UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

July 12, 2018

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In Reply Refer to:
EPA Complaint # Nos. 01R-09-R4 & 07R-10-R4

Noah Valenstein, Secretary
Florida Department of Environmental Protection
3900 Commonwealth Boulevard, M.S. 49
Tallahassee, FL 32399

Re: Resolution and Closure of Administrative Complaints, EPA File Nos. 01R-09-R4 & 07R-10-R4

Dear Secretary Valenstein:

This letter is to notify you that the U.S. Environmental Protection Agency's (EPA) External Civil Rights Compliance Office (ECRCO), previously known as the Office of Civil Rights (OCR), is resolving and closing, as of the date of this letter, two administrative complaints filed with EPA. The first of these, EPA # 01R-09-R4, was received on January 22, 2009; the second, EPA # 07R-10-R4, was received on January 20, 2010. Both complaints alleged discrimination on the part of the City of St. Augustine (City) and by the Florida Department of Environmental Protection (FDEP). The consolidated complaints were partially accepted for a joint investigation on September 9, 2010. ECRCO accepted the complaints for investigation against the FDEP, but rejected the complaints against the City, based on a lack of EPA financial assistance to that entity[1] The complaints generally alleged that FDEP violated Title VI of the Civil Rights Act of 1964, as amended, 42 United States Code (U.S.C.) §§ 2000d *et seq.* (Title VI) and the EPA's nondiscrimination regulation found at 40 Code of Federal Regulations (C.F.R.) Part 7.

[1] EPA's nondiscrimination regulation requires that a complaint accepted for investigation must meet four jurisdictional requirements. One of these is that the complaint must allege that the discriminatory act was committed by an applicant for, or recipient of, EPA financial assistance. *See* 40 C.F.R. § 7.15.

ECRCO is responsible for enforcing several federal civil rights laws that prohibit discrimination on the bases of race, color, national origin (including limited-English proficiency), disability, sex, and age in programs or activities that receive financial assistance from the EPA. After a careful assessment of the available information, including the information presented by complainants through their complaints as well as numerous subsequent communications, ECRCO determined that its investigation would focus on the following issue:

- Whether FDEP treated the historically African American Lincolnville Neighborhood, within the City of St Augustine, differently, on the basis of race, with respect to the assessment and enforcement of penalties related to the sewage spills into the Maria Sanchez Lake and the San Sebastian River than it treated other areas in the state impacted by similar untreated wastewater spills.

The complaint also appeared to allege, and ECRCO originally accepted for investigation, that FDEP discriminated against the historically African American Lincolnville Neighborhood on the basis of race by not conducting a health assessment and/or investigation as to the health effects on the African American residents of this neighborhood as a result of pollution and contamination resulting from spills, including the possible relationship between spills, e-coli contamination and infant mortality. However, after repeated attempts by ECRCO to reach out to complaints in order to clarify the allegation, only one[2] of the five complainants responded, but did not respond to our specific questions and instead provided information on other complaints that had been submitted. ECRCO asked the complainant for information regarding the alleged relationship between the sewage pills and the health assessment. The complainant did not provide clarification and did not provide sufficient factual information regarding complainant's belief that there was connection between the spills, health effects on the community and FDEP's failure to investigate the health effects.[3] In light of the available information, ECRCO did not conduct any further investigation of different treatment on the basis of race on the merits of this allegation because the allegation was not sufficiently grounded in fact. Accordingly, ECRCO is administratively closing the investigation of this issue as of the date of this letter.

With respect to the issue investigated by ECRCO, whether FDEP treated the historically African American Lincolnville Neighborhood, within the City, differently, on the basis of race, with respect to the assessment and enforcement of penalties related to the sewage spills into the Maria Sanchez Lake and the San Sebastian River, than it treated other areas

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[2] Between October 19, 2015 and June 23, 2016, ECRCO made six attempts, by telephone, email, and letter, to reach Complainants and to obtain additional information to understand their claim and continue the investigation. On August 11, 2016, one of the Complainants was interviewed. However, his comments did not provide support for a link between the sewage spillage into Lake Maria Sanchez and/or the San Sebastian River and alleged poor health outcomes.

[3] In addition, ECRCO's preliminary investigation concluded that FDEP does not conduct health effect investigations/assessments/analysis for any populations, neighborhoods, or state areas. According to FDEP response to EPA Request for Information (May 24, 2011), FDEP orders or performs testing of waters for potential health risks on a case by case basis. However, the analysis into actual health impacts traditionally lies within the jurisdiction of the State of Florida's Department of Health (DOH).

in the state impacted by similar untreated wastewater spills, ECRCO finds insufficient evidence to conclude that FDEP violated Title VI and EPA's nondiscrimination regulation.

Background / History

St. Augustine is a city in the northeastern region of Florida, and the county seat of St. Johns County.[4] According to the 2010 Census, African Americans comprised 11.6% of the population of St. Augustine,[5] and 5.6% of the population of St. John's County.[6] The City operates the St. Augustine Wastewater Treatment Facility, located at 501 Riberia Street and the attached wastewater collection system. The facility is currently permitted to discharge 4.950 million gallons per day of treated waste water into the Matanzas River.[7]

Lincolnville is a Historic District located within St. Augustine on a peninsula of land bound by the San Sebastian and the Matanzas Rivers. Maria Sanchez Lake is contained within the peninsula south-east of Lincolnville. The community was founded by freed black slaves after the Civil War. The National Park Service, which maintains certain sites within Lincolnville, identifies it as "St. Augustine's most prominent historically black neighborhood." In the 20th century, it was the local focal point for the Civil Rights Movement.[8] At approximately the time of the complaint filing, the population of the census tract in which Lincolnville is located was 18.8% African American and 77% White.[9] The Lincolnville neighborhood has a higher percentage of African American residents than the City or County as a whole.

FDEP is the State's lead agency for environmental management and stewardship, protecting Florida's air, water and land. FDEP is divided into three primary areas: Land and Recreation, Regulatory, and Ecosystem Restoration.[10] The Regulatory programs safeguard natural resources by overseeing permitting and compliance activities that protect air and water quality, and manage waste cleanups.[11] The Division of Water Resource Management implements state laws that protect the quality of Florida's water, rivers, lakes, estuaries and wetlands, and preservation of the state's beach and dune systems.[12]

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[4] http://citystaug.com /

[5] American Fact Finder Profile of General Population and Housing Characteristics 2010. St. Augustine Florida (2010 Demographic Profile Data (April 6, 2018).

[6] American Fact Finder. Race and Hispanic or Latino Origin: 2010. St. John's County, Florida. (2010 Census Summary File (April 6, 2018)).

[7] FDEP Consent Order OGC file No. 09-3590 (November 13, 2009).

[8] https://www.nps.gov/nr/travel/geo-flor/28.htm

[9] 2010 Census Information for Census Tract 204, St. John (April 11, 2018).

[10] https://floridadep.gov/about-dep

[11] https://floridadep.gov/about-dep

[12] https://floridadep.gov/regulatory

Maria Sanchez Lake

On May 17, 2009, an unusually powerful storm system caused over 10 inches of rain in six counties including St. Johns. The downpour caused a sanitary sewer overflow into the Maria Sanchez Lake. Other sanitary sewer overflow incidents were reported in the same general area during this period.[13] Among the reported spills was an overflow of 750 gallons, according to FDEP records, from a manhole cover at Cordova Court and St. Francis Street that affected the "nearby lake."[14] Maria Sanchez Lake is located within the south-east corner of the Lincolnville neighborhood and immediately south of this intersection. On the same date, two other overflows from manhole covers for which the City was named as the responsible entity, occurred at two other locations, specifically an 1,850 gallons overflow was reported at the intersection of South Street and Washington Street, and a 500 gallons overflow was reported from a manhole cover on Pine Street. All of the overflows were attributed by the FDEP as being "due to heavy rains and [t]he hydraulic overload of their system.[15] The City responded by using a vacuum truck to relieve hydraulic pressure to the system.[16]

On May 22, 2009, the Governor of the State of Florida issued an Executive Order (EO), #09-126, declaring a state of emergency in several counties, including St. Johns.[17] As part of the EO, the Governor delegated to local officials and governmental agencies the authority to waive or deviate from their respective rules, ordinances or orders in response to circumstances created by the storm. No consent order or other formal enforcement action was taken in response to the May 17, 2009 storm in any of the counties or areas affected by CO#09-126, including any areas within St. Johns County.

San Sebastian River

On May 30, 2009, in a separate incident, FDEP received notification through the State Warning Point system that a St. Augustine wastewater pipeline running beneath the San Sebastian River had erupted. The estimated outflow at that time was between 800,000 and 1.1 million gallons.[18] Reports of the incident state that the pipeline break was "approximately 75 feet from the shore in a salt marsh that extends from the shore line approximately 250 feet to the San Sebastian River."[19] FDEP and the City of St. Augustine took water samples after the spill and found "elevated levels of Fecal Coliform counts above Class III Marine water quality standards" in the San Sebastian River for a three-day period.[20]

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[13] FDEP response to EPA Request for Information page 3 (May 24, 2011).
[14] FDEP response to EPA Request for Information: Spills with District Response (May 10, 2012).
[15] FDEP response to EPA Request for Information: FDEP spreadsheets of the sanitary sewer overflows (May 24, 2011).
[16] FDEP response to EPA Request for Information: FDEP spreadsheets of the sanitary sewer overflows (May 24, 2011).
[17] FDEP response to EPA Request for Information page 3 (May 24, 2011).
[18] FDEP records submitted in response to EPA Data Request dated (May 24, 2011).
[19] FDEP Consent Order OGC file No. 09-3590 page 2 (November 13, 2009).
[20] FDEP response to EPA Request for Information (May 24, 2011).

The City staff implemented "flow diversion" to reduce the outflow, estimating that they achieved a reduction of 300,000 gallons per day. The City dispatched vacuum trucks to the site within an hour of the report of the break, and posted signs advising the public to avoid contact with the water due to contamination with raw sewage. Seven tanker trucks were used to remove the contaminated water. [21]

On June 2, 2009, the City reported that it had shut off pumping stations west of the compromised pipe and successfully removed the damaged section. By 8:00 pm on June 2, 2009 the City reported that the permanent repair of the pipe had been completed. The City reported that water samples were taken throughout the event and that as of June 3, 2009, sampling results "showed that restrictions could be lifted."[22]

On November 13, 2009, St. Augustine's City Manager entered into a Consent Order (CO) with the FDEP containing 11 remedial actions which included conducting an inventory of all wastewater pipes crossing over or under waters of the state and planning for and completing replacement of any segments which failed an integrity check. In addition, FDEP required the City to impose restrictions on boats traveling near the wastewater collection system, as it was theorized that contact with a boat may have led to the rupture which occurred on May 30, 2009. FDEP directed the City to pay $30,000 in civil penalties and to pay $3,000 to reimburse FDEP for costs incurred during the event.[23] In addition, FDEP offered the City the opportunity to off-set the amount of the penalty by "implementing an in-kind penalty project that is valued at one and a half times the penalty amount." [24]

Chapter 120, Florida Statutes, requires that all COs entered into by FDEP be made available for public inspection and provides that persons who are not parties to the CO may file a petition requesting an administrative hearing in order to challenge the provisions of the CO. Accordingly, the subject CO was made available to the public for review for 21 days. At the request of Complainants, the FDEP extended the deadline for public comment twice, finally concluding the public comment period on January 7, 2010. On January 7, 2010, Complainants filed a petition with FDEP arguing the CO was insufficient to address the City's environmental violations and asking that it be rejected. FDEP granted various requests for extensions of time and issued orders dismissing the petitions with leave to amend. No submittals were made by the Complainants to amend their petition and FDEP subsequently closed the matter. The CO went into effect on February 22, 2010. FDEP states that the City has complied with its requirements of the CO.

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[21] Letter to Khalid Al-Nahdy, Wastewater Manager, FDEP, from Todd J. Grant, Deputy Director of Public Works, City of St. Augustine, dated August 27, 2009.
[22] *Id.*
[23] FDEP Consent Order OGC file No. 09-3590 (November 13, 2009).
[24] *Id.* at paragraph 12.

ECRCO's Investigation

In conducting this investigation, ECRCO reviewed available information, including the original complaints submitted to ECRCO, FDEP's responses to ECRCO's requests for information, and all other supplemental information provided to ECRCO by Complainants and the Recipient through conversations, letters, and emails pertaining to the issue accepted for investigation. ECRCO reviewed FDEP Guidance, relevant Executive Orders, Consent Orders[25] and information about FDEP-issued COs in the FDEP Electronic Document Management System (OCULUS) database.[26] ECRCO also reviewed penalty calculation worksheets and other documents related to this case and other COs.

Legal Standard

ECRCO's investigation was conducted under the authority of Title VI of the Civil Rights Act of 1964, and EPA's nondiscrimination regulation (40 C.F.R. Part 7) and in a manner consistent with ECRCO's Case Resolution Manual.[27] EPA's regulation at 40 C.F.R. § 7.35(a) states, in relevant part, that a recipient shall not directly or through contractual, licensing, or other arrangements on the basis of race, color, national origin or, if applicable, sex: 1) Deny a person any service, aid or other benefit of the program or activity; 2) Provide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program or activity; 3) Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program or activity; 4) Subject a person to segregation in any manner or separate treatment in any way related to receiving services or benefits under the program or activity. . ." .

Federal civil rights laws prohibit recipients from intentionally discriminating in their programs and activities based on race, color, or national origin, disability, age, or sex. This is also referred to as disparate treatment. A claim of intentional discrimination alleges that a recipient intentionally treated individuals differently or otherwise knowingly caused them harm because of their race, color, or national origin, disability, age or sex. Intentional discrimination requires a showing that a "challenged action was motivated by an intent to discriminate."[28] Evidence of "bad faith, ill will or any evil motive of the part of the [recipient] is not necessary.[29] Evidence in a disparate treatment case will generally show that the recipient was not only aware of the complainant's

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[25] FDEP submitted a total of 63 Consent Orders (CO) in response to EPA's Request for Information. The COs provided were in long and short forms. These COs included spills in the following categories: S1 – Untreated DW Spills; S2 – Untreated DW Spills plus other DW issues, S3 – Other DW spills (treated or partially treated), and DW – Domestic Wastewater.

[26] The reviewed information included: FDEP Guidelines for Characterizing Wastewater Violations (January 2008 and updated on October 2013); Settlement Guidelines for Civil and Administrative Penalties (July 2007); Wastewater Program Enforcement Response Guide (January 2006).

[27] Case Resolution Manual (Jan. 2017), at https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf.

[28] *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993).

[29] *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984).

protected status, but that the recipient acted, at least in part, because of the complainant's protected status.[30]

Intentional discrimination occurs also when a policy or decision that is facially neutral (for instance, if the language used does not explicitly differentiate between groups on the basis of race) is administered by the recipient in a discriminatory manner that is motivated, at least in part, by the race, color, national origin, disability, age or sex of the alleged victims of discriminatory treatment.

Whether FDEP treated the historically African American Lincolnville Neighborhood, within the City of St. Augustine, differently, on the basis of race, with respect to the assessment and enforcement of penalties related to the spills into the Maria Sanchez Lake and the San Sebastian River than it treated other areas in the state impacted by similar untreated wastewater spills.

Alleged FDEP Discriminatory Treatment with Respect to Sanitary Sewer Overflow into the Maria Sanchez Lake

Complainants alleged that the FDEP discriminated against the African American residents of the Lincolnville neighborhood by failing to enforce water quality standards equally by imposing large fines elsewhere but no meaningful fine or enforcement action against the City of St. Augustine in response to the overflow of sanitary sewage system into Maria Sanchez Lake,[31] which is located within the south-east corner of the Lincolnville neighborhood.

As previously mentioned, ECRCO determined that on May 17, 2009, an unusually high storm system caused over ten inches of rain to fall in six counties, including St. Johns, which resulted in a sanitary sewer overflow into the Maria Sanchez Lake, as well as other sanitary sewer overflow incidents in this and other counties.[32]

The investigation revealed that "... in response to extraordinary events such as hurricanes, the Governor's office has the authority to issue an Executive Order (EO) and the Secretary's office has the authority to issue an EO to assist regulated facilities in taking necessary steps towards recovery." In addition, according to FDEP's Wastewater Program Enforcement Response Guide ("Response Guide") when an Emergency Order has been issued, regulatory agencies may consider those "factors which may mitigate the Department's enforcement response," to environmental violations including "spills beyond the reasonable control of the utility."[33] The Response guide also states that "in addition to the events which may result in an Emergency Order, this may also include

[30] *See e.g., Washington v. Davis*, 426 U.S. 229, 242 (1976) (discussing analysis of intentional discrimination generally).
[31] Complainant's Letter to Helena Wooden-Aguilar dated January 10, 2010.
[32] FDEP response to EPA Request for Information at page 3 (May 24, 2011).
[33] FDEP Wastewater Program Enforcement Response Guide (III. GI)

severe storms, tornados, wild fires, lightning strikes, and third party actions including vehicular accidents or vandalism."[34]

As a result of the excessive rainfall and sanitary sewer overflows occurring between May 17, 2009 and May 22, 2009, then Florida Governor Charlie Crist, issued EO #09-126 declaring a state of emergency in Brevard, Clay, Duval, Flagler, Lake, Nassau, Orange, Putnam, Seminole, St. Johns, and Volusia counties; therefore, FDEP "determined that formal[35] enforcement was not warranted in the Maria Sanchez Lake in accordance with the Department's Response Guide."[36] This EO in 2009 "would have potentially overridden enforcement actions against spills during that time period."[37]

ECRCO reviewed FDEP's record of reported spills and overflows and found that between May 17 and May 22, 2009, FDEP received reports of 31 overflow incidents in the counties to which EO #09-126 applied and 28 of these incidents were storm-overflows due to rain, including the Maria Sanchez Lake overflow. Based on a review of the available data, ECRCO found that FDEP used informal enforcement to resolve 20 of the 28 spills.

ECRCO further reviewed the FDEP's 2009 records of all Consent Decrees issued in response to untreated domestic waste spills. ECRCO determined that FDEP did not take formal enforcement actions against any of the entities which experienced storm-related overflows during the period covered by EO #09-126. In addition, the investigation found that FDEP implemented only informal enforcement actions in response to the 20 spills reviewed by ECRCO, including the spill into Maria Sanchez Lake, in accordance with the FDEP's Wastewater Program Enforcement Response Guide.[38]

Therefore, ECRCO found that the treatment of these 20 spills to which EO #09-126 applied was consistent with the treatment of the Maria Sanchez Lake spill, in that no formal enforcement was taken, regardless of the racial make-up of the neighborhood and/or county. There is insufficient evidence that FDEP treated its response to the sanitary sewer overflow into Maria Sanchez Lake differently, on the basis of race.

Alleged FDEP Discriminatory Treatment with Respect to Sewage Spillage into the San Sebastian River

On May 30, 2009, at 7:30 PM, the City of St. Augustine Wastewater Treatment Facility, located at 501 Ribera Street, contacted the State Warning Point system to "report that a

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[34] FDEP Wastewater Program Enforcement Response Guide (III. GI).

[35] Enforcement Manual Chapter 3 Enforcement Options: Informal Enforcement e.g.: an inspection; phone call; non-compliance letter and/or warning letter. Formal Enforcement e.g.: Consent Order https://floridadep.gov/ogc/ogc/content/enforcement-manual .Also, Informal and Formal Actions Summary of Guidance and Portrayal on EPA Websites https://www.epa.gov/compliance/informal-and-formal-actions-summary-guidance-and-portrayal-epa-websites

[36] FDEP response to EPA Request for Information (May 24, 2011).

[37] FDEP response to EPA Request for Information (May 10, 2012).

[38] FDEP response to EPA Request for Information (2009 Spill with District response) (May 10, 2012).

pipeline crossing under the San Sebastian River at Oyster Creek had erupted and that untreated sewage was being discharged into the river."[39] The discharge spanned the time period from at least as early as "May 30, 2009, until the afternoon of June 1, 2009, when the facility was able to fit a temporary sleeve over the break in the pipeline."[40] This facility is permitted to discharge 4.950 million gallons per day of **treated** wastewater, but only into the Matanzas River.[41] However, due to the break in the pipeline, "approximately 611,294 gallons of untreated domestic wastewater was discharged into the San Sebastian River,"[42] which flows to the west of Riberia Street for the entire length of Lincolnville.

As previously stated, the release of untreated sewage water into the St. Sebastian River resulted in the FDEP issuing a Consent Order which required the City to conduct infrastructure improvements and pay a penalty totaling $33,000.[43] Complainants alleged that the FDEP "took no meaningful enforcement action, with a small fine proposed," [44]thus, treating this spill differently from spills involving non-minority neighborhoods, resulting in discriminating against the African American residents of Lincolnville. ECRCO sought to determine whether the enforcement action taken by FDEP in this instance complied with established procedures for calculating penalties and the procedures were similarly applied regardless of the racial demographics of communities impacted by untreated wastewater spills.

FDEP's Guidance

The investigation revealed that FDEP "tracks citizen complaints of sanitary sewer overflows through the State Warning Point System and complaints made directly to the Department" and that "if the subject of the complaint falls within the FDEP's jurisdiction," then FDEP "investigates the matter and is required to take the appropriate enforcement action."[45] In addition, FDEP guidelines state that "when the decision has been made to pursue enforcement actions for a wastewater violation(s), staff should use Environmental Litigation Reform Act (ELRA), DEP Directive 923[46], the DEP Enforcement Manual and program-specific guidance to characterize the violations and calculate the appropriate penalty." FDEP staff are directed to use "penalty amounts calculated to be $10,000 or less[47], then the amount should be used as the baseline for settlement discussions"[48]

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[39] FDEP Consent Order OGC file No. 09-3590 page 2 (November 13, 2009).
[40] FDEP Consent Order OGC file No. 09-3590 page 2 (November 13, 2009).
[41] FDEP Consent Order OGC file No. 09-3590 page 2 (November 13, 2009).
[42] FDEP Consent Order OGC file No. 09-3590 page 2 (November 13, 2009).
[43] FDEP Consent Order OGC file No. 09-3590 page 2 (November 13, 2009).
[44] *See* Complainant's Letter to Helena Wooden-Aguilar dated January 10, 2010.
[45] FDEP response to EPA Request for Information (May 24, 2011).
[46] FDEP Guidelines for Characterizing Wastewater Violations at 5 (January 2008).
[47] If the total penalty amount calculated is more than $10,000 per day, then the General Guidelines contained in the remainder of the guidance for characterizing wastewater violations should be used instead, as the basis for penalty calculations, unless the District Director decides to cap the penalty at $10,000. If the ELRA NOV is the enforcement document chosen to pursue penalties, then staff shall follow ELRA (Section 403.121 F.S.), DEP Directive 923 and the guidance contained in this section.
[48] FDEP Guidelines for Characterizing Wastewater Violations at 5 (January 2008).

According to the FDEP's Wastewater Program Enforcement Response Guide[49] ("Response Guide"), "the implementation of a particular enforcement response should be determined by evaluating: i) the magnitude and duration of the violation; ii) the impact of the violation on the environment and public health; and iii) the compliance history and good faith of the facility."[50]

The Response Guide provides the following list as a range of enforcement options that can be selected depending on the severity of the violation:

- Phone Call/Electronic Mail
- Noncompliance Letter
- Warning Letter
- Enforcement Meetings
- Consent Order
- Notice of Violation
- Short Form Consent Order
- Request for Payment of Stipulated Penalties
- Pollution Prevention and In-Kind Penalty Projects
- Civil Action
- Criminal Referrals
- Emergency and Executive Orders.[51]

In addition, under ELRA the FDEP has the authority to impose up to a total of $10,000 per day in civil penalties in one administrative action for most regulatory violations as provided in ELRA.[52]

Consent Order (OGC #09-3590) between FDEP and the City of St. Augustine, San Sebastian Spill

ECRCO found that on November 13, 2009, FDEP issued a Consent Order (OGC #09-3590) between FDEP and the City of St. Augustine, finding "violations stemming from a discharge on May 30, 2009, of untreated wastewater into the San Sebastian River from a ruptured 10-inch force main operated by the City of St. Augustine." [53]

ECRCO analyzed whether FDEP had imposed "no meaningful enforcement action" and a "small fine" as alleged and as compared to enforcement actions and/or fines in non-minority neighborhoods. During the investigation, FDEP supplied an overview of 63

[49] The Response Guide "recommends enforcement responses that are timely and appropriate in relation to the nature and severity of the violation and the overall degree of noncompliance." Response Guide at 1. In addition, it serves as a "guide for wastewater program staff to consistently and uniformly apply to comparable levels and types of noncompliance." *Id.*
[50] Response Guide at 1 (January 2006).
[51] *Id.* at 2-6.
[52] FDEP DEP 923 Settlement Guideline for Civil and Administrative Penalties (July 2007) at 1.
[53] FDEP to EPA Request for Information (May 24, 2011).

Consent Orders issued by the FDEP between 2009 and 2011. [54] The universe included consent orders issued because of spills involving treated, partially treated and untreated domestic wastewater spills. ECRCO reviewed the Consent Orders issued by FDEP in all spills, including those affecting non-minority neighborhoods to evaluate the spill amount and duration, the penalties imposed and the racial demographic of the area where the spill occurred.

ECRCO reviewed the penalty computation worksheet[55] FDEP used to determine what enforcement action should be taken against the City of St. Augustine in this instance and found that the worksheet[56] identified the "Violation Type" as a "[f]ailure to meet permit imposed effluent Limitations and/or water quality standards." The violation was categorized as "major"[57] which is defined as a spill which "results in a violation of water quality criteria, or toxicity standards for class 1, Class II or Class III surface water." The penalty computation worksheet further classified the "extent of deviation" caused by the spill as major, which is defined as a "violation of a limit for any other parameter by 80 percent or more." The penalty range for this type of harm was $8,000 to $10,000 per day. FDEP's contemporaneous paperwork demonstrated that the fine imposed for the San Sebastian spill was $33,000, ($10,000 per day for three days, plus fees.)

Because the San Sebastian spill involved untreated domestic wastewater, the investigation was particularly focused on the forty-six (46) similar spills of untreated domestic wastewater[58] to which FDEP responded. This category included spills involving sanitary sewer overflow, untreated wastewater, and discharge of raw sewage. ECRCO reviewed all 46 COs related to the release of S1- untreated domestic wastewater, and

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[54] EPA reviewed all instances from 2009 through 2011 in which FDEP entered in to a CO to resolve wastewater discharge violations.

[55] The FDEP Settlement Guideline for Civil and Administrative Penalties (July 2007) includes a penalty matrix which recognizes two factors by which the severity of a spill incident is evaluated. These are: "(a) the potential for environmental harm; and (b.) the extent of deviation from a statutory or regulatory requirement. Incidents are classified as reflecting one of three levels of potential for harm MAJOR: violations that actually or are reasonably expected to result in pollution in a manner that represents a substantial threat to human health or the environment; 2. MODERATE: violations that actually or are reasonably expected to result in pollution in a manner that represents a significant threat to human health or the environment; 3. MINOR: violations that actually or are reasonably expected to result in minimal or no pollution. In addition, incidents are classified as reflecting one of three levels of deviation from FDEP regulation. These are: 1. MAJOR: the violator deviates from the requirements of the law to such an extent that there is substantial noncompliance. 2. MODERATE: the violator deviates from the legal requirements of the law significantly but some of the requirements are implemented as intended. MINOR: the violator deviates somewhat from the requirements of the law but most of the requirements are met."

[56] Penalty Computation Worksheet: City of St. Augustine: Permit #FL0021938.

[57] FDEP DEP 923 Settlement Guideline for Civil and Administrative Penalties FDEP (July 2007) at 5: Major: violations that actually are or are reasonably expected to "result in pollution in a manner that represents a substantial threat to human health or the environment."

[58] ECRCO found that 46 out of the 63 COs were characterized as "S1 – Untreated DW Spills." This category included: sanitary sewer overflow, untreated wastewater, raw sewage, and untreated domestic wastewater. The spills occurred in different locations such as: wetlands, ground surface, canal, overflow into a storm water pond, street, retention areas, lift station areas, intercostal waterways, storm water drainage wells, manholes, surface water, and lakes.

evaluated the penalties imposed and the adjustment factors implemented, if any, in relation to the size, duration and severity of each event.

With respect to the San Sebastian spill, the investigation revealed that FDEP fine of $10,000 per day for each day that the spill was in effect, was the maximum daily penalty permitted by FDEP guidelines for responding to spills. ECRCO found no evidence that FDEP imposed a fine in excess of $10,000 per day on any entity in any area of the state during the period under review. ECRCO's investigation found that FDEP operates under regulations which define adjustment factors and allows FDEP to cite such factors as a reason to reduce a penalty they have imposed. FDEP did not use adjustment factors to reduce the penalty imposed upon the City of St. Augustine for the San Sebastian spill. However, ECRCO found that FDEP applied adjustment factors to reduce the penalty imposed in other incidents involving other areas of the state.

Further, the investigation revealed that, during the three-year period under review, only three entities received overall fines for wastewater spills that were larger than that imposed upon St. Augustine in response to the San Sebastian Spill. ECRCO reviewed the available information and found that the duration, amount of discharge and extent of impact of the three spills was significantly different from that of the San Sebastian spill.

- The highest fine assessed in the group of consent orders reviewed was $192,000 ($187,400 as a penalty and $5,500 as reimbursement for costs), for multiple location[59] discharges, assessed against the Miami-Dade Water and Sewer Department, (OGC# 101941). The spill associated with this penalty involved 5.6 million gallons of untreated wastewater, contaminating surface waters, ground waters, roadway swales, and a residential neighborhood. The multiple location discharge occurred within Miami-Dade County, Florida.[60] According to the 2010 census, Miami-Dade County had a population of 2,496,435 of which 15.4 percent were non-Hispanic White, 18.96 percent were Black or African American, 1.5 percent were Asian,[61] and 65 percent were Hispanic, of any race. [62]
- The second highest penalty assessed was initially $113,000[63] for multiple location discharges assessed against the City of Tallahassee for the discharge of 1,773,054

[59] FDEP DEP 923 Settlement Guideline for Civil and Administrative Penalties FDEP (July 2007). With respect to "multiple location" penalties, "a penalty should be calculated for every violation which constitutes an independent and substantially distinguishable violation, or when the same person has violated the same requirement in substantially different locations."

[60] County-level demographics were used due to the fact that the discharges occurred in multiple locations within the County.

[61] American Fact Finder: Community Facts; Profile of General Population and Housing Characteristics: Miami-Dade County, Florida: 2010 Demographic Profile Data (April 11, 2018).

[62] Percentages may total more than 100% because persons who may self-identify may be, for example, Hispanic and white or Hispanic and black.

[63] In this instance, the penalty was subsequently reduced by $76, 500, in light of several adjustment factors, in accordance with the provisions of FDEP DEP 923 Settlement Guideline for Civil and Administrative Penalties FDEP (July 2007). The fine assessed against the City of Tallahassee was reduced in consideration of actions already taken by the City, including the installation of manhole inserts to reduce inflow; construction of a bypass connection; the addition of an emergency generator, the relocation of a

gallons of untreated wastewater (OGC # 82519). The multiple location discharges occurred in Leon County, Florida [64] and according to the 2010 census this area had a population of 275,487 of which 59.3 percent were non-Hispanic White, 30.3 percent were Black or African-American, 2.9 percent were Asian and 5.6 percent were Hispanic, of any race.[65]

- The third highest penalty was initially $42,600.00[66] for multiple location discharges (OGC #90276) assessed against Emerald Coast Utilities for the discharge of 215,000 gallons of untreated wastewater. In this instance, there were 30 unauthorized discharges from 2006 to 2009, of which eight were major violations and two (2) were considered moderate spills. The discharge occurred in Escambia County, Florida[67] and according to the 2010 census this area had a population of 297,619 of which 66.2 percent were non-Hispanic White, 22.9 were Black or African -American, 2.7 were Asian[68] and 4.7 were Hispanic, of any race.
- The fourth highest penalty of the 46 COs reviewed, involved a multi-day[69] discharge and was the subject penalty, issued against St. Augustine. As previously stated, this spill involved a total of 611,294 gallons of untreated domestic wastewater released into the San Sebastian River. In this case there were no adjustment factors and the penalty assessed totaled $33,000.

ECRCO's investigation determined that the fines appear to be assessed according to the factors by which FDEP was required to assess penalties.[70] ECRCO found insufficient evidence to support that the issuance of the penalties was based on discriminatory intent, as, the penalties were the product of consistent application of the same procedural processes and substantive standards identified in FDEP policies and orders regardless of the demographics of the communities in which the untreated wastewater spills occurred.

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pump station, and numerous other system improvements. The final penalty assessed after all these improvements had been considered was $36,500.

[64] County-level demographics were used due to the fact that the discharges occurred in multiple locations within the County.

[65] American Fact Finder: Community Facts: Profile of General Population and Housing Characteristics: Leon County: 2010 Demographic Profile Data (April 11, 2018).

[66] However, a 50% good faith efforts reduction was applied resulting in a total of $21,3000.00 in civil penalties.

[67] County-level demographics were s used in light of the multiple location discharges within the County.

[68] American Fact Finder: Community Facts: Profile of General Population and Housing Characteristics: Escambia County: 2010 Demographic Profile Data (April 11, 2018)

[69] FDEP DEP 923 Settlement Guideline for Civil and Administrative Penalties FDEP (July 2007),With respect to "multi-day" penalties, these should be used where "daily advantage is being gained by the violator for an ongoing violation; where the violation is causing daily adverse impacts to the environment or the program, or where the violator knew or should have known of the violation after the first day it occurred and either failed to take action to mitigate or eliminate the violation or took action that resulted in the violation continuing; or where economic benefit is being gained on a daily basis."

[70] ECRCO also found that in 2010, at request of one of the Complainants, the EPA Region 4 Criminal Investigation Division (CID) conducted a criminal investigation into whether there was any intentional misconduct about several allegations against the City of St. Augustine related to the discharges referred to in the complaint. The CID investigator found no evidence of criminal conduct on the part of the City. Also, CID found during their investigation that FDEP's criminal office had conducted its own criminal investigation of the actions by the City (and found none) before referring the matter to its civil office (which resulted in the Consent Order at issue in the complaint). The CID investigator believed that FDEP had conducted a thorough criminal investigation.

Conclusion

Ultimately, there must be evidence of a racially discriminatory intent or purpose to show intentional discrimination under Title VI. However, the totality of the relevant facts and evidence does not establish disparate treatment discrimination here.[71] As a result, ECRCO finds insufficient evidence to conclude that FDEP violated Title VI and EPA's nondiscrimination regulation in with respect to whether FDEP treated the historically African American Lincolnville Neighborhood, within the City of St. Augustine, differently, on the basis of race, with respect to the assessment and enforcement of penalties related to the spills into the Maria Sanchez Lake and the San Sebastian River than it treated other areas in the state impacted by similar untreated wastewater spills. Accordingly, EPA Complaint Nos. 01R-09-R4 and 07R-10-R4 are closed as of the date of this letter.

ECRCO would like to thank FDEP for its cooperation during this investigation. If you have any questions, please feel free to contact me at (202) 564-9649, by e-mail at dorka.lilian@epa.gov, or U.S. mail at U.S. EPA, Office of General Counsel, External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460.

Sincerely,

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[71] *See, e.g., Washington v. Davis*, 426 U.S. 229, 242 (1976).