position does not control if the Department's air program elects to pursue violations involving asbestos, or if the Department's hazardous waste program elects to pursue violations involving hazardous waste."

The Settlement Guidelines also provide guidance on penalty assessments for groundwater violations. When dealing with secondary water standards in situations such as this in which there is demonstrable groundwater contamination at a single compliance point the guidelines call for a $5,000 civil penalty.[7] In this case three out of the four monitoring wells have consistently shown aluminum levels above the MCL.

In addition, the failure on more than one occasion to properly maintain the monitoring wells is classified by the FDEP as causing major environmental harm and a moderate deviation from the Permit. The Settlement Guidelines call for a $2,000 civil penalty for this single violation.[8] Further, if, as the FDEP contends, the wells are providing inaccurate data, the Settlement Guidelines characterize the violation as one that causes major environmental harm and a major permit deviation. In such cases the civil penalty is $2,000, according to the Settlement Guidelines.[9]

III. Remaining Violations

The remaining violations involve the unauthorized disposal of white goods, a waste tire, and various other non-allowed items. A single violation of such unauthorized disposal results in a civil penalty of $4,000, according to the FDEP Settlement Guidelines, Solid Waste Facilities, August 2002, Page 13. The Settlement Guidelines characterize such violations as causing major environmental harm. They constitute a major deviation from the Permit.

[7] FDEP Settlement Guidelines, Solid Waste Facilities, August 2002, Page 8.
[8] FDEP Settlement Guidelines, Solid Waste Facilities, August 2002, Page 8.
[9] FDEP Settlement Guidelines, Solid Waste Facilities, August 2002, Page 8.

In addition, the failure to have properly trained spotters or operators exposed the violator to a civil penalty of $3,000 for a single event. FDEP Settlement Guidelines, Solid Waste Facilities, August 2002, Page 6.

IV. The ELRA Doesn't Apply

The total dollar value of the individual violations is significant according to the Settlement Guidelines. Simply put, if the combined individual civil penalties total more than $10,000 the ELRA does not apply:

> As long as the total penalty amount does not exceed $10,000 and does not involve asbestos, hazardous waste, or underground injection, the Department must use ELRA in order to pursue penalties.

FDEP Settlement Guidelines, Solid Waste Facilities, August 2002, Page iii. Thus, the Department was free in this case to assess civil penalties at the statutory maximum of $10,000 per day per violation.

F. CONCLUSION AND RECOMMENDATIONS

> TALLHASSEE - William McCoy Weeks, 57, and William McCore Weeks, 38, a father and son, both of Marianna, were arrested and charged late this evening with one count each of felony littering.
>
> The Florida Department of Environmental Protection's Division of Law Enforcement, after receiving several citizen complaints, initiated a two-month investigation in late May of this year. DEP's law enforcement personnel were assisted in this investigation by DEP's Division of Environmental Regulation, the Jackson County Department of Community Development, and the Florida Department of Health.

> Both father and son have been involved in the refuse collection business for the past 10 years. During this time, they have been warned repeatedly and have received civil penalties springing from violations of Florida's litter law and other environmental regulations. A criminal warrant was obtained for the arrest of both men after DEP officers visited the Weeks' home at 6117 Coastal Trail in Marianna and found trucks loaded with refuse that had been collected from other residences and illegally deposited in the backyard. A strong odor was allegedly emanating from the residence.
>
> Because the Weeks' live in and accumulated garbage in a residential area, the trash became not only a general nuisance, but a public health concern as well.
>
> Both suspects will appear before a Jackson County Circuit judge later today. Felony Littering is punishable by up to 5 years of imprisonment and/or a $5,000 dollar fine.

FDEP Press Release, August 30, 2002

The above press release concerns illegal dumping that was occurring in Florida's Panhandle. The dumping occurred less than one hundred miles from the Facility at issue in this White Paper. Messrs. McCoy and McCore were prosecuted by the same office that has allowed Aztec to go entirely unpunished. Even though the FDEP's own files reflect serious groundwater contamination and illegal dumping of airborne asbestos at the instant Facility. The only demonstrable difference between the two cases is the criminal prosecution did not involve a commercial enterprise.

I. Conclusions and Comments Regarding FDEP's Enforcement

Several issues stand out when reviewing this file:

First, Florida PEER requested copies of the complete compliance and enforcement file from 2001 to the present. No documents from 2001 were produced by the FDEP.

Second, despite repeated violations concerning the groundwater monitoring wells a warning letter has yet to be sent to the Facility concerning the same. Furthermore, FDEP's inspections confirmed illegal dumping of waste, perhaps oil and asbestos, into the groundwater. Yet, no further testing was ordered.

Third, the refusal to cite rule violations that were personally observed by FDEP inspectors is, at best, improper. This clearly occurred in the issuance of the warning letter. This behavior sends a signal to staff that it makes no difference what is documented, because management may simply decide to ignore the findings

Fourth, the FDEP's own Settlement Guidelines describe the violations as being of a nature that would cause major environmental harm. Yet, what is striking is that there were no compliance inspections between December 18, 2002 and March 26, 2003. And even though asbestos violations were again discovered on March 26, 2003, there were no follow-up inspections until July 10, 2003—a period of 3 ½ months. This is hardly indicative of an agency that wants to aggressively monitor environmental compliance.

Finally, it is obvious from a review of the file that the agency was documenting the violations. However, as the warning letter shows, securing approval to actually take enforcement, once the violations were repeatedly documented, appears to be have been at the mercy of employees in the Pensacola Office.

II. Recommendations

There are several serious issues presented by the activities that have taken place in connection with the Big Wheel Landfill on Steelfield Road. Florida PEER recommends that several steps must be immediately taken if the public trust is to be regained by the FDEP and other governmental bodies associated with this matter.

With respect to FDEP the issues arise out of a complex series of events; however, the response should be simple:

- First, Florida PEER requested all compliance and enforcement files from 2001 to the present. No files from 2001 have been produced. Likewise, no lab reports pertaining to the asbestos samples taken from the site have been produced. No source material supporting the memoranda pertaining to the groundwater violations was produced. To the extent that these documents exist and have not been produced there has been a violation of § 119.07, Fla. Stat. Simply stated, they are criminal in nature and should be prosecuted as such under § 119.10(2), Fla. Stat.
- Second, the July 10, 2003, inspection report completed by FDEP personnel is, at best, inaccurate. More to the point, however, it is false, because it states under Section IV., A., 12 that "[a]ll permit specific conditions [have been] complied with[.]" Filing a false report constitutes a first-degree misdemeanor in Florida. § 839.13(1), Fla. Stat. This issue should be addressed by law enforcement.
- Third, the December 18, 2002, warning letter was, at best, inaccurate. Under the circumstances, it appears that an investigation is warranted into why the letter failed to include violations that agency inspectors had documented as having existed. Again, filing a false report constitutes a first-degree misdemeanor in Florida. § 839.13(1), Fla. Stat. This issue should be addressed by law enforcement.
- Fourth, the "revision" of the warning letter leads us to question whether other reports exist that document violations of Florida's environmental laws. Furthermore, the agency's actions compromise the integrity of the reports that have been disclosed. Are they complete? Have they been altered in order to demonstrate compliance when perhaps no compliance existed? The public may never know. Consequently, those individuals who were in charge of these investigations should be disciplined.
- Fifth, as indicated earlier, the results of the agency's inspection of the Facility on July 10, 2003, are highly questionable. In part this is because of the unusual number of inspectors, but it is more than that. It is also the combination of the inspectors, i.e. a Program

Administrator, a Solid Waste Section Supervisor, and a Branch Manager. The Program Administrator issued the December 18 warning letter. The draft warning letter had been first sent to the Solid Waste Section Supervisor. Finally, the Branch Manager is closely connected with a now-former director of BWRI of Florida and perhaps owes his job to the director.

- Sixth, all of the events identified above also point to the ultimate problem: FDEP simply abdicated its responsibility to enforce the environmental laws that it is charged with upholding. The best case scenario is that the agency simply lacked the will to do its job due to a lack of resources, personnel etc. The worst case scenario is that it did not do its job because of political pressure that was applied to prevent the enforcement of Florida's environmental laws.

Based upon the above concerns, Florida PEER recommends **(1)** that a federal or state special grand jury be empanelled to review these issues and to recommend the appropriate legal steps to be pursued, and **(2)** that law enforcement investigate the documented problems with compliance with Florida's Public Records law, and the lack of accuracy in the inspection reports and Warning Letter generated by the FDEP.

Finally, when asked about her District's performance in this case, District Director, Mary Jean Yon stated, "As long as I'm seeing a willingness to respond to the issues, … I'm not going to yank their permit." Tampa Tribune, June 8, 2004. This statement shows an obvious failure to grasp the basic facts of the case. It also ignores the fact that multiple solid waste violations were observed by agency staff 40 days after the initial inspection that identified asbestos violations. Three months after the Warning Letter was issued additional asbestos violations were identified by the agency. And looming over it all is the fact that to this day the FDEP doesn't know whether the groundwater monitoring wells are even functional.

With all due respect, Florida's residents and the environment deserve more than a cavalier response that incorrectly presupposes that the only alternative to doing nothing in this case was to "yank their permit." That alternative was to actually enforce the law by requiring realistic groundwater monitoring, remediation, a cessation of the violations, and the payment of civil penalties.

One cannot help but wonder how this case would have been handled if the permit holder had been an individual resident of the state without any clout. Apparently we need look no farther than Messrs. McCoy and McCore. They faced criminal prosecution on felony charges.