FLORIDA LEGISLATURE PASSES "PUBLIC NOTICE OF POLLUTION ACT"

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By: Daniel H. Thompson

On May 3, 2017, the Florida House of Representatives unanimously voted in favor of the "Public Notice of Pollution Act," which had already unanimously passed in the Florida Senate as Senate Bill 532. Before final passage SB 532 became part of SB 1018. Governor Scott had previously asked the Florida Legislature to approve and send him a pollution notification bill. He now has announced his intention to sign the bill, which upon enactment will be codified at Sections 403.076-403.078, Florida Statutes, with an effective date of July 1, 2017.

The Act does not expand the *types* of pollution events that must be disclosed to the Florida Department of Environmental Protection ("FDEP"), but rather provides a significant expansion in *how* those events must be reported. The Act requires an owner or operator of a facility that has a "reportable pollution release" to provide notice of such a release to the FDEP within 24 hours of discovery, and to report again within 24 hours if such owner or operator subsequently discovers that the release has migrated beyond the facility's property boundaries. Within 24 hours of such notice, the FDEP must provide a notice of the release by posting it on a designated public website and emailing it to a list of local government agencies, news media, and similar entities as established in the Act, as well as to anyone else who asks to be on an email list for such notices. The FDEP has authority to adopt rules to implement the Act.

This reporting requirement is a significant expansion on current law to the extent that it expands the procedure for how pollution events are reported to the public. Under current law, reports of pollution events to the FDEP are public records, but they usually are only filed with the FDEP, and only become really "public" if someone makes a public records request for them, assuming that person knows what to ask for. In the Mosaic case discussed below, the company reported a groundwater discharge to the FDEP, but local residents were unaware of the event for many weeks simply because no one knew to ask for the reports. As the result of passage of the Act, it is very likely that the locals would know about it much more quickly, because of both the much wider distribution of notice and the two 24-hour reporting requirements.

What the Act does not do is to expand what types of releases must be reported in the first place. The Act defines a "reportable pollution release" as "the release or discharge of a substance from an installation to the air, land, or waters of the state . . . which is not authorized by law, and which is reportable to the State Watch Office . . . pursuant to any department rule, permit, order, or variance." The State Watch Office is a part of the Division of Emergency Management within the Governor's Office. The Act states, "The primary purpose of the office is to record, analyze, and share information with federal, state, and county entities for appropriate response to emergencies." In other words, it is simply a clearinghouse—it has no authority to require incidents to be reported to it.

The definition of "reportable release," therefore, limits the reporting requirements in the Act to releases that were already legally required to be reported by statute, rule, or permit anyway—with the change limited strictly to the reach of the notice of the report. As I discussed in a previous blog, the original impetus of the legislation came from two pollution events in 2016 that received widespread public notice—the discharge of processing

water stored by Mosaic Fertilizer LLC in a gypsum stack in the Tampa Bay area into the underlying groundwater, and an unauthorized discharge of domestic wastewater into Tampa Bay from facilities operated by the City of St. Petersburg. In response to widespread negative response to the spills, including complaints that locals had been kept in the dark about a pollution event that may have been impacting their health, Governor Scott issued an emergency order requiring the "owner or operator of any installation who has knowledge of any pollution at such installation" to notify the FDEP and specified local officials in writing and the "general public by providing notice to local broadcast television affiliates and a newspaper of general circulation in the area of the contamination" of an "occurrence of any incident at an installation resulting in pollution or the discovery of pollution," all within specified time periods. Governor Scott directed the FDEP to issue an emergency rule and then engage in regular rulemaking to implement this policy by rule, and asked the Legislature to enact implementing legislation.

The emergency rule and proposed rule were very controversial, with strong opposition from industry and development interests, primarily for two reasons, both of which flowed originally from the scope of the Governor's Order. First, the opposition did not like that the reporting would cover any kind of pollution event, no matter what size or type—including, for example, the discovery of legacy pollution as part of an environmental assessment during routine due diligence for a real estate transaction. Florida law now has no generalized pollution reporting obligation, only obligations for specified types of pollution events, not including many of those involving discovery through due diligence. Instead, current statutes and implementing FDEP rules contain a patchwork quilt of specific reporting requirements, some of which are ambiguous or complex, that limit both the types of pollution releases required to be reported and to whom the reporting must be made--often only to the FDEP—but with ongoing disagreements over how expansive those requirements are. The opponents also complained that the responsible party should not have to bear the cost and complexities of reporting to the various local residents, government agencies, and the media, but should report only to the FDEP, which is better situated to provide the broader notice.

The opposition led to challenges to the rulemaking, the result of which was that an Administrative Law Judge issued a Final Order finding the rule to be "an invalid exercise of delegated legislative authority." The Judge ruled that the FDEP's current statutory authorities were not specific enough to impose a public notification obligation upon the person responsible for the release. He also found the proposed rule invalid because it imposed additional regulatory costs on the responsible party for providing public notification that was not specifically authorized by law.

In voting for the Act as finally passed, the Legislature heeded the industry concerns as expressed in the rulemaking by limiting the scope of the pollution reporting requirements to releases that must already be reported to the specified agencies, and by not expanding the types of releases that must be reported. Nevertheless, the expanded distribution of such notices in itself provides a significant public benefit—no longer will reports of pollution releases simply sit in agency files awaiting discovery by happenstance.

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