

January 12, 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—SPENCER’S WASTEWATER FACILITY, CLAY COUNTY UTILITY AUTHORITY, FLORIDA

Dear Ms. Fleming:

Public Employees for Environmental Responsibility (PEER) formally requests that the U.S. Environmental Protection Agency initiate immediate action against the Clay County Utility Authority (CCUA)¹, Clay County, Florida 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 the Clean Water Act.

FDEP’s enforcement response against CCUA 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 Permit² and, with full public participation, take action to comprehensively assess and mitigate the imminent and substantial threat to public health and environmental harm caused by numerous permit violations, in connection with the CCUA’s wastewater discharges.

1 The Facility also operates under the name Spencer’s Wastewater Treatment Facility.

2 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.

A. Permitting of this Facility

The CCUA operates a wastewater discharge facility (Facility) under NPDES Permit Number FL0173371 (Permit). The Permit was issued on June 1, 2009, as a renewal of an existing permit. The Facility is a major discharger and is authorized to discharge 4.0 MGD of effluent via 3 outfalls. It is also authorized to discharge 4.73 MGD of residuals via land application. The permit’s expiration date is June 1, 2014. It has been revised twice since its issuance.

Given the impairment condition of the St. Johns River, the Facility operates under a TMDL for nitrogen. This TMDL applies to all three outfalls and was deemed necessary because the Facility discharges to an unnamed tributary of Little Black Creek which flows to the St. Johns River, itself in TMDL-Group 2. The Facility is currently required to report its nitrogen discharges which carry an annual limitation of 5,388.00 pounds per year.

According to the Amendment to the Fact Sheet that was published by the FDEP at the time of final Permit issuance for this Facility, the FDEP advised the public that “[t]he facility’s **Compliance Inspection Reports indicate that the facility has been in compliance for the last 5 years (2003-2008).**” (Emphasis added) This is a complete misrepresentation of the Facility’s past history. Not only had prior inspections identified violations,³ but in 2004 EPA Region 4 had notified both the FDEP and the CCUA that the EPA would initiate enforcement if the FDEP did not act. In response, the FDEP issued a Consent Order on August 23, 2004 that addressed numerous permit violations. The Fact Sheet also stated that, “[t]here are **no unresolved compliance issues for this facility**” when, in fact, the FDEP’s own records indicate that all requirements of the Consent Order were not met until almost 3 years later, on February 20, 2007, when it notified the CCUA of the same. Yet, any member of the public who relied upon the veracity of the Amendment to the Fact Sheet issued by the FDEP and who may have been interested in challenging the new permit issuance would not have known this.

B. A General Overview of The Facility’s History

This Facility is one characterized as having a repeated pattern of permit violations. While the FDEP has occasionally taken enforcement, the only significant enforcement was the one that was necessitated by EPA forcing the issue. In July 2004 EPA, recognizing the noncompliant status of the Facility, threatened to intervene because Florida was not enforcing the Permit. In response, the FDEP took enforcement that was supposed to bring the Facility back into compliance. On August 23, 2004, the parties executed a Consent Order (OGC-04-1165) (“Consent Order”) that identified a multitude of past violations. There were 79 named violations, all of which were taken from DMRs and most of which involved exceedances of nitrogen limits. In addressing these violations, the FDEP assessed a civil penalty. But it also changed the annual average limits

³ For example, a CEI dated March 5, 2004, rated the Facility as Significantly Out of Compliance.

on nitrogen and phosphorous to “report only” (paragraphs 13-15). A construction schedule for facility improvements was imposed (paragraph 16). Under the terms of the Consent Order the construction process was to begin on September 1, 2004, and be completed by August 1, 2006. A civil penalty of \$8,500.00 (plus \$500.00 for costs) was imposed (paragraph 18) and stipulated penalties of \$100.00/day were set (paragraph 21). This civil penalty was actually a reduction of the calculated civil penalty of \$17,500.00 which was reduced by 50% due to what the FDEP characterized as CCUA’s good faith efforts to correct their violations.

The Consent Order has been amended twice. On July 12, 2005, barely one year after its execution, it was amended to increase the limit for Total Suspended Solids (“TSS”) from 5 mg/L to 10 mg/L. This was apparently done because the Facility could not meet its effluent limits. The construction schedule was then extended on November 28, 2006 in order to give CCUA additional time to complete facility improvements.

On January 5, 2005, within six months of execution of the Consent Order, CCUA notified FDEP that it was having continuing exceedances of its TSS and TN annual averages. This was attributed to Hurricane Jeanne which struck Florida in September 2004 (less than a month after the Consent Order was executed). On

On February 20, 2007, the FDEP notified CCUA that all requirements of the Consent Order had been met.

The Facility’s failure to comply with its FDEP-issued permits has not surprisingly also resulted in it being included on multiple non-compliance reports submitted to the EPA from the FDEP. It has been listed on at least **twenty-eight** different Quarterly Noncompliance Reports (QNCRs) between 1999 and 2010. It has also been included on **ten** Significant Noncompliance Reports (SNC) between 2004 and 2007. What is surprising is that the overwhelming majority of these violations have occurred since mid-2004, when the Consent Order was issued. Yet, there have been no assessments for stipulated penalties, as called for under the terms of the Consent Order agreed upon by CCUA and the FDEP.

C. A History of Noncompliance Since 2006

In addition to problems reported on the QNCRs, there have been at least five (5) documented Permit violations in 2006, 4 in 2007, 1 in 2008, 2 in 2009 and 3 in 2010, of which there were 2 spills so far this year (both of which were contained onsite). Only one enforcement action has been taken since 2006 that being a short-form consent order that was executed in July 2007. Yet, the Facility is clearly not in a state of continual compliance with the Permit. The violations from 2006 to the present are as follows:

1. *QNCRs—1st Quarter 2006-1st Quarter 2007*

According to the QNCRs filed by the FDEP with the EPA, the Facility was out of compliance due to effluent violations for the entire year. The facility was listed as being in reportable non-compliance. The FDEP took no enforcement.

The QNCRs listed the following violations:

1. 1st Quarter 2006—Phosphorous—Out of Compliance but listed as Resolved Pending
2. 2nd Quarter 2006—Solids (Total), Nitrogen (Total), Nitrogen (Ammonia), Phosphorus (Total)—Resolved Pending
3. 3rd Quarter 2006—BOD (Carbonaceous), Completion of Repairs (Schedule violation--Reporting)—Non-Compliance
4. 4th Quarter 2006—BOD (Carbonaceous), as well as 13 non-reporting violations in September 2006—Non-Compliance
5. 1st Quarter 2007—Tide Stage (Failure to Report), BOD, (Carbonaceous—3 months)—Non-Compliance

Permit Condition(s) Violated: I. A.1.; X. 1.; X.7.

2. *QNCRs—2nd Quarter 2007 through 2nd Quarter 2010*

According to the QNCR filed by the FDEP with the EPA, the Facility has consistently failed to properly report its performance from the 2nd Quarter 2007 through the 2nd Quarter 2010.⁴ The facility was listed as being in continuing non-compliance for all but 3 of the quarters. In the 3 that were not listed as non-compliance, the facility was listed as being resolved pending. According to the FDEP’s records no formal enforcement was taken on these issues.

The QNCRs listed the following violations:

- a. 2nd Quarter 2007—LC50 Statre 96 HR ACU Ceriodaph—Failure to Report, LC50 Statre 96 HR Acucyprinella—Failure to Report—Non-Compliance
- b. 3rd Quarter 2007—50 instances of failure to report permit required parameters—Non-Compliance
- c. 4th Quarter 2007—Simply listed as Resolved Pending

⁴ The period may actually be longer inasmuch as QNCR reports are not yet available for reporting periods post June 30, 2010.

- d. 1st Quarter 2008—50 instances of failure to report permit required parameters—Non-Compliance
- e. 2nd Quarter 2008—Simply listed as Resolved Pending
- f. 3rd Quarter 2008—13 Instances of failure to report permit required parameters—Non-Compliance
- g. 4th Quarter 2008—30 Instances of failure to report permit required parameters—Non-Compliance
- h. 1st Quarter 2009—13 Instances of failure to report permit required parameters—Resolved Pending
- i. 3rd Quarter 2009—Failure to Report Total Suspended Solids—Non-Compliant⁵
- j. 1st Quarter 2010—Continuing Failure to Report LC50 Statre 96 HR ACU Ceriodaph, LC50 Statre 96 HR Acucyprinella. TSS and TP are listed as Resolved Pending—Non-Compliance
- k. 2nd Quarter 2010—Failure to Report Flow and Nitrogen—Non-Compliant

Permit Condition(s) Violated: I. G.8.; X.1.; X.7.

3. *SNCs—3rd Quarter 2006 through 1st Quarter 2007*

The Facility has been listed as Significantly Out of Compliance 3 times during this period. The listings are as follows:

- a. 3rd Quarter 2006—CBOD effluent violations. The FDEP notified EPA that an Amended Consent Order was executed on November 28, 2006. That much is true. However, this “Second Modification to Consent Order” simply modified the construction schedule for the Facility. The CBOD effluent violations are not mentioned and no civil penalties were assessed.
- b. 4th Quarter 2006—CBOD effluent violations. The status continues to be listed as an Amended Consent Order having been executed on November 28, 2006.
- c. 1st Quarter 2007—CBOD effluent violations. The status continues to be listed as an Amended Consent Order having been executed on November 28, 2006.

⁵ The QNCR for the 2nd Quarter 2009 is not available.

Permit Condition(s) Violated: I. A.1.; X. 1.; X.7.

4. *Violations in 2006*

On February 2, 2006, there was a raw effluent discharge of 38,000 gallons, because Ortega Construction Company broke an 8” pvc force main. The flow was contained in an excavated hole that was located near the line break. Apparently there was no discharge to surface waters, but the extent to which groundwater was affected is unclear.

Permit Condition(s) Violated: X.1.; X.7.

On February 6, four days after the February 2, 2006, spill the CCUA advised the FDEP that its TN annual average was 4.6 mg/L for period of September 2005 through December 2005. The Permit limit is 3.0 mg/L.

Permit Condition(s) Violated: I.B.1.; X.1.; X.7.

On March 27, 2006, while conducting water sampling at the Facility, the Florida Department of Health found that the Facility’s meter was not functioning. There is no indication in the file that the FDEP ever followed through on the violation.

Permit Condition(s) Violated: I. G.4.; X.1.; X.7.

On July 10, 2006, the CCUA advised the FDEP that the Facility had experienced upset conditions from March 26, 2006, through April 5, 2006. The upset discharged into a constructed wetland. The TN level was 7.0 mg/L entering the pond and 5.8 mg/L leaving the pond. There is no indication that enforcement was taken.

Permit Condition(s) Violated: I.A.1.; X.1.; X.7.; X.20.

The FDEP conducted a Compliance Evaluation Inspection at the Facility on April 21, 2006. During that inspection they found that CCUA had failed to report excursions that had occurred in April 2005—one year earlier. In addition, filed DMRs were found to be deficient. No enforcement was taken.

Permit Condition(s) Violated: I.G.8.; IX.3; X.1.; X.7.; X.19; X.20.

September 7, 2006 CCUA submitted a “Reclaimed Water or Effluent Analysis Report” that indicated that Total Trihalomethane (TMH) and foaming agents were above standard. No enforcement was taken.

Permit Condition(s) Violated: I.A.1.; X.1.; X.7.

5. *Violations in 2007*

On February 3, 2007 there was an unauthorized discharge of .357 million gallons of unchlorinated AWT effluent from the effluent pumping station, through the diffuser piping and into the Tributary of Little Black Creek at 4145-1 Savannah Glen, Orange Park, FL 32073. This was reported to the FDEP but no enforcement was taken.

Permit Condition(s) Violated: I.A.1.; X.1.; X.7.

On February 9, 2007, the Facility experienced a sewage overflow of 43,000 gallons into a storm drain. The drain went to a retention pond. On June 19, 2007, the FDEP then told CCUA that it wouldn’t normally take enforcement on a single incident. CCUA responded by telling the FDEP that their neighbor goes months or years out of compliance without enforcement. Nevertheless, the CCUA laboratory reported that the fecal results extremely high. Ultimately the FDEP took enforcement via a short-form consent order assessing \$10,000.00 in civil penalties (in addition to \$500.00 in costs). The short-form consent order was executed on July 23, 2007. There was no effort made to increase oversight at the Facility.

Permit Condition(s) Violated: I.A.1.; X.1.; X.7.

According to the 3rd year inspection conducted by FDEP on September 5, 2007, there were 5 TN and 8 CBOD exceedances between March and December 2006,. In addition, CCUA failed to report some of the exceedances for March and April. (In addition, as noted above, the flow meter was not functioning during part of that time), yet facility was listed as “in compliance.”

Permit Condition(s) Violated: I.A.1.; IX.3; X.1.; X.7.; X.20; X.19.

On October 10, 2007, during a Compliance Bio-Monitoring Inspection and a Toxic Sampling Inspection the FDEP learned that the Facility was experiencing acute toxicity due, in part, to TRC exceedances in the effluent. The FDEP wrote this issue off as not being a violation because flows were diverted to reuse, but indicated that further testing may have been necessary because the full reason for the toxicity was not determined. The file does not reflect that further testing was done. No enforcement was taken.

Permit Condition(s) Violated: I.F.1.; I.F.8; X.1.; X.7.

6. *Violations in 2008*

A file review conducted by the FDEP on June 6, 2008, revealed that the biannual Pathogen report had not been submitted. When FDEP checked with CCUA they learned that the testing had not yet been done. The Facility was rated as being out-of-compliance, but no enforcement was taken.

Permit Condition(s) Violated: II.15; X.1.; X.7; X.19.

7. *Violations in 2009*

On April 13, 2009, the FDEP conducted a stormwater site inspection. According to the report issued by the FDEP the Facility was “out of compliance.” The FDEP found that the Facility was pumping groundwater into a stormwater pond without a permit. In addition, there was a 10% algae growth and other problems identified. On May 8, 2009 a non-compliance letter was sent to CCUA. No enforcement was taken.

Permit Condition(s) Violated: X.1.; X.7. Rule Violation: 62-4.030, General prohibition against unpermitted discharges

On June 1, 2009, CCUA notified the FDEP that an air relief valve failed the previous afternoon resulting in a spill of 9,000 gallons of untreated effluent behind 711 Charles Pickney Street. The flow apparently percolated into the ground. Hydrated lime was applied to the area. CCUA did not believe that the spill compromised a nearby stormwater retention pond, but there is no indication that testing was actually performed to confirm that fact. No enforcement was taken.

Permit Condition(s) Violated: X.1.; X.7.

8. *Violations in 2010*

A Compliance Evaluation Inspection conducted on February 2, 2010, rated the Facility as being significantly out of compliance due to both schedule and effluent violations. The FDEP found that Outfall D-003 was constructed and put into service without submitting an engineering design report or otherwise obtaining FDEP approval to place the outfall into operation. In addition, there was a CBOD violation on December 30, 2009. The permit limit was 6.25 mg/L and the reported result was 228 mg/L. The required pathogen monitoring report had not been submitted. There was light foam on the surface of the aeration basin and the clarifiers. The effluent disposal system was rated as out of compliance because the operating protocol was not being followed. On March 19, 2010 a warning letter was sent, but all of the violations were not included in the warning letter and no penalties were assessed. In addition, by this time the FDEP had closed the August 23, 2004, Consent Order as having been fully complied with. The Second Modification to this Consent Order had given the CCUA until March 1, 2007, to bring the Facility into a full Operational Level. Clearly this was not done, even though the FDEP had pronounced the same to have been achieved.

Permit Condition(s) Violated: I.A.1.; II.15; X.1.; X.7; X.19. Rule Violations: 62-4.030, 62-620.300(5); Statutory Violations: 403.161(1)(a) and 403.161(1)(b), Fla. Stat.

On May 3, 2010, the CCUA reported a 10,000 gallon spill of sludge that had occurred that day because a suction line on the bottom of a biochem #1 process tank had blown apart. The spill was contained on-site. Lime was applied to the ground and the Facility was repaired. No enforcement was taken.

Permit Condition(s) Violated: II.1.; X.7.; IX.3

On June 8, 2010, CCUA notified the FDEP that 11,000 gallons of sludge had spilled five days earlier, on June 3, 2010. The spill apparently resulted from a power loss that was not corrected by backup generators. The spill was contained on-site. No enforcement was taken.

Permit Condition(s) Violated: II.1.; X.7.; IX. 3; X.20.

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. There have been repeated situations in which either treated or untreated wastewater and/or sludge have been improperly discharged, effluent limits have been violated and required reports have not been filed. Even where improper effluent releases have not impacted surface waters it still must be considered that the groundwater may have been effected, 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. As is evident from the above, the CCUA has seen

formal enforcement in only one of the cases of non-compliance since 2006. Stipulated penalties called for under the terms of the Consent Order were never assessed.

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. The history of noncompliance was even disregarded as an upward adjustment in 2004 when the FDEP was forced to take enforcement by the EPA as a result of the CCUA’s continual state of non-compliance.

The failure of the CCUA to promptly and accurately report its discharge data to the FDEP has been consistently treated as a minor inconvenience to the FDEP; rather than emblematic of a permittee who has a rather callous disregard of the health, safety and welfare of the public. One thing that most inspectors will tell you is that a facility that routinely fails to properly report basic data to a regulatory agency quite often has other, much more serious, problems with its operation.

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). Such is the case now before you.

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. 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 Clay County Utility Authority as

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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 Clay County Utility Authority. 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: Mimi A. Drew, Secretary, Florida, Department of Environmental Protection
Cynthia Giles, EPA, Assistant Administrator for Enforcement & Compliance Assurance