

January 26, 2010

A. Stanley Meiburg
Acting Regional Administrator
U.S. Environmental Protection Agency
Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303

RE: OVERFILE REQUEST

Dear Mr. Meiburg:

Public Employees for Environmental Responsibility (PEER) formally requests that the U.S. Environmental Protection Agency initiate immediate action against Palm Beach County, Florida and Gastion, Inc., in connection with the imminent and substantial threat to public health presented by the release of hazardous substances from spills on and encroaching upon properties currently owned by Palm Beach County, Florida and Gastion, Inc.

Specifically, PEER requests that EPA immediately assert primary jurisdiction over the sites 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 the spills, pursuant to EPA's response authority under Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9604, and its imminent hazard authority under RCRA, 42 U.S.C. § 6973. Furthermore, we request that EPA initiate enforcement action and prosecute Palm Beach County, Florida and Gastion, Inc. to the fullest extent of the law for violations of the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq, and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq., in connection with Palm Beach County, Florida's and Gastion, Inc.'s maintenance of the sites involved.

The property in question is subject to the regulatory authority of the Florida, Department of Environmental Protection (FDEP) under Chapter 376, Florida Statutes. The FDEP has delegated its regulatory authority over the locale to Palm Beach County's Department of Environmental Resource Management (DERM) in accordance with §376.303(3)(b), Fla. Stat., although the FDEP, at all times pertinent hereto, has had oversight responsibility for the actions of the DERM.

As is more fully described below, what is occurring at the site in Palm Beach County is ongoing contamination by petroleum products at one site owned by Gastion, Inc. (the Gastion Site). These petroleum products have migrated in the past onto adjacent property that was previously contaminated with petroleum products and that is now owned by Palm Beach County, Florida (the PBC Site). Palm Beach County owns and maintains office buildings on the PBC Site and as a result of the contamination employees who work in at least one of those buildings are suffering significant adverse effects to their health as a result of what appears to be vapor intrusion. The contamination at these sites has existed for least twenty (20) years. Yet, as a direct result of what can only be described as bureaucratic foot-dragging coupled with a clear conflict of interest neither site has been fully investigated and remediated.

Indeed, FDEP's enforcement response against these two violators has fallen so far short of both EPA's and FDEP's own standards and policies, that protection of the environment and public health requires federal intervention in these cases. PEER, therefore, requests that EPA Region 4 take immediate and appropriate action against these violators under its concurrent authority to enforce the RCRA and the CWA in Florida.

A. The Gastion Site

The Gastion Site is located at 252 S. Military Trail in West Palm Beach, Florida. This site is on the southeast corner of the intersection of S. Military Trail and Gun Club Road. For over 20 years it has been the site of a service station. During this 20 year period it has been owned first by Texaco and then by Chevron. It has been assigned a federal ID of 8514618.

In 1987 Texaco Refining and Marketing, Inc., (Texaco) submitted an Early Detection Incentive Program, Notification Application to the FDER notifying the agency of a petroleum spill and seeking reimbursement for the subsequent cleanup of that spill. Documents dating as far back as 1987 show that there was petroleum contamination at the site apparently arising from the removal of underground storage tanks. The static water table in the area is approximately 5 feet below the ground surface. Testing in 1988 revealed that the groundwater was contaminated with varying concentrations of dissolved hydrocarbons. The plume of contamination extended from south to north in the direction of the PBC Site, though in early years it was not known whether the PBC Site had been contaminated by migrating pollutants from the Gastion Site. On September 19, 1989, two years after the spill was first discovered, the parties agreed upon a Contamination Assessment Report (CAR) and Remedial Action Plan (RAP) for the site.

The contaminants found at the site included benzene, BTEX, methyl-tert-butyl ether (MTBE), ethyl-benzene, xylene, and toluene. Despite remediation efforts the size of the plume and concentration of the VOAs fluctuated over time. This was due, in part, to repeated operational failures of the equipment that was being used for the remediation as well as frequent instances of high water intrusion. These failures continually hindered successful remediation efforts. Then, in an annual report that was submitted to DERM by Harding Lawson Associates for calendar year 1994, it was learned that:

“A review of historical information on the site shows that a large quantity of petroleum-contaminated soil was removed from the central portion of the site several years ago. Soil removal apparently did not take place in the vicinity of RW-2 (in fact, little information on the presence or absence of contaminated soil in the vicinity of RW-2 exists). This could explain why areas to the south of RW-2 have cleaned up while the elevated ground water concentrations of organic chemical concentrations persist in the northern portion of the site in the vicinity of RW-2.” (Page 2)

1994 Annual Report, submitted on March 23, 1995. RW-2 is the northernmost recovery well on the property. It is the closest well to the PBC site.

In addition, the 1994 annual report revealed that several monitoring wells had been destroyed on the site because of adjacent roadway construction. It was recommended that these wells be replaced.

By the end of 1996 the destroyed monitoring wells still had not been replaced. In addition, however, it was now recommended that a monitoring well needed to be installed on the PBC Site because of an increasing flow rate northward across the remediation area. This new well (as well as the replacement monitoring wells) was installed in July 1997 and MTBE was detected in that well. When testing in 2000 showed no VOAs in this well it appears that further testing ceased, despite the fact that VOA levels in all of the wells fluctuated considerably from one reporting period to another.

On or about April 18, 2002, Chevron notified DERM that Chevron and Texaco merged on October 9, 2001, and that Chevron had assumed liability for the Texaco facilities, including the facility at 250 S. Military Trail. Actually, by this time, DERM had already been advised that a new owner of the site, Gastion, was intending to build and operate a new station at the site. This new construction caused yet additional damage to existing monitoring wells. In fact, on April 27, 2001, DERM notified the engineering firm that “[i]t appears most likely that the existing monitoring wells have been destroyed during the construction. For this reason, the monitoring wells associated with the Natural Attenuation Monitoring Order dated January 4, 2001 for this site will need to be reinstated after the new construction has been completed.”

It appears from the file that construction of the new facility was completed in 2001 and the facility was placed into operation. Within twelve months, however, the facility was already being notified by DERM that it was in violation of various rules, including the failure to perform a tightness test before placing the tanks into service. Two months later, on July 19, 2002, DERM advised the facility to cease operation until the proper test was conducted.

The fact that the facility was operational did not mean that the site had been fully remediated.

Ongoing monitoring was consistently showing a continued presence of contaminants at the site. Therefore, on November 7, 2002, seven (7) additional shallow monitoring wells were installed. No additional deep wells were installed at that time. Less than a year later, on September 24, 2003, the facility reported that contamination levels were rising and that there had been a gasoline leak at the site. Significantly, results from one of the northernmost monitoring wells indicated high levels of MTBEs in the latter half of 2003. As was stated in the Annual Natural Attenuation Monitoring Report for October 2002 through September 2003 (dated October 2003), “The samples collected from monitoring well MW-6 have shown an overall increase in VGA and MTBE concentrations and are above the GCTL's. Additionally, the samples collected from monitoring well MW-6 for the September 4, 2003 sampling event and September 25, 2003 re-sampling event has VGA concentrations above the NADSC.” (Page 4) The engineer, Shaw Environmental, Inc., recommended additional testing because of what was believed to be yet another release at the site. This report was followed by an inspection on November 20, 2003, by DERM in which DERM found that groundwater contamination at the site was increasing.

The DERM inspection on November 20, 2003, was followed by an enforcement letter from DERM to Gastion on January 16, 2004, advising the company that a site assessment was to be submitted to DERM within 270 days of discovery of the release. The facility was not inspected by DERM for 10 months after that. Then, at an inspection on November 10, 2004, DERM found open violations for release detection devices. Furthermore, the site assessment still had not been provided. Then, almost 11 months later DERM sent a warning letter to Gastion advising the facility that it may be in violation.

The FDEP inspected the facility on November 30, 2006, and found the facility to once again be out of compliance because leak detection testing had not been conducted. This has been an ongoing problem at the facility, yet no enforcement was initiated.

The next activity in the file occurred over 2 years later when a score tracking sheet was completed on October 8, 2007, showing that due to continued high levels of contamination the site continued to score too high for cleanup funding from the state. The tracking sheet, which was completed on October 8, 2007, shows that there were recent light petroleum products released that had contaminated groundwater. The site is listed as being located in a G-4 aquifer and high recharge/permeability geological area. This sheet was followed by yet another noncompliance letter on October 16, 2007, from DERM to Gastion in which the facility was notified that it may be in noncompliance for yet additional releases and equipment malfunctions.

The last activity at the facility occurred on November 16, 2009, by the FDEP. Remarkably, the FDEP found the facility to be in compliance at that time.¹

Thus far, Texaco has been reimbursed in excess of \$150,000 by the State of Florida for the

¹ Interestingly, this inspection was conducted only a few weeks after *Florida* PEER submitted a public records request seeking the agency's records on the facility.

incomplete remediation of the site that has been contaminated by their own petroleum products.

It appears from the records that since 2000 there has been no further study on the issue of whether or not petroleum products have migrated onto the adjacent property at 50 S. Military Trail that is owned by Palm Beach County.

B. The PBC Site

Immediately downgradient and to the north of the Gastion Site is the PBC Site. The latter property is located on S. Military Trail, immediately south of the West Palm Beach Canal (a major canal) and the Palm Beach International Airport. The property was long owned by McArthur Dairy which operated a business on the site.²

This site was contaminated with petroleum products from as far back as 1969. It was given facility identification number 508943687 and on or about December 31, 1969, a remediation plan was put in place. Then, on or about February 2, 1989, the property was deeded to Palm Beach County, which has owned it since.

Apparently no work was done in furtherance of the remediation plan prior to Palm Beach County's acquisition of the site, inasmuch as DERM records indicate that not until 1990 were 3 storage tanks removed and 6,450 gallons of oily waste removed by Glasgow Equipment service and/or Environmental Petroleum Recovery. There is no indication that final closure approval was obtained after the petroleum products were allegedly removed. The few remaining available files may be viewed on the county's "CINEMA" website at http://files.co.palm-beach.fl.us/cinema/pbc.pkgERMViewer.main?p_department_seq=13&p_department_name=ERM.

After Palm Beach County purchased the PBC Site, county offices were moved into the 53,792 square foot existing office building located at 50 S. Military Trail which is at the center of the property. Before the county built two additional office buildings in which to locate additional county offices, the county removed the three petroleum storage tanks. One of the newer buildings is located at 240 S. Military Trail and houses the Palm Beach County Supervisor of Elections. This building is located on the northeast corner of the intersection of Military Trail and Gun Club Road. The other building is located at 20 S. Military Trail and is on the northernmost section of the property, adjacent to the West Palm Beach Canal. It houses the Palm Beach County Emergency Operations Center. Both buildings were built on fill that was needed subsequent to the removal of the McArthur Dairy petroleum tanks. Sandwiched between these two buildings at a slightly lower elevation is the oldest of the three buildings that is the subject of this complaint, the 50 S. Military Trail building. This building now sits on the lowest elevation of the property as if it were in the middle of a fishbowl. Over the years, it has housed multiple county offices, including Fire Rescue, Property and Real Estate Management, General

² McArthur Dairy owns another site in Broward County, FL. This site is a brownfields site. *Brownfield Site ID* Number BF060201001.

Services, Purchasing, Consumer Affairs, Small Business Administration and Human Resources. In mid 2009 the County moved Fire Rescue and Human Resources to other locations in preparation for major renovations to the building which are now in progress. However, Purchasing, Consumer Affairs, and the Small Business Administration remain in the South end of the building during the reconstruction of the North end.

C. Enforcement Status At The Two Sites

§ 376.30701 (g) 3., Fla. Stat., states, in pertinent part, that, “[g]roundwater resource protection remains the ultimate goal of cleanup, particularly in light of the state's continued growth and consequent demands for drinking water resources.” Frankly, at this juncture there is no evidence as to whether or not groundwater contamination continues at the PBC Site. The same cannot be said of the Gastion Site after 20 years of supposed remediation.

As was stated above, the FDEP has delegated compliance/enforcement responsibilities in this geographical area to Palm Beach County DERM.

There are very few records available with respect to the PBC Site. There is no indication that McArthur Dairy was ever fined or otherwise penalized in connection with the illegal discharge of petroleum products at the PBC Site. There is now a significant problem posed with cleanup of the site because of a direct conflict of interest involving Palm Beach County (the agency delegated the responsibility to enforce the tanks program in the county) since the county now owns property upon which the county buildings are situated and because Palm Beach County knew of the contamination at the site when it purchased the property in 1989.

The Gastion Site has likewise seen only minimal enforcement under § 376.3071, Fla. Stat. This statutory provision provides that the FDEP is authorized to conduct the immediate cleanup of contaminated sites via use of the Inland Protection Trust Fund. The FDEP is authorized to enter into agreements with violators so that contaminated sites may be remediated if the violator has insufficient resources at its disposal to properly remediate the site. See, § 376.30714, Fla. Stat. While an agreement was apparently reached between the FDEP and Texaco, the records are silent as to the situation after Chevron/Gastion assumed liability for the site. Likewise, there is no indication that any enforcement has taken place in regards to the additional releases that occurred after the initial release of contaminants by Texaco.

D. The Health and Environmental Risks Posed by the Two Sites

Chief among the multiple concerns regarding the situation at these two sites is that of **vapor intrusion** occurring inside the building at 50 S. Military Trail. This vapor intrusion, we believe, is jeopardizing the health of the employees who work on the PBC Site. There has been, at best, a tepid response of management to complaints raised about the situation inside the building at 50 S. Military Trail. At least one employee has raised serious complaints about suffering severe respiratory and other problems for over eight (8) years while working in the building. She was diagnosed with a serious lung condition two years ago. With the consent of her physicians (who

would have preferred that she be moved out of the building entirely) this employee has been wearing respiratory protection equipment, including a Breathe Easy PAPR mask, with carbon filtration for extended periods of time just to be able to work in the building. The employee sought reimbursement from her employer, Palm Beach County, for the considerable expense that she was incurring as a result of this situation. Her request was denied. She also repeatedly asked that the county conduct air quality testing for VOCs that she believed were present in the building. However, the county cared so little about the health of its employees that it conducted only minimal testing that is not designed to identify the compounds believed to be at the source of the problem. The county has also inexplicably refused to allow the employee to conduct her own air quality testing inside the building. In the meantime, other employees in the building either have experienced, or are continuing to experience health problems, including, but not limited to, lung cancer, kidney cancer, MS, skin cancer, skin rashes, severe allergies, sinusitis, asthma, bronchitis, migraines, and insomnia. These employees are afraid to speak out, however, because of concerns about job security. This does not include members of the public who could be exposed to VOCs upon entering the building.

The idea that officials at Palm Beach County would be so resistant to discovering whether or not VOC contamination exists in one of their buildings is stunning. § 376.30702(2), Fla. Stat., provides that affected property owners are to receive notice whenever it is discovered that a plume of contamination has traveled beyond the property boundaries of the site at which rehabilitation was initiated. § 376.30702(3), Fla. Stat., provides that the FDEP is to send this notice to such owners. Thus, there is a clear public policy that immediate notification be given to persons who could be affected by the release of petroleum products. Palm Beach County is acting in complete disregard of this policy.

There is a significant environmental problem in addition to the health risk posed by the contamination at this site. There is well documented history of failure in remediation at of the VOCs at the Gastion Site. Two companies, Texaco and Chevron, have not only failed to clean up this site, but there have been multiple instances of additional spills during the time that remediation was supposed to be occurring. Nevertheless, the State of Florida has spent taxpayer money to reimburse the contractors who, to this point, have failed to accomplish full remediation. In the meantime, the plume of MTBE and other compounds continues to lie just to the south and upgradient of the building at 50 S. Military Trail, as well as the West Palm Beach Canal.

The situation on the PBC Site is no less troubling. The site has a history of petroleum contamination with an equally questionable history of success in remediation. Palm Beach County conducted some cleanup of the site, but may well have exacerbated the problem by excavating the site such that the building at 50 S. Military Trail became the epicenter for migrating contamination from both the Gastion and PBC Sites.

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

Both RCRA, 42 U.S.C. § 6928(a)(2), and CWA, 33 U.S.C. § 1319(a)(3), bestow 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 both statutes allow 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. 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 both the Gastion and Palm Beach County cases, Florida's DEP has failed to take adequate enforcement action by EPA standards. In both cases, despite the violators' egregious records of environmental noncompliance, both DERM and FDEP have dragged their heels and ultimately allowed violations of substantial gravity to go entirely unpenalized. For its part, the FDEP has not only allowed McArthur Dairy's violation to go wholly unaddressed, it has now allowed Palm Beach County to operate on the PBC Site without conducting any meaningful cleanup or even investigation into the likelihood that serious VOC contamination is occurring on the property. Moreover, both the FDEP and DERM have been content to watch one mishap after another take place at the Gastion Site when they know that groundwater contamination has yet to be properly remediated by the property owner. Clearly, in neither case can Florida's DEP be viewed as meeting its delegated mandate to provide a credible deterrent against violations of federal environmental laws.

The extent to which the State of Florida has abdicated its responsibility to enforce these cases can perhaps be most easily seen when it is considered that *Florida* PEER submitted a public records request to the agency for its records in these two cases. The request was submitted under § 119.07, Fla. Stat., on October 13, 2009.³ The agency has found no records with respect to the PBC Site. There are only minimal records on the Gastion Site.

PEER, therefore, formally requests that EPA immediately initiate civil enforcement proceedings against Gastion, Inc. and Palm Beach County in connection with the environmental violations described above and any others that may be discovered. In addition, PEER is requesting that

³ Four weeks before the FDEP visited the Gastion Site and pronounced it in compliance.

immediate testing be conducted, particularly at 50 S. Military Trail, to determine the extent to which vapor intrusion has infected the building to the detriment of the health, safety and welfare of the public.

PEER has in its possession voluminous materials from the DEP case files for Texaco/Chevron/Gastion, Inc. and Palm Beach County that document the violations and DEP actions outlined in this letter. 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: Michael W. Sole, Secretary, Florida, Department of Environmental Protection
Cynthia Giles, EPA, Assistant Administrator for Enforcement & Compliance Assurance