



Jeb Bush
Governor

John O. Agwunobi, M.D., M.B.A.
Secretary

To: Lona Gibson
Florida Department of Health

Fr: Morton R. Laitner, Esquire
Chief Legal Counsel
Miami-Dade County Health Department

Re: Storm Drain Mosquito Abatement

Date: March 9, 2005

FACTUAL BACKGROUND

- There are between 100,000 and 300,000 storm drains (a/k/a catch basins) in Miami-Dade County.
- Without storm drains, the 60 to 80 inches of rain during the region's wet season, would create an intolerable condition of six to eight inches of standing water in many neighborhoods for a period of three to four days at a time.
- The County's Mosquito Control Program, upon resident notification, will investigate and/or abate the mosquito problems within 24 to 48 hours.
- Additional financial resources would be needed to implement a routine storm drain inspection program (there are 100,000 – 300,000 storm drains in Miami-Dade County).
- There are numerous species of mosquitoes, some capable of transmitting disease-causing pathogens to humans, some of them may breed in stormdrains.
- Upon abatement of an offending sanitary nuisance, a court-imposed injunction is dismissed.

STATUTORY AUTHORITY

§ 386.01. Sanitary nuisance

A sanitary nuisance is the commission of any act, by an individual, municipality, organization, or corporation, or the keeping, maintaining, propagation, existence, or permission of anything, by an individual, municipality, organization, or corporation, by which the health or life of an

individual, or the health or lives of individuals, may be threatened or impaired, or by which or through which, directly or indirectly, disease may be caused.

§ 386.02. Duty of Department of Health

The Department of Health, upon request of the proper authorities, or of any three responsible resident citizens, or whenever it may seem necessary to the department, shall investigate the sanitary condition of any city, town, or place in the state; and if, upon examination, the department shall ascertain the existence of any sanitary nuisance as herein defined, it shall serve notice upon the proper party or parties to remove or abate the said nuisance or, if necessary, proceed to remove or abate the said nuisance in the manner provided in s. 823.01.

§ 386.03. Notice to remove nuisances; authority of Department of Health and local health authorities

(1) The Department of Health, upon determining the existence of anything or things herein declared to be nuisances by law, shall notify the person or persons committing, creating, keeping, or maintaining the same, to remove or cause to be removed, the same within 24 hours, or such other reasonable time as may be determined by the department, after such notice be duly given.

(2) If the sanitary nuisance condition is not removed by such person or persons within the time prescribed in said notice, the department, its agents or deputies or local health authorities, may within the county where the nuisance exists, remove, cause to remove, or prevent the continuing sanitary nuisance condition in the following manner:

(a) Undertake required correctional procedures, including the removal of same if necessary; the cost or expense of such removal or correctional procedures shall be paid by the person or persons committing, creating, keeping, or maintaining such nuisances; and if the said cost and expense thus accruing shall not be paid within 10 days after such removal, the same shall be collected from the person or persons committing, creating, keeping, or maintaining such nuisances, by suit at law; but this paragraph shall not authorize the department to alter, change, demolish, or remove any machinery, equipment, or facility designed or used for the processing or disposing of liquid or smoke effluent of a manufacturing plant.

(b) Institute criminal proceedings in the county court in the jurisdiction of which the condition exists against all persons failing to comply with notices to correct sanitary nuisance conditions as provided in this chapter.

(c) Institute legal proceedings authorized by the department as set forth in s. 381.0012.

(d) Institute administrative proceedings authorized by the department as set forth in s. 381.0061.

§ 386.041. Nuisances injurious to health

(1) The following conditions existing, permitted, maintained, kept, or caused by any individual, municipal organization, or corporation, governmental or private, shall constitute prima facie evidence of maintaining a nuisance injurious to health:

...

(e) The creation, maintenance, or causing of any condition capable of breeding flies, mosquitoes, or other arthropods capable of transmitting diseases, directly or indirectly to humans.

...

(2) The Department of Health, its agents and deputies, or local health authorities are authorized to investigate any condition or alleged nuisance in any city, town, or place within the state, and if such condition is determined to constitute a sanitary nuisance, they may take such action to abate the said nuisance condition in accordance with the provisions of this chapter.

(Emphasis added.)

LEGAL ANALYSIS

I. Identification of Mosquitoes Found in Storm Drains

For the Legal Department to obtain an injunction against Miami-Dade County would require legal proof of the following elements: 1. The County created, maintained or caused a condition capable of breeding mosquitoes, and 2. These mosquitoes are capable of transmitting diseases directly or indirectly to humans.

As to these two elements, it is the Legal Department's understanding that many storm drains are capable of breeding mosquitoes; however, the second element is one of concern as the Agency has the burden of proof of showing which specific storm drains have disease-carrying mosquitoes, as opposed to non-disease-carrying mosquitoes. As such, a request for the Health Department to test all 100,000 to 300,000 storm drains to determine the existence of a sanitary nuisance creates an unfeasible burden on Agency resources.

II. Injunctive Relief would be Moot Due to Mosquito Controls' Corrective Actions

It is the understanding of the Legal Office that County Mosquito Control maintains an aggressive treatment program to ameliorate mosquito infestations. As such, any Health Department action for injunctive relief would be subject to dismissal for mootness each time the particular mosquito problem that forms the basis of the Health Department's lawsuit is eliminated. Injunctive relief is an extraordinary remedy that should be granted only sparingly. Mercado Oriental, Inc. v. Marin, 725 So.2d 468 (Fla. 3d DCA 1999). Injunctive relief is appropriate only where there is a substantial likelihood of an immediate and irreparable harm. Id. There is no possibility of harm where the underlying cause of the public health threat – the mosquito infestation – has been eradicated.

Moreover, Chapter 386 of the Florida Statutes provides the Health Department authority to abate only existing sanitary nuisances. The statute makes no provision for the abatement of potential or anticipated sanitary nuisances. Consequently, County Mosquito Control's corrective action would subject any Health Department legal action based upon the Chapter 386 subject to dismissal for mootness.

III. Discretionary Authority of the Health Department

Under Chapter 386, the Health Department's authority to take legal action to abate sanitary nuisances is discretionary. See §386.041(2): "The Department of Health... may take such action to abate the said nuisance in accordance with the provisions of this chapter." Consequently, the Health Department should yield in its authority to abate sanitary nuisances to governmental authorities with a specific statutory mandate to regulate the condition underlying the sanitary nuisance. As regards mosquito control in Miami-Dade County, such specific authority vests with the Miami-Dade County Mosquito Control Program. Moreover, the analysis in sections 1 and 2 hereinabove give the Health Department ample reason to exercise its discretionary authority to refrain from pursuing legal action.

RECOMMENDATION

Educational Campaign. The Legal Department recommends that consideration be given to posting on County, Mosquito Control, and Health Department's websites which governmental agencies to alert to deal with mosquito problems in storm drains. Other educational materials to be considered include pamphlets, public service announcements, and other media events.

Cc: Lillian Rivera
Eric Grimm
Samir Elmir