

TO THE GOVERNOR OF THE STATE OF FLORIDA AND THE CHIEF JUDGE OF
THE STATE OF FLORIDA, FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY AND GULF COUNTIES

IN RE THE NEED FOR AN
EXECUTIVE ORDER APPOINTING
A SPECIAL PROSECUTOR FOR
FULFILLING DUTIES OF THE
STATE ATTORNEY TO THE
GRAND JURY IN THE
FOURTEENTH JUDICIAL CIRCUIT
AS CONCERNS ENVIRONMENTAL
MATTERS AND FOR THE EMPANELLING
OF A SPECIAL GRAND JURY IN THE
FOURTEENTH JUDICIAL CIRCUIT
ON ENVIRONMENTAL MATTERS

EXECUTIVE ORDER FILE NO. ____
JUDICIAL ORDER FILE NO. ____

**PETITION FOR AN EXECUTIVE ORDER APPOINTING A SPECIAL PROSECUTOR
FOR FULFILLING DUTIES OF THE STATE ATTORNEY
TO THE GRAND JURY IN THE FOURTEENTH JUDICIAL CIRCUIT
AS CONCERNS ENVIRONMENTAL MATTERS AND TO REQUEST THE EMPANELLING
OF A SPECIAL GRAND JURY IN THE FOURTEENTH JUDICIAL CIRCUIT ON
ENVIRONMENTAL MATTERS**

Petitioner, PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY (PEER), by and through counsel, respectfully
petitions the Honorable Jeb Bush, Governor of the State of
Florida, for an executive order appointing a special prosecutor
for fulfilling duties of the state attorney to the grand jury in
the Fourteenth Judicial Circuit as concerns environmental
matters, and further petitions the Honorable Judy M. Pittman,
Chief Judge, for the empanelling of a special grand jury in the
Fourteenth Judicial Circuit on environmental matters, on the
following grounds:

I. LEGAL AND ETHICAL BACKGROUND

A. Gubernatorial Authority

1. Under Article IV, Section 1(a), Florida Constitution, the governor is vested with "supreme executive power." Further, the governor "shall take care that the laws be faithfully executed" and commissions "all officers of the state and counties." *Id.*

2. Under the general law of the state, the governor may, by executive order filed with the Department of State, assign state attorneys "one or more specified investigations, cases, or matters." Specifically, Section 27.14(1), Florida Statutes, provides:

(1) If any state attorney is disqualified to represent the state in any investigation, case or matter pending in the courts of his or her circuit or if, for any other good and sufficient reason, the Governor determines that the ends of justice would be best served, the Governor may, by executive order filed with the Department of State, either order an exchange of circuits or of courts between such state attorney and any other state attorney or order an assignment of any state attorney to discharge the duties of the state attorney with respect to one or more specified investigations, cases, or matters, specified in general in the executive order of the Governor. Any exchange or assignment of any state attorney to a particular circuit shall expire 12 months after the date of issuance, unless an extension is approved by order of the Supreme Court upon application of the Governor showing good and sufficient cause to extend such exchange or assignment.

B. State Attorney Duties

3. Under Section 27.03, Florida Statutes, the state attorney has the key legal role in conducting the affairs of grand juries:

27.03 **Duties before grand jury.**—Whenever required by the grand jury, the state attorney shall attend them for the purpose of examining witnesses in their presence, or of giving legal advice in any matter before them; and he or she shall prepare bills of indictment.¹

4. As a lawyer, the state attorney is moreover bound by the Rules of Professional Conduct, Chapter 4 of the Rules Regulating the Florida Bar. These rules include Rule 4-1.7 on "Conflict of Interest," and Rule 4-1.10 on "Imputed Disqualification."

5. Rule 4-1.7 states in pertinent part:

(a) **Representing Adverse Interests.** A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

¹ See also Section 905.19, Florida Statutes ("Duty of state attorney"). Section 125.59(2), Florida Statutes, also allows a grand jury to "employ special investigators and special legal counsel" Further, "When requested, the court shall advise the grand jury about its legal duties." § 905.18, Fla. Stat.

(1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and

(2) each client consents after consultation.

(b) **Duty to Avoid Limitation on Independent Professional Judgment.** A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

6. Carrying this rule one step further is Rule 4-1.10, which provides in pertinent part,

(a) **Imputed Disqualification of All Lawyers in Firm.** While lawyers are associated in a firm, none of them shall knowingly represent a client when any 1 of them practicing alone would be prohibited from doing so by rule 4-1.7, 4-1.8(c), 4-1.9, or 4-2.2.

II. SPECIFIC ALLEGATIONS

A. Institutional Concerns

7. Bay and Gulf Counties, within the Fourteenth Judicial Circuit, have substantial environmental problems. Ironically, often these problems directly or indirectly involve major failures of government, including the State of Florida Department of Environmental Protection ("DEP"). While, as their

names rightly signify, Bay and Gulf Counties are areas of tremendous natural beauty, significant threats to the environment persist. Unfortunately, in many cases, needed improvements are being ignored or adamantly avoided by government officials.

8. A special grand jury can be a highly effective means to discern problems and develop solutions to pressing environmental problems. Last summer a special grand jury empanelled by the Chief Judge of the First Judicial Circuit, at the request of its State Attorney, issued a report on air and water quality that has been a focal point for improvements in the environment within Escambia and Santa Rosa Counties.² The special grand jury specifically focused on institutional influence peddling on behalf of polluters involving DEP as a factor in the area's environmental problems.

9. Recently, a general grand jury empanelled in the Fourteenth Judicial Circuit was asked to look at one controversial environmental issue within Bay County, the exposed raw sewage underwater pipeline placed into service by Bay County last July although it had knowingly been constructed without the

² The grand jury's report can be viewed at the Pensacola News Journal website:

www.pensacolanejournal.com/news/specialreports.

required minimum 4-foot below-grade cover. The pipeline brings waste across St. Andrew Bay to the Military Point Regional Advanced Wastewater Treatment (AWT) Facility. Unfortunately, the grand jury also is burdened with a slew of general legal matters having nothing to do with the environment.

10. Another controversial local environmental issue with potential criminal overtones involves the illegal destruction of wetlands associated with the expansion of Frank Brown Park in the City of Panama City Beach.

11. In each of the cases, the same prominent local attorney has represented a local government at the center of a DEP-related environmental controversy, and the controversy has, at least in part, involved the same major construction contractor. In the Frank Brown Park controversy, the attorney represented the City of Panama City Beach. In the raw sewage pipeline controversy, he represented the City of Callaway, a part owner of the Military Point AWT Facility.

12. His private law firm also has lawyers who work part-time for the State Attorney for the Fourteenth Judicial Circuit, Jim Appleman. See Exhibit "1." Further, the daughter of Mr. Appleman also is a recently hired attorney at this law firm.

13. Neither the Frank Brown Park violations nor the raw sewage pipeline violations have been criminally prosecuted by Mr. Appleman.

B. Litany of Other Major Environmental Issues

14. The issues involving the raw sewage pipeline and Frank Brown Park only begin to scratch the surface of environmental issues facing Bay and Gulf Counties that appropriately should be brought before a special grand jury.

15. The problems listed below are by no means exhaustive. Nor is the order of presentation a ranking. Rather, the listing begins to illustrate the depth and breadth of serious environmental issues facing these counties, and some associated factors, all of which are in need of careful, comprehensive, and unbiased factual and legal examination on behalf of the public.³

16. As demonstrated below, many of these problems have been maintained and exacerbated, if not caused, by official government action or inaction.

³ The prominent attorney interfacing with DEP officials in the Frank Brown Park and pipeline matters also has represented a party involved with at least one of the additional environmental issues discussed below, i.e., the City of Panama City Beach in its effort to increase wastewater discharging to a channel leading directly to West Bay.

***The City of Panama City Beach's
Stormwater Discharges to the Gulf of Mexico***

17. While Walton County just to the west has no stormwater pipes to the Gulf of Mexico, the City of Panama City Beach in Bay County has at least 50 stormwater discharge pipes directly to the Gulf. This equates to approximately one stormwater outfall for each one-third mile of one of the world's most important tourist beaches.

18. Despite the fact that this beach is the backbone of the local economy, these outfalls receive little or no pre-treatment. Although bacteria and algae may be intermittent problems, no routine bacterial monitoring is done in beach waters, nor does nutrient monitoring take place. Stormwater also typically has chemical contaminants, which also are not monitored in the nearby Gulf waters.

19. Further, the above-referenced 50 direct discharge points may not be all of the story. Another approximately 90 outfalls have been relocated to stormwater treatment ponds behind dunes or motels. The possibility exists that ground water from such ponds could leach beneath the beach sand into the nearby Gulf waters.

20. Putting all intrinsic concern for natural resources aside, local motel owners can be devastated by cancellations of reservations because of unattractive algae buildup. The City's

lack of regard for the goose that lays the golden eggs has been acquiesced in through permitting by the DEP, with little oversight from the United States Environmental Protection Agency ("EPA"). However, the problem is not going away through official inattention. Panama City Beach was recently placed on the Natural Resources Defense Council's "bad" list as a "bum beach."

21. The major problem of direct stormwater discharges to the Gulf off Panama City Beach desperately needs to be faced head on. Stormwater could be collected, pretreated (in wetlands or a large receiving facility), or discharged at upland spray irrigation fields.

Bay County Incinerator

22. The Bay County incinerator burns about 500 tons of garbage per day. This facility emits a large amount of chemicals that could be better controlled.

23. According to federal government estimates, a 45% reduction in Nitrogen Oxide (NOx) emissions and a 90% reduction in emissions of acid gases, dioxins, furans and mercury could be technologically achieved. The incinerator is the single most important emission source for dioxin compounds in Bay County.

24. Emissions from this source and other air pollution sources in Bay County are toxic to humans. The citizens of Bay

County have a higher rate of heart disease, lung disease, and cancer than other citizens in the 14-county Big Bend area. In addition, sea grass bed habitat and aquatic life may be adversely affected by this air pollution. Contaminants absorbed by living organisms enter the food chain and become magnified as they move up the food chain. Deer Point Reservoir is already on the State 303(d) list as an impaired water body because of a mercury consumption advisory.

25. EPA and DEP are responsible for permitting the air emissions of this facility under the Clean Air Act. They do not require dioxin monitoring of facility air emissions. EPA requires acid-gas scrubbers on facilities burning more than 500 tons of garbage per day. However, EPA agreed to allow the facility to continue to burn without scrubbers, with certain equipment adjustments and a reduction in the amount allowed to be burned from 510 to 498 tons per day.

26. In order to postpone the approximately \$20 million cost of retrofitting this facility with acid/gas scrubbers for five years, Bay County sued EPA to allow it to "derate" the facility to a "small generator." The County employed several lawyers and a lobbyist, at great expense to the taxpayers, to continue the discharge of harmful pollutants to the local air and waters.

Smurfit-Stone Solid Waste Site

27. The Smurfit-Stone solid waste site in Bay County is an approximately 60-acre site adjacent to and west of Martin Lake. The site contains settling ponds and an unstabilized solid waste disposal area. The disposal area consists primarily of paper pulp effluent sludge and "fly ash" from boiler and incinerators. The sludge is believed to have high concentrations of contaminants, including metals, organics and dioxin compounds. Ponds are unlined and the ground water is believed to have been contaminated.

28. Sediments in the lake are also believed to be extensively contaminated. Further, hurricane and tropical storm winds may have transported large quantities of the dried, contaminated waste materials over surrounding waters and residential areas.

29. Although the Smurfit-Stone site is a federal hazardous waste enforcement site, no significant enforcement actions have been taken by EPA. Nor has EPA followed through on an agreement to conduct dioxin sampling of sediments in nearby Watson Bayou and Martin Lake, and in the sludge ponds and waste pile. DEP has issued a consent order requiring well monitoring and contaminated water withdrawal, but has not required removal of contaminated material or installation of impermeable linings for

the ponds and waste pile. Nor has any agency required stabilization of the waste site so as to minimize further contamination release.

***Bay County Sludge Disposal
at Gulf Farms, Gulf County, Florida.***

30. Under Bay County's DEP-approved agricultural use plan, up to 125,000-cubic yards per year of sludge is disposed at Gulf Farms in Gulf County, Florida. It is probable that these materials are contaminated with dioxin compounds. Significant concentrations of cadmium, copper, lead, nickel and zinc are also likely in the sludge, as well as a variety of organic compounds.

31. As a result, the soil of several hundred acres of agricultural land in Gulf County is likely affected, which is available to food chain organisms and wildlife. According to an EPA report, birds, wildlife, and soil organisms can be injured or die from exposure to dioxin compounds in the sludge-treated soil.

32. DEP may have made an error in accepting dioxin analysis based on leachate tests of the sludge when it issued the agricultural use plan permit. The proper test, a bulk analysis of the sludge, could have revealed dioxin that would not dissolve in the leachate water.

Dioxin Contamination of St. Andrew Bay

33. Dioxin has contaminated sediments within St. Andrew Bay. A primary source of dioxin may be Stone Container, a facility that uses chlorine as a bleaching agent for pulp at its mill. As noted above, Bay County itself has balked at installing acid scrubbers on the County incinerator. Bay County also manages the Military Point Treatment Lagoon, the major effluent source for dioxin generated by the paper mill.

34. This lack of local government concern is disappointing, to say the least. After all, dioxin is one of the most toxic and persistent chemical compounds known.

35. In addition to directly affecting marine life within the bay, recreational and commercial fish harvest from the bay may be reduced. Nonetheless, remarkably, DEP does not conduct testing for dioxin compounds in water, sediment, soil, or fish or animal tissues.

Effluent Discharge from City of Panama City Beach Sewage Treatment Plant

36. The City of Panama City Beach discharges from its sewage treatment plant into a small channel flowing directly into "Class II" waters of West Bay. Class II waters are

supposed to be shellfish harvesting waters. However, shellfish harvesting area in the southwest portion of West Bay has been closed, resulting in major lost economic, recreation, and tourism opportunities. In addition, the discharge may be causing lower water and sediment quality and may be a factor in the failure of lost sea grass beds to recover.

37. Nonetheless, rather than reducing and eventually eliminating the discharge, the City has proposed to increase the discharge from 7 to 10 million gallons per day.

38. The City of Panama City Beach has been reluctant to pursue relocation of the discharge or treated water reuse options because of perceived expense, assuming the receptivity of DEP to bay discharges. DEP has in fact been loath to force the issue. On December 30, 1999, DEP issued a Notice of Draft Permit that would allow the increased discharge.

39. The West Bay discharge long has been an ever-increasing addiction to the City. Effluent discharge into West Bay began in 1970 at a volume of 2.5 MGD. Volume has gradually been increased over the last 29 years. Due to the rate of growth of Panama City Beach, effluent discharge increases to 14 and then 20 MGD are anticipated. Further, an old dumpsite exists next to channel. Dump leachates (if any) are not known to have been evaluated.

40. West Bay sea grass losses since 1964 have been documented at approximately 300 acres. Some believe that the losses may be linked to the former Marifarms operation in the vicinity from 1970 to 1975, which used toxic chemicals. Increased freshwater discharges (turtle grass does not thrive at low salinities) and nutrient loading, and excess copper discharges associated with the Panama City Beach operation also could be adversely affecting recovery of sea grass beds.

41. Some propose that the City should remove the entire discharge from West Bay and dispose of treated wastewater using a combination of treated wastewater reuse, wetland filtering and/or wetland creation, and spray irrigation. Some also believe that a sea grass recovery program and cleanup of the Marifarms site are needed.

C. Bay and Gulf Counties Need a Special Grand Jury Focused On the Environment, With a Special Prosecutor Who Does Not Have Potential Mixed Emotions or Imputed Ethics Questions

42. The environment is too important to the future of Bay and Gulf Counties to potentially become lost in the shuffle of competing general grand jury issues. Moreover, the Bay and Gulf Counties environment should not be sacrificed on the altar of political expediency one more time, this time by a state attorney who may not have the willingness or freedom to fully confront the issues.

43. Mr. Appleman expressly and publicly has resisted criticism of his potential for a conflict of interest. He was quoted in the Panama City News Herald on April 20, 2000 as saying, "I intend to be their legal adviser until the grand jury tells me it's a conflict for me to do so."

44. Assuming for the sake of argument that Mr. Appleman would not have a conflict of interest and a requirement to disqualify himself and his "firm" from all matters directly affecting the outside firm of his associates and daughter, and that the grand jury would be able to give informed consent on behalf of the citizens of the Fourteenth Judicial Circuit to Mr. Appleman's continuing control of the grand jury process, at a minimum this presents a potential appearance of conflict of interest or impropriety.

45. Governor Jeb Bush frequently issues executive orders appointing another state attorney to investigate and prosecute cases free from the taint of such appearances. In fact, in situations of far less ranging potential public import, state attorneys themselves frequently come to the Governor asking to be relieved of any "appearance" problems. See, e.g., Executive Order No. 2000-175 (June 2, 2000) (assigning of special prosecutor where law enforcement officer under investigation was related to an employee of the state attorney's office).

46. Thus, Mr. Appleman's adamant insistence on remaining in charge of grand jury issues involving the environment in the Fourteenth Judicial Circuit is puzzling, if not deeply troubling.

47. Even if Mr. Appleman is not technically disqualified from serving this grand jury, these circumstances present "good and sufficient reason" for the Governor to determine "that the ends of justice would be best served" by assigning another state attorney to oversee investigation of grand jury environmental issues. These circumstances clearly will call into question the fair administration of justice. For Mr. Appleman to continue in this capacity has the potential to cloud case-specific outcomes of the grand jury, or at least those short of full prosecution and conviction. Moreover, justice would not be served if, despite the best efforts of the grand jury itself, the citizens lose out on the opportunity for an unbridled, facially neutral, and fully systematic grand jury review of the serious environmental problems affecting the Fourteenth Judicial Circuit, along with their root causes, and potential solutions.

STATEMENT OF PETITIONER'S SUBSTANTIAL INTERESTS

48. In further support of this petition, Petitioner provides the following additional information as to its substantial interests in the subject matter of this petition:

(a) PEER's name, address, and telephone number are:

Public Employees for Environmental Responsibility
2001 S. Street, N.W.
Suite 570
Washington, D.C. 20009
(202) 265-PEER (265-7337)

(b) PEER is a non-profit tax-exempt organization whose membership includes local, state, and federal employees working within environmental and natural resource protection agencies. PEER has been working with public employees in Florida for more than three years. On behalf of its members, PEER's work in Florida has included substantial review of environmental problems in the Northwest District of DEP, including problems associated with Bay and Gulf Counties and other counties within the Fourteenth Judicial Circuit. Substantial numbers of PEER's members are beneficiaries of environmental resources within Bay and Gulf Counties, and substantially interested in, and substantially and adversely affected by, the actual and imminently threatened harm to these resources, such as would properly be the subject of grand jury inquiry.

REQUEST FOR RELIEF

WHEREFORE, Petitioner PEER respectfully petitions the Honorable Jeb Bush, Governor of the State of Florida, for an executive order appointing a special prosecutor for fulfilling duties of the state attorney to the grand jury in the Fourteenth Judicial Circuit as concerns environmental matters, and further petitions the Honorable Judy M. Pittman, Chief Judge, for the empanelling of a special grand jury in the Fourteenth Judicial Circuit on environmental matters.

Respectfully submitted this 14th day of June 2000.

FOR PETITIONER
PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY

Steven A. Medina, P.A.

/S/

By:

Steven A. Medina
Fla. Bar No. 370622
P.O. Box 247
Ft. Walton Beach, Florida
32549-0247
(850) 664-7856
Florida Counsel for Petitioner

And

/S/ by /SAM/

Daniel P. Meyer
District of Columbia Bar
No. 455369
Public Employees for Environmental
Responsibility
2001 S. Street, N.W.
Suite 570
Washington, D.C. 20009
(202) 265-7337
General Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished
by U.S. Mail to the below-referenced persons this 14th day of
June 2000. /S/

Steven A. Medina

Jeb Bush
Governor
The Capitol
Tallahassee, FL 32399-0001

Judy M. Pittman
Chief Judge
Bay County Circuit Court
P.O. Box 27
Panama City, FL 32402

Robert A. Butterworth
Attorney General
The Capitol
Tallahassee, FL 32399-0001

Jim Appleman, State Attorney
P.O. Box 1040
Panama City, FL 32402-1040

David B. Struhs, Secretary
Florida Department of Environmental Protection
3900 Commonwealth Blvd., MS 35
Tallahassee, FL 32399-3000

Teri L. Donaldson, General Counsel
Florida Department of Environmental Protection
3900 Commonwealth Blvd., MS #35
Tallahassee, FL 32399-3000