PEER

WHITE PAPER

Number Forty-Three

Let's Make A Deal

Corporate Avoidance of Pollution Penalties in Florida

March 2004

About PEER

Public Employees for Environmental Responsibility (PEER) is a national alliance of local state and federal resource professionals. PEER's environmental work is solely directed by the needs of its members. As a consequence, we have the distinct honor of serving resource professionals who daily cast profiles in courage in cubicles across the country.

Public employees are a unique force working for environmental enforcement. In the ever-changing tide of political leadership, these front-line employees stand as defenders of the public interest within their agencies and as the first line of defense against the exploitation and pollution of our environment. Their unmatched technical knowledge, long-term service and proven experiences make these professionals a credible voice for meaningful reform.

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.

Objectives of PEER

- *Organize* a broad base of support among employees within local, state and federal resource management agencies.
- *Monitor* natural resource management agencies by serving as a "watch dog" for the public interest.
- *Inform* the administration, Congress, state officials, media and the public about substantive environmental issues of concern to PEER members.
- *Defend* and strengthen the legal rights of public employees who speak out about issues concerning natural resource management and environmental protection. Provide free legal assistance if and when necessary.

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Executive Summary

An examination of Florida Department of Environmental Protection (DEP) enforcement actions over the past five years reveals a clear pattern:

DEP almost never takes unilateral action against corporate violators. Instead, the agency works out a "consent order" with the polluter and these arrangements exhibit a clear pattern:

- Corporate violators are seldom if ever required to pay civil fines;
- Criminal charges are not pursued, even against repeat violators with long records of multiple pollution offenses; and
- In some settlements, corporate polluters are given new permits that increase the amount of pollution the companies are allowed to emit.

In Florida, only individuals or "mom and pop" businesses are ordered to pay civil fines without being given alternatives. By contrast, corporate violators bargain with DEP to obtain alternative resolutions. In theory, these alternatives are supposed to prevent or clean-up pollution at a cost equal to or greater than the civil penalties for which they should be liable. In fact, corporations prefer these alternatives because they commonly —

- Are often tax deductible, allowing corporations to minimize net costs or even come out financially ahead;
- Allow the violator to invest in plant improvements that create economic benefits for the polluter. In other words, the polluter can avoid fines by investing in capital improvements that add to the company's bottom line; and
- Often involve substantial forgiveness or reduction of the total penalty amount before calculating the value of the alternative.

In addition to other shortcomings of these penalty alternatives, avoidance of civil penalties cuts revenue going into the state Ecosystem Management and Restoration Trust Fund. This Fund is supposed to finance a wide range of pollution prevention and clean-up activities, ranging from Florida's fragile coral reefs to gritty industrial "brownfields" in Florida's cities.

Let's Make A Deal: Corporate Avoidance of Pollution Penalties in Florida

The State of Florida, Department of Environmental Protection ("DEP") has taken great pains over the past year to assert that the assessment of civil penalties has increased under the leadership of Secretary David Struhs. Taken as a general proposition their position is meritorious. However, as Florida PEER disclosed in the summer of 2003, the increase is largely the result of a greater concentration of enforcement resources in those areas involving small business and individuals. Larger corporations were seldom on the receiving end of such actions. DEP disputed this allegation, pointing to an enforcement case that it concluded against the Dupont Maxville Corporation in July 2003 wherein it assessed a $700,000 civil penalty against the company.

Introduction

Florida PEER recently conducted a review of thirty-four consent orders issued by DEP from 1999 to the present. All but one of these consent orders were so-called long-form consent orders, i.e. those consent orders issued in order to require more than just the payment of a civil penalty. What is evident from the review of these consent orders is that in almost every case involving violations committed by corporations the defendant was, in fact, allowed to circumvent the actual payment of civil penalties. Two mechanisms were employed in this regard: First, DEP is now liberally allowing the defendants a dollar for dollar credit against the payment of civil penalties if the defendant enters into a DEP sponsored "Pollution Prevention Program." Second, the agency is authorizing corporate defendants to sidestep the payment of civil penalties if they agree to the imposition of "In-Kind" penalties that are required by agency policy to be equal to, or exceed, one and one half times the civil penalty assessment.

Pollution Prevention Projects

Pollution Prevention Projects are programs that the violator proposes and the Department approves. Typically, the programs are of a nature that would, if adopted, assist the violator in either eliminating or reducing the discharge of pollution from the violator's facility. Various factors are considered, including, but not limited to, a consideration of whether certain processes currently used by the facility can be entirely eliminated, whether the discharge can be reduced, whether different materials may be used so as to reduce the harmful discharges, and the ability to more aggressively recycle—both before and after discharge of the pollutant. Also important is the effect of the modification(s) on the health and safety of the work force, as well as the public at large. But regardless of the details of each project, the common denominator of the program is an effort to improve the environmental friendliness of each regulated facility. Finally, the Department's Settlement Guidelines state that, "[p]otential or actual economic benefits gained by the responsible party should not be used as a basis for denying an otherwise acceptable proposal for a pollution prevention project." See, Settlement Guidelines, Section 9.d.

In-Kind Projects

So-called in-kind projects, by contrast, typically involve undertakings that more directly benefit the public at large. This can mean the donation of environmentally sensitive parcels to the State of Florida, or to a local community. In-kind projects may also include environmental restoration projects, environmental education projects and projects to improve facilities owned by insolvent third parties. When the civil penalty assessment is less than $10,000 and the violator is a private company the in-kind options are limited to environmental restoration and education.

The DEP settlement guidelines specifically require that the violator post signs notifying the public that the project is undertaken as part of an enforcement action against the violator in all environmental restoration projects. Thus, DEP does not allow profiteering from such projects.

The Affect Of The DEP Approach To Enforcement

How does this shift away from requiring the payment of civil penalties affect Floridians? Consider this. The Ecosystem Management and Restoration Trust Fund was created under Section 403.1651, Fla. Stat. While its uses are varied, it is evident from the statute that civil penalties are to be the primary funding for this trust fund. See, Section 403.1651(2)(a), Fla. Stat. Thus, a scenario that reduces the amount of collected civil penalties will eventually result in a drawdown of this very important fund. This is not an insignificant matter, since the fund, according to Section 403.1651(1), Fla. Stat., was created in order to: (a) fund the detailed planning for and implementation of programs for the management and restoration of ecosystems, (b) fund the development and implementation of surface water improvement and management plans and programs under Sections 373.451-373.4595, Fla. Stat., (c) fund activities to restore polluted areas of the state, as defined by the department, to their condition before pollution occurred or to otherwise enhance pollution control activities, (d) fund activities to restore or rehabilitate injured or destroyed coral reefs, and (e) fund activities by the DEP to recover moneys as a result of actions against any person for a violation of Chapter 373, Florida Statutes.

At first glance, Pollution Prevention Projects certainly appear to be a worthwhile endeavor. After all, no one would argue against a program that would require a company to modernize its production of wastes that are emitted into the environment. However, in many cases such modernization is already a necessity if the violator is to comply with existing

environmental laws. The Legislature and DEP adopted those laws in order to ensure that our air is clean to breathe and our water clean to drink. Thus, it is perhaps the case that allowing a company to sidestep the payment of these penalties by investing in such modernization is realistically accomplishing little more than expediting the process. And, of course, the fact that the Department's Settlement Guidelines specifically allow these projects in cases that result in an economic benefit to the violator signals a willingness to forgive past violations if the culprit(s) will just consent to obeying the existing laws.

In-kind penalties are nothing new to the Department. However, in the past they were most often used in cases involving municipalities and counties, i.e. where the violator was another governmental entity. Shifting away from civil penalty assessments in those cases generally made sense because it was taxpayer money being used to pay the penalty. In-kind penalties, on the other hand, while their implementation would likely require use of taxpayer funds, would in return also give something of value to the community. And when it is considered that community residents almost always desire a clean community, it is also true that they expect their elected officials to comply with laws meant to accomplish the same. Therefore, the need for deterrence provided by civil penalties is arguably less when dealing with such situations. But the same cannot necessarily be said of private corporations who fundamentally exist for the primary purpose of generating profit and are beholden to stockholders. That is not to say that corporations are not interested in a clean environment; rather, their primary objective is to provide a positive return on stockholder's investments.

Such a wide-scale use of in-kind penalties to offset civil penalties could also be detrimental on a different level. The Florida Legislature, in passing Section 403.1651, Fla. Stat., set up the Ecosystem Management and Restoration Trust Fund in order to accomplish certain

enumerated tasks. One of these tasks is to "fund activities to restore polluted areas of the state, as defined by the department, to their condition before pollution occurred or to otherwise enhance pollution control activities[.]" Section 403.1651(1)(c), Fla. Stat. Thus, the Legislature expected that civil penalty assessments would be used to fund these projects. The diversion of these monies from the fund necessarily deprives it of the principal and the interest that the principal will generate. This depletion affects all activities that the fund is meant to support—not just restoration of polluted areas.

There are two additional concerns associated with in-kind penalties. First, it is historically difficult to value a mitigation project precisely. For example, where property is conveyed from the violator to the state it is hardly uncommon to find significant divergence among appraisers. This is particularly true when the property is polluted, or when the property is environmentally sensitive. Were this not the case we would routinely see the Department demand that violators reimburse the Department for environmental damages resulting from the violators' actions. Yet, the Department rarely makes such demands.

Finally, the use of in-kind penalties allows the violator an opportunity to secure a tax deduction for "donated land" or "community projects" that might not otherwise have been available. Payment of civil penalties, on the other hand, is more problematic in this regard. And notably, the consent orders reviewed by PEER did not contain clauses that prevented violators from claiming such federal or state tax deductions.

Individual Case Highlights

So, exactly what did the consent orders reveal? 25 of the consent orders involved corporations. Five involved individuals. Four were against lower governments.

A. Corporate Consent Orders

Of the 25 consent orders involving corporations, seven allowed a dollar for dollar offset of the civil penalty through a Pollution Prevention Project. Eight allowed the violator to choose an in-kind project that was equal to 1.5 times the assessed civil penalty. Thus, a total of 60% of the consent orders involving corporations allowed these offsets. Of the 15 previously mentioned consent orders, two allowed the violator to choose between a Pollution Prevention Project or in-kind penalties. $1,113,904.66 in civil penalties were offset by these fifteen consent orders.

In the case of *DEP vs. Anderson Columbia*,[1] OGC No.: 98-2673 the DEP assessed a $24,000.00 civil penalty but then gave a 2/3 pro rata offset. There is also a $104,540.00 assessment that is offset if the company elects to install a baghouse. No stipulated penalties were required. At the time of the issuance of this consent order, DEP had taken five previous enforcement actions against Anderson Columbia. It has opened two additional enforcement cases since issuance of this order.

In *DEP vs. Florida Coastal Tires, Ltd.*, OGC No.: 98-2455 the DEP assessed a civil penalty of $10,000. However, under the terms of the consent order the DEP waived the entire civil penalty if the violator simply complied with the terms of the consent order.

The DEP issued a consent order to Jefferson Smurfit Corporation on April 2, 1999. The OGC No.: is 99-0231. In this case, which involves a paper mill, the violator was required to apply for a permit modification within 60 days. The purpose of the modification was to increase the effluent limits for nickel and copper. The consent order also allowed the violator to increase the size of its mixing zones (which would make it easier to comply with water quality standards

while simultaneously dumping significant volumes of polluted wastewater into the receiving water body).

Seven months later, on November 24, 1999, the DEP issued another consent order to Jefferson Smurfit Corporation. (*DEP vs. Jefferson Smurfit Corporation*, OGC No.: 99-1363) This time the DEP gave the violator 30 days to apply for a modification to its NPDES permit. This time the modification would be to increase the levels of nickel, copper, zinc and iron in its effluent. Once again, the consent order indicates that an increase of the mixing zones would be appropriate.

Over the years Jefferson Smurfit has amassed a long record of violations that have necessitated the initiation of enforcement actions by the DEP. DEP had initiated nine enforcement actions against Jefferson Smurfit prior to the two consent orders identified above. It has also initiated one enforcement action against the company since the entry of these two.

In the case of *DEP vs. Millenium Specialty Chemicals, Inc.*, OGC No. 00-139, the DEP, in addition to assessing civil penalties, set interim effluent limits for copper, iron, zinc, total coliform and fecal coliform. In-kind penalties were allowed. Then, on May 21, 2001, a modified consent order was entered to reflect a new violation on February 13, 2001. No new penalty assessments were made, however. Then, the facility experienced an overflow of industrial waste that prompted entry of a second modified consent order on December 11, 2001. This time a $30,000.00 civil penalty was assessed—but the DEP still allowed an in-kind offset. DEP had taken two enforcement actions against this company prior to this case. In fact, both of the two prior actions fell within two years of this the initiation of this matter.

[1] This consent order does not specifically allow a Pollution Prevention Project, or an in-kind project. Therefore, it was not included among the 15 corporate consent orders allowing such actions. The tenor of the consent order does suggest, however, an equivalent type of action.

Perry Lumber Company operated a saw mill and planing mill. The operations involved pressure treating that generated hazardous waste. The company closed the facility without filing a closure plan, prompting issuance of a consent order. *DEP vs. Perry Lumber Company*, OGC No.: 98-0570. There were no civil penalties assessed. The company was a defendant in one prior enforcement case brought by DEP in 1992.

The same failure to assess civil penalties occurred in *DEP vs. Price Brothers Company*, OGC No.: 01-1097. The violation involved the illegal discharge of process wastewater to surface waters. To its credit, the company has no history of prior enforcement actions by DEP.

In the much-heralded case of *DEP vs. Dupont Maxville*, OGC No.: 03-0390, the DEP issued a consent order with a civil penalty of $700,000.00. This consent order, which the DEP entered on July 31, 2003, covered violations that began in July 2002. The violations involved the illegal discharge of over 60 million gallons of untreated wastewater by the company. This case involved clear repeated violations when the corporation knew, or should have known, of the same. The violations were arguably of a nature that would have justified criminal prosecution, even though the company did not have a prior enforcement history. Yet, the Department allowed the violator to offset the entire civil penalty with an in-kind project.

Finally, one short form consent order, *DEP vs. Berry Citrus Groves*, OGC No.: 99-1911 required the payment of $1,650.00 in civil penalties due to hazardous waste violations. This corporation, like many of the above, has a long history of environmental violations. Since this was a short form consent order there were no further requirements placed on the violator. At the time that this consent order was entered, the company had been administratively dissolved for five years, according to the Florida Department of State. There were five prior DEP enforcement cases against this company, or affiliates with substantially the same directors. DEP records show

yet another prior enforcement case (OGC No.: 97-1991) against a company, Berry Citrus, Inc., that is not listed by the Florida Department of State as a corporation licensed to conduct business in the state.

B. Governments

Of the four consent orders involving governmental entities, three allowed the offsetting of the civil penalties via the use of in-kind projects.

C. Individuals

Five consent orders involving individuals were reviewed. None of the consent orders allowed the individuals to offset the civil penalties by the use of any mechanism. Three of the five consent orders assessed civil penalties.

Conclusion/Recommendations

DEP repeatedly asserted over the past year that it has significantly increased the assessment of civil penalties. This is only partially accurate. DEP has assessed the penalties; however, collection of the penalties has not always occurred as a result of the election given to corporations to engage in other projects, some of which may result in economic benefits to the companies themselves.

Historically criminal penal codes in all areas have been directed towards the goal of deterrence. In Florida we have seen a dramatic increase in this approach in many of our criminal statutes through which the state now demands set prison terms for individuals who commit

certain types of crimes. The state has increased penalties for certain types of vehicular violations such as driving under the influence.

At the same time, the state still uses diversion programs for some drug cases. And certain violations of the motor vehicle laws may be dealt with through educational programs rather than actual assessments of fines. These are just two examples of many.

Thus, what we are seeing is a trend towards increasing the severity of the penalty on repeat offenders while at the same time working towards diversionary programs for those whose brush with the law is limited.

Taken in the above context, no one would seriously argue that DEP's encouragement of corporations to become more environmentally friendly is a bad thing. We all benefit from a corporation who performs in a manner such that it obeys the environmental laws that govern us all. However, the administration of this approach appears flawed. There is a significant problem, when corporations that have repeatedly violated Florida's environmental laws are given what amounts to diversionary programs that would never be available in other areas of the law. We do not, as a society, allow a drunk driver to repeatedly violate the motor vehicle laws of this state by sending him back to school every time. That defendant is eventually incarcerated. Yet, DEP's approach to environmental enforcement is to keep sending corporate habitual offenders back to school. This approach is misguided and ultimately detrimental to Florida's environment.

Florida PEER therefore recommends that:

- Pollution Prevention Projects be allowed only for defendants who have no prior history of enforcement actions.
- DEP should not allow defendants to realize direct economic gain from a Pollution Prevention Project.

- In-Kind Projects be allowed only for defendants who have no prior history of enforcement actions.
- If DEP still wishes to use Pollution Prevention Projects or In-Kind Projects for repeat offenders the option should still be available, but only as an addition to the basic penalty assessment called for in DEP's Settlement Guidelines and Penalty Matrix.
- Consent orders should specifically state that the defendant is not allowed to use participation in a Pollution Prevention Project or In-Kind Project as the basis to claim deductions on state and/or federal taxes.
- Consent orders should require that corporate annual reports identify cases in which the corporation has been the subject of an environmental action so that the corporate shareholders will be aware of the company's willingness to obey environmental laws.
- Cases involving repeated violations of Florida's environmental laws should result in criminal prosecution. Section 403.161(3), Fla. Stat., states that a violation of Section 403.161(1)(a), Fla. Stat., constitutes a third degree felony punishable by five years imprisonment and a fine of up to $50,000. Section 403.161(1)(a), Fla. Stat., states that it is a violation "[t]o cause pollution, except as otherwise provided in this chapter, so as to harm or injure human health or welfare, animal, plant, or aquatic life or property." Thus, violations (particularly repeated violations) of Florida's environmental laws that are designed to protect human health or welfare, animal life, plant life, or aquatic life should be prosecuted if the agency is truly intent on seeing an increase in compliance.

- For its part, on a regular basis DEP should publish a list of enforcement actions that it has taken and include in that list a summary or synopsis of the violations involved in each case and the action taken by the agency.

Since Pollution Prevention Projects and In-Kind Projects are directed at an effort to make corporations more cognizant of environmental issues it would be logical to direct this training at those who initially need retraining in order to change. For those who exhibit an intent to repeatedly violate the laws of this state it is doubtful that such training will have long-term positive effects. Thus, DEP must strictly adhere to its penalty matrix, and penalty assessments must take into account and recover the economic benefit of noncompliance enjoyed by the corporation.

Every opportunity to benefit from involvement as a defendant in an enforcement case must be removed from the defendant. The most obvious concern is that of tax deductions, which must not be allowed. In addition, however, the shareholders who invest in public corporations should be aware of the environmental policies of corporations—particularly those who repeatedly violate the law. Wise investors will move their investments to companies whose environmental policies do not subject the companies to increased liabilities that endanger assets.

Criminal prosecution is a necessity. It is not enough to only prosecute individuals caught dumping trash in the woods. Prosecutors have long known the benefits received by society from prosecuting a handful of high value corporate defendants. It significantly increases the attention that others give to the particular area of law in question. The same applies to environmental enforcement with respect to corporations who discharge millions of gallons of waste into Florida's surface waters. Not until they understand that their actions are criminal and could land

them on the receiving end of a criminal indictment will some corporations finally decide to obey the law.

Finally, DEP should publish a list of the formal environmental actions that it has taken. This list should include the identities of the offenders, the violations and the remedies exacted. Publication of this list, perhaps on the agency's website, would go a long way towards educating the public about the violators of Florida's environmental laws. It would also tell the public how the agency is approaching those cases so that the public can decide for itself whether the approach taken is appropriate.