

November 21, 2011

Gwendolyn Keyes Fleming
Regional Administrator
U.S. Environmental Protection Agency
Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303

RE: OVERFILE REQUEST—DAYTONA/BETHUNE POINT WASTEWATER FACILITY, VOLUSIA COUNTY, FLORIDA

Dear Ms. Fleming:

Public Employees for Environmental Responsibility (PEER), pursuant to Section 505, 33 U.S.C. 1365, formally requests that the U.S. Environmental Protection Agency initiate immediate action against the City of Daytona Beach, Florida (“the City”) in connection with the imminent and substantial threat to public health presented by the repeated violations of its National Pollutant Discharge Elimination System (NPDES) permit issued by the State of Florida, Department of Environmental Protection (FDEP) under its delegated authority to administer provisions of the Clean Water Act.

FDEP’s enforcement response against the City has fallen far short of both EPA’s and FDEP’s own standards and policies. Protection of the environment and public health requires that the EPA assume responsibility for oversight over this permit. PEER, therefore, requests that EPA Region 4 take immediate and appropriate action against this violator under its concurrent authority to enforce the Clean Water Act (CWA) in Florida. Specifically, PEER requests that EPA pursuant to EPA’s response authority under the CWA, 33 U.S.C. § 1251 et seq, immediately assert primary jurisdiction over the NPDES Permit¹ and, with full public

¹ The permit in question is subject to the regulatory authority of the Florida, Department of Environmental Protection (FDEP) under § 403.0885, et. seq., Florida Statutes.

participation, take action to comprehensively assess and mitigate the imminent and substantial threat to public health as well as the environmental harm caused by numerous permit violations, in connection with the City's wastewater discharges.

A. Permitting of this Facility

The City operates a wastewater discharge facility (Facility) under NPDES Permit Number FL0025984 (Permit). The Permit was issued on December 10, 2008, as a renewal of an existing permit. Prior to issuance of this Permit the Facility had been operating under a similar permit that was issued on June 2, 2003 and expired on June 1, 2008. The Facility is a major discharger and is authorized to treat 13.0 MGD of influent and to discharge 20.0 MGD AADF effluent into the Halifax River (Class III marine waters). The Facility discharges its effluent via outfall D-001 which is also used by the City's Westside Regional Facility, thus authorizing a combined 22.8 MGD maximum daily flow. It is also authorized to discharge 13.0 MGD of residuals via land application (R-001). The Permit was issued with Administrative Order Number DW-08-0013 ("AO") that provides for an interim limit of 10.0 µ/L for cyanide because of elevated cyanide levels in the Facility's effluent, the intent being to reduce these levels within 36 months of permit issuance. The permit's expiration date is December 9, 2013.

Given the impairment condition of the Halifax River, the Facility operates under a TMDL for 3 contaminants: CBOD₅, Total Nitrogen (TN) and Total Phosphorus (TP). This TMDL applies to the combined discharges of the Bethune Point and Westside Regional plants. Under Permit Condition I.A.6. the combined discharges are limited to 1900 Lbs/day of CBOD₅, 570 Lbs/day TN and 190 Lbs/day TP.

B. A History of Noncompliance

This is a facility that has had a long history of permit violations dating as far back as 1997 when the parties entered into Consent Order 97-1994 because of numerous violations of effluent limits for Total Residual Chlorine and minimum pH (Paragraph 5). At that time the FDEP held the assessment of civil penalties in abeyance, provided that the Facility did not violate the terms of the consent order. The rationale was that the money would be better spent on Facility upgrades. For the next decade the Facility nevertheless continued to operate in and out of compliance. The FDEP's response was to write to the Facility, acknowledge the violations and advise them to bring the Facility back into compliance.

On January 11, 2006, there was a fire and explosion at the Facility resulting in two fatalities and

a release of approximately 3,000 gallons of methanol.² As a result of the explosion and death the U.S. Chemical Safety Board conducted an investigation at the site. The CSB's findings included a lack of inspections and training at the Facility.³ There were multiple findings of equipment failure and lack of maintenance at the Facility. Remarkably, the last finding of the CSB was that "[n]o state or federal oversight of public employee safety exists in the State of Florida." Report, Page 36. Yet, one of the general conditions of the Facility's NPDES was a condition that is found in all wastewater permits issued by the Department. General Condition 7 states that:

The permittee shall at all times properly operate and maintain the facility and systems of treatment and control, and related appurtenances, that are installed and used by the permittee to achieve compliance with the conditions of this permit. This provision includes the operation of backup or auxiliary facilities or similar systems when necessary to maintain or achieve compliance with the conditions of the permit. [62-620.610(7)]

The FDEP took no enforcement against the Facility despite the findings of the CSB and the death of two workers, when federal authorities had clear found a failure to properly maintain the Facility.

On January 19, 2006, a mere 7 days after the explosion that killed two people, the FDEP received notice that the Facility had been discharging raw sewage in a wooded area behind an apartment complex for at least 3 years. The FDEP report states, in pertinent part, that:

According to the report the facility had disconnected the sewer line from the City of Daytona Beach WWTP and was running a four inch pipe into a wooded area where untreated sewage was being discharged. The City of Daytona Beach Police Department and the Volusia County Health Department responded.

Once again, there was no enforcement taken.

EPA conducted a Compliance Sampling Inspection at the Facility on September 26, 2006. The records in the FDEP files are silent as to any mention of the above-mentioned explosion at the Facility, or of the illegal discharge of raw effluent. EPA found only minor deficiencies. It is unknown whether EPA was even notified of the other issues for which significant enforcement should have been taken.

Eleven months later, on August 20, 2007, the FDEP received a complaint from an anonymous caller who informed the FDEP that because of high fecal rates the Facility was turning off the

² http://www.waterandwastewater.com/videos/view_video.php?viewkey=6785b92134bd6c1d0fa4

³ http://www.csb.gov/recommendations/details.aspx?SID=21&pg=1&F_InvestigationId=21 and http://www.csb.gov/assets/document/Bethune_Final_Report.pdf

power to its UV system 30 minutes before samples were being taken, aeration bay #3 was repeatedly overflowing and the influent flow meter was not working. One month later the FDEP listed the Facility as out of compliance. This was followed up two months later with a warning letter on November 20, 2007. Then, on December 13, 2007, a whistleblower complaint was filed with the FDEP by multiple Facility employees alleging that the Facility's operator was misrepresenting results about its UV disinfection, i.e. understating its rate of disinfection. The whistleblowers advised the FDEP to review certain log book entries that would allegedly confirm the allegations. The FDEP inspected the Facility three weeks later, but it is unclear whether the log book entries corroborated the allegations sent to the FDEP.

The FDEP and the City agreed to resolve the multiple violations through a Consent Order (CO-1) (OGC—08-0175) on March 14, 2008 in which the City was penalized \$11,000 in civil penalties.⁴ The penalties were assessed due to numerous permit exceedances. CO-1 allowed the City to have interim limits for Total Phosphorus (Paragraph 14). In addition, the Consent Order allowed the imposition of stipulated penalties of \$250 per day/per violation should any further violations of the Consent Order occur.

Further violations did occur. But not of Total Phosphorus. And the manner in which CO-1 was drafted did not enable the FDEP to assess stipulated penalties for violations of the Permit, even though the violations were numerous.

On November 5, 2008, shortly before the City was issued its new Permit and AO, an inspection was completed at the Facility at which time the Facility was determined by the Department to be significantly out of compliance due to multiple exceedances of the Permit's TN limits and other parameters. The AO that was issued by the FDEP gave no indication to the public that the Facility was significantly out of compliance at that time. It did not address the fact that the Facility was having significant difficulty meeting its effluent limits for TN, a pollutant that was causing serious damage to the Halifax River. It likewise gave no indication that the FDEP was about to initiate enforcement against the Facility. Thus, the public was not advised of the true status of the Facility at the time of permit renewal. The FDEP likewise missed an opportunity to enter an enforceable order against the City that would have addressed the habitual TN violations.

The Permit was then issued on December 10, 2008. Eight days later the Department sent the City a warning letter advising it that it was significantly out of compliance due to numerous nitrogen and other exceedances—during the time that the City was operating under a TMDL for nitrogen due to the impairment status of the Halifax River. These exceedances occurred prior to the FDEP's issuance of the new Permit. The Department sought the imposition of \$21,562.00 in civil penalties for these violations.

⁴ No enforcement was taken for the events that resulted in the two fatalities, or of the illegal 3 year discharge.

The parties then entered into a new Consent Order (CO-2) (OGC-09-0674) on July 8, 2009. This new consent order assessed civil penalties of \$19,000 (Paragraph 17), an amount that waived any adjustment for the Facility's significant history of noncompliance. The Department provided for the assessment of stipulated penalties of \$250 per day per violation should the City violate the terms of CO-2 (Paragraph 19).⁵ The Department also set interim limits for yet another parameter, TN (Paragraph 8). The new limits were more than double the limits set in the Permit, even though this pollutant was the subject of a TMDL. Paragraph 14 of CO-2 states that the Department will close its enforcement action when the City complies with the TN limits for a period of 6 consecutive months.

The City opted to complete a pollution prevention project in lieu of paying the civil penalty assessment. The purpose of the project was to identify methods of reducing the Facility's discharge of nitrate and nitrite concentrations below 1.5 mg/L, an admittedly lower level than required under the Permit. This project included a pilot test that was to have been concluded by October 2010, which it was. However, the report submitted to the FDEP indicated that additional studies were necessary.⁶ The Department eventually pronounced the project as being completed on May 10, 2011. This is supposed to result in issuance of a new, modified permit such that the improved system would be placed into operation within 6 months of permit issuance (Paragraph 12, CO-2).

CO-2 was entered into less than a year and a half after CO-1, meaning that the Facility was continuing to violate its Permit within a short period of time after issuance of CO-1. Nevertheless, CO-2 failed to address multiple violations that occurred between the times that the two Consent Orders were executed. The FDEP's records reflect the following violations known to the FDEP at the time that CO-2 was executed:

- 12/30/08—UV System malfunction.
- 1/28/09—The December MOR showed TN exceedances on annual and monthly averages.
- 2/6/09—Sanitary sewer overflow of less than 100 gallons due to a blockage.
- 2/16/09—Sanitary sewer overflow of less than 1000 gallons.
- 2/18/09—Enterococcus level was 248 colonies/100mL. Permit allows 35 colonies/100mL (Permit Condition I.A.I.).
- 2/24/09—pH excursion of combined effluent.
- 3/4/09—TN excursion of 6.41 mg/L.
- 3/5/09—TN excursion of 6.19 mg/L.

⁵ Unlike CO-1, Paragraph 8 of CO-2 required the City to comply with **all** permit provisions.

⁶ Conclusions/Recommendations, Page 8.

- 4/10/09—Sampler not purging all of sample from the collection line.
- 4/16/09—Auto sampler malfunctioning causing erroneous samples.
- 4/27/09—A “minor” overflow at LS 050.
- 5/2/09—200-300 gallon spill due to a vacuum failure.
- 5/19/09—50,000 gallon spill. The spill was contained on site.
- 5/22/09—Enterococcus exceedances of 112 & 3450 colonies.
- 5/25/09—Overflows from clarifiers and filters.
- 5/26/09—TSS⁷ exceedance of 10.2 mg/L (Permit limit is 10.0 mg/L—Condition I.A.1.) and TN exceedance of 6.26 mg/L (Permit limit is 6.0 mg/L—Condition I.A.1.).
- 5/27/09—Combined effluent TSS exceedance of 40.0 mg/L.
- 5/28/09—TSS exceedance of 20.0 mg/L.
- 5/24/09—High TSS due to problems with clarifier.
- 5/25/09—TSS of 6.59 mg/L for combined effluent (Permit limit is 6.0 mg/L).
- 6/3/09—Excursion report for April 2009 indicates TN exceeded the 3.0 mg/L Permit, limit allegedly due to flooding.
- 6/5/09—Loss of flow signal going to chart recorders.
- 6/16/09—Lift Station (LS) 004 spill of 200-300 gallons.
- 6/23/09—Autosampler failure.
- 6/26/09—Sewer overflow of less than 25 gallons at Lift Station 132.
- 6/29/09—Facility was without power for 10 minutes resulting in 66,650 gallons of effluent (not disinfected) being discharged to the Halifax River.

As stated above, none of these violations were included in CO-2. Neither were they considered in the penalty assessments, as indicated on the relevant Penalty Computation Worksheet in the FDEP’s files.

And just as was the case after the issuance of CO-1, the City violated the Permit almost immediately after CO-2 was executed. Those violations include:

- 7/10/09—Facility’s UV disinfection was without power for 15 minutes.

7 Total Suspended Solids

- 7/18/09—Facility was without power for 2 hours. Approximately 10,000 gallons (or less) of effluent was not disinfected. Approximately 600 gallons of return sludge spilled.
- 7/24/09—Excursion due to “massive flooding.”
- 8/2/09—Fecal coliform exceedance: 12,800 colonies. Cause unknown. Permit Condition I.A.12. sets limit at 800 colonies/100mL sample.
- 8/11/09—In addition to a broken force main there was a spill of an undetermined amount of effluent into a storm drain that connects to a wet detention pond.
- 8/21/09—Overflow of a sludge blanket resulting in a discharge of < 1,000 gallons.
- 8/23/09—Fecal coliform exceedance: 870 colonies.
- 8/31/09—Fecal coliform exceedances: 840 colonies.
- 9/11/09—Bubbler air pressure leak. 50 gallons released to ground.
- 9/22/09—Excursion report. TSS spikes on 8/20/09. Calibration problems reported. The excursions were blamed on flooding in area at that time.
- 9/22/09—Email regarding a pump failure at LS 114. ~20 gallons discharged on ground.
- 10/8/09—Email regarding a filter malfunction necessitating a bypass, but effluent was expected to be disinfected before discharge to the Halifax River.
- 11/5/09—Email noting a 100 gallon overflow at LS 007.
- 1/12/10—Email noting a leaking reuse valve in reuse distribution system.
- 2/15/10—Email noting minor sewer overflow at LS 50 due to power loss from FPL.
- 3/15/10—Email noting a 2,000 gallon overflow of plant manholes on March 15. Drained back into the plant. LS 19 failure. There was also a failure of LS 074 on March 12 due to lack of power. Some spilled out of manhole.
- 3/15/10—Email noting 3/13 fecal coliform exceedance.
- 3/19/10—Email noting TSS exceedances on March 11-14. CBOD exceedance on March 13.
- 3/21/10—Incident report of 20,000 gallon discharge of partially treated effluent. Contained onsite and redirected into wastewater system. Filter malfunction blamed.
- 3/24/10—Email from Terpstra to Vahlsing. Permit exceedances on March 22 for TSS.

- 4/12/10—Email from Terpstra to Vahlsing. Permit exceedances on April 3 for CBOD.
- 4/21/10—Memo from city superintendent to water utilities manager. Advises that there are several excursions on 3/2010 MOR.
- 5/4/10—Excessive samples collected at influent sample composite sampler. Sampler is malfunctioning.
- 5/10/10—The FDEP conducted a Fifth Year Inspection at the Facility. During the inspection the FDEP found numerous violations. The violations included:
 - TSS exceedances on two different days, but since the City reported the exceedances, the FDEP stated that “no further response is needed at this time.”
 - TSS weekly average reported on the October 2009 was 7.8 mg/L and thus exceeded the permit limit. Once again, since the City reported the exceedances, the FDEP stated that “no further response is needed at this time.”
 - The pH levels in May and June 2009 were below the permitted limit of 6.5. Once again, since the City reported the exceedances, the FDEP stated that “no further response is needed at this time.”
 - The TN annual average for August 2009 was 4.2 mg/L, the permitted level being 4.1 mg/L. Once again, since the City reported the exceedances, the FDEP stated that “no further response is needed at this time.” The Facility, it will be recalled, was operating under a TMDL for Total Nitrogen. Permit Condition I.A.6. CO-2, which was signed on July 8, 2009, had addressed this very parameter at this time it allowed higher TN limits (Paragraph 8).
 - The inspection report rated the Facility as Significantly Out-of-Compliance due to multiple effluent violations, most of which were for fecal coliform.
- 5/19/10—Memo from Vahlsing to Amber Ray indicates that on May 18, 2010, 100 gallons of return sludge discharged to ground and were cleaned up.
- 5/25/10—Memo from the city superintendent to water utilities manager advises of 5 sampling excursions during the previous month.
- 6-15-10--Notes indicate an overflow of 200 gallons out of manhole on 6/14. Area cleaned.

Eventually the FDEP sent a Noncompliance Letter sent to the City. This letter, which was issued, on June 17, 2010, outlines the numerous violations that had been identified during the FDEP’s Fifth Year Inspection that was conducted on May 10, 2010 (but doesn’t address the multitude of

other violations).⁸ Then, on September 2, 2010, the FDEP demanded that the City pay stipulated penalties of \$1,500.00 for 6 violations to the Total Nitrogen annual and monthly average parameters. None of the other violations were referenced in the demand. The City paid the \$1,500 stipulated penalty on September 22, 2010.

Even as the City was paying stipulated penalties for violating CO-2 it was continuing to violate the order with respect to TN and TP limits. Total Nitrogen annual averages were violated in September and October 2010. The monthly average for Total Nitrogen was also violated in October 2010. The Single Sample Daily Maximum Total Phosphorus was also violated in September 2010. Both of the parameters, it will be remembered were the subject of a TMDL that had been put in place to protect the water quality of the Halifax River. On December 23, 2010, the Department wrote to the City and demanded payment of stipulated penalties for these violations. The Department sought \$1,000.00 in total stipulated penalties for these violations. The City paid the \$1,000 stipulated penalty on January 18, 2011.

During the time that the Department demanded stipulated penalties from the City, Total Nitrogen annual averages were still being violated. Indeed, these parameters were violated for the five month period beginning in November 2010 and ending in March 2011. In addition, an inspection conducted on April 20, 2011, identified yet more violations. Another Noncompliance Letter was issued on May 19, 2011 resulting from that inspection. It cited:

- Leak of teacup grit removal system
- DMRs not received in a timely manner
- CBOD5 results for March and April 2010 were 15 and 13.9 mg/L, both of which exceeded permit limits
- TSS maximum, weekly and monthly averages were exceeded in March 2010
- “Throughout the DMR review period, pH minimum and pH maximum limits of D001 were exceeded multiple times. The exceedances were properly reported to the Department and no further response is needed at this time.”
- Dissolved Oxygen minimum results for March and April 2010 were 1.1 mg/L and 1.7 mg/L respectively, both of which fell below the required permitted minimum of 2.0 mg/L.
- TN annual averages for November 2010 through February 2011 exceeded the 4.1 mg/L interim limit.

Once again the Department, this time on July 6, 2011, demanded payment of stipulated penalties. The demand was for \$1,250.00 under the terms of CO-2. As before, the Department ignored all violations other than TN. Not surprisingly, the City paid these penalties on July 15, 2011.

⁸ One month later, on July 16, 2010 Florida PEER submitted a public records request to the FDEP asking for the agency’s compliance/enforcement files “from 2000 to the present” on this and other wastewater facilities.

Finally, it should be noted that this Facility has been listed on EPA's website as in non-compliance for every quarter since July-September 2008 to present.⁹ It is evident from the Facility's history of non-compliance that being listed as being out of compliance accomplishes little more than documenting the continual pollution of Florida's environment.

D. Health and Environmental Risks

The documents amassed in this case pointedly demonstrate a lack of reasonable assurance that this facility has been operated in the past in a manner that considers the public health, safety and welfare as its top priority. The FDEP imposed a TMDL in order to protect the Halifax River from nitrogen and phosphorus pollution, yet the Facility routinely and regularly violates the regulatory limits imposed by the FDEP. Frankly, there is little reason for it to do otherwise when it knows that it can pay a minimal stipulated penalty in order to avoid more serious consequences. In addition, there have been repeated situations in which the system has failed due to maintenance issues. Sadly, this type of callous disregard for maintenance likely cost two people their lives in 2006. Yet, it appears that little has been done to turn the situation around. Treated or untreated wastewater and/or sludge continues to be improperly discharged and effluent limits are routinely violated. Even where improper effluent releases have not impacted surface waters it still must be considered that the groundwater may have been affected, as well as the health of the workers who were present. Thus, public health is likely to have been jeopardized to the extent that workers or the general public were exposed to these materials. Yet in each and every case the FDEP chose to treat the matter as of little or no consequence.

E. EPA Overfiling Is Necessary to Protect Public Health and the Environment

Over the course of the past year we have seen firsthand what can happen when a regulatory agency disregards its statutory obligation to enforce the laws of the land. The Deepwater Horizon/BP spill in the Gulf of Mexico will likely poison the Gulf of Mexico for years, if not decades, to come. What has become abundantly clear is that the MMS had ample opportunity to require that the owners and operators of the rig in question properly operate and maintain the same. The MMS shirked its responsibility to the people and the environment and all of us will now pay the price.

The violations described herein are perhaps not as egregious as those witnessed on the Deepwater Horizon. They do, however, demonstrate an equal complacency with respect to the need for adherence to the Clean Water Act. It is equally clear from the facility's history that the FDEP has consistently failed or refused to consider previous violations on those few instances in which the agency has decided to take enforcement.

⁹ <http://www.epa-echo.gov/cgi-bin/get1cReport.cgi?tool=echo&IDNumber=110000517334>

The CWA, 33 U.S.C. § 1319(a)(3), bestows upon EPA the concurrent authority to overfile, or bring enforcement actions against violators when authorized state programs have failed to enforce these statutes properly. EPA regulations under this statute allows EPA to withdraw state program authorization altogether when a state's enforcement program fails to act on violations and to seek adequate enforcement penalties. 40 C.F.R. 271.22; 40 C.F.R. 123.63(3). Finally, and most importantly, EPA has repeatedly made strong public policy pronouncements regarding the agency's interest in consistency in enforcement, declaring that EPA will intervene in state enforcement cases when necessary to prevent a race to the bottom. EPA has long had a policy of requiring that economic benefits from environmental violations be recovered. In testimony before the U.S. Senate, EPA Assistant Administrator for Enforcement Steve Herman forcefully defended EPA's overfiling policy, stating that EPA can and will take action against violators especially when delegated state agencies have failed to recover the economic benefit the violator has gained from its noncompliance or when serious harm to public health or the environment is at stake. (Testimony before Senate Environment and Public Works Committee, June 10, 1997). Administrator Lisa Jackson has maintained this policy. On October 15, 2009, she stated at a House Transportation and Infrastructure Committee hearing that:

“The safety of the water that we use in our homes -- the water we drink and give to our children -- is of paramount importance to our health and our environment. Having clean and safe water in our communities is a right that should be guaranteed for all Americans,” said Administrator Jackson. “Updating our efforts under the Clean Water Act will promote innovative solutions for 21st century water challenges, build stronger ties between EPA, state, and local actions, and provide the transparency the public rightfully expects.”

EPA Press Release, October 15, 2009. Three days later in New Orleans she directly discussed the need for oversight over state programs when she said that “[m]any of these state programs are 20, 30 years old, and we might even need to hit the reset button and say, 'OK, we're going to hold you to a standard. If you're doing your job, great, but if you're not, we're going to be here going inside until you are'. . . It's EPA's job to oversee. . . We often say we're partners, but we're also delegating our authority to a state, and of course, ultimately that means your ultimate answer would be to take it back. But I would hope that would rarely if ever be resorted to." New Orleans *Times-Picayune*, November 18, 2009. The case now before you requires that EPA exercise its oversight authority as envisioned by Administrator Jackson.

In this case the FDEP has failed to take adequate enforcement action by EPA standards. Despite the violator's egregious records of environmental noncompliance, the FDEP has dragged its heels and ultimately allowed violations of substantial gravity to go entirely unpenalized or, in some instances underpenalized. The enforcement that has taken place can best be described as “token.”

Gwendolyn Keyes Fleming
Regional Administrator
Re: Overfile Request— Daytona/Bethune Point Wastewater Facility, Volusia County, Florida
November 21, 2011

Clearly, in this case the FDEP cannot be viewed as meeting its delegated mandate to provide a credible deterrent against violations of federal environmental laws.

PEER, therefore, formally requests that EPA immediately take over the administration of this permit and begin civil enforcement proceedings against the City of Daytona as appropriate in connection with the environmental violations described above and any others that may be discovered.

PEER has in its possession voluminous materials from the FDEP case files substantiating the violations committed by the City of Daytona. PEER would be more than willing to provide any additional documentation if requested.

Thank you very much for your attention to these matters. Please do not hesitate to contact me to discuss.

Sincerely,

Jerrel E. Phillips
Director, *Florida* PEER

cc: Herschel Vinyard, Secretary, Florida, Department of Environmental Protection
Cynthia Giles, EPA, Assistant Administrator for Enforcement & Compliance Assurance