



Florida
PEER

Public Employees for Environmental Responsibility

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May 25, 2018

Trey Glenn
Regional Administrator
U.S. Environmental Protection Agency
Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-8960

RE: OVERFILE REQUEST—Clay County Utility Authority

Dear Mr. Glenn:

Public Employees for Environmental Responsibility (PEER) formally requests that the U.S. Environmental Protection Agency initiate immediate action against the Clay County Utility Authority, 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 or the Department) under its delegated authority pursuant to the Clean Water Act.

Specifically, PEER requests that EPA, pursuant to EPA's response authority under the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq, immediately assert primary jurisdiction over the NPDES Permit 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 Facility, Florida's wastewater discharges.

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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.

The Clay County Utility Authority (the County, or Clay County, or the permittee) operates a wastewater discharge facility (Facility) under NPDES Permit Number FL0025151 (Permit). The Facility is a major discharger and is authorized to discharge 5.0 MGD of effluent into the St. Johns River, a Class III Marine waterbody via Outfall D-001. Class III waterbodies are those that, according to the State of Florida, allow for fish consumption; recreation, propagation and maintenance of a healthy, well-balanced population of fish and wildlife. See, § [62-302.400\(1\), F.A.C.](#) The discharge point is into the Lower St. Johns River, a segment for which the Department has developed a TMDL for multiple pollutants, including Thallium, Mercury, Nutrients, and Silver. Consequently, due to the nature of the Facility's operation, Total Nitrogen, Total Phosphorus and Mercury are the pollutants of primary concern, vis-à-vis the TMDL. The Facility is also authorized to operate a public access system that discharges 3.0 MGD AADF of reuse via R-001. The permit was renewed on June 7, 2014, along with Administrative Order (AO). The AO was issued, because Clay County advised the FDEP that would not be able to comply with Permit limits on whole effluent toxicity (AO, ¶ II.5.). Therefore, the FDEP allowed Clay County to exceed normal Permit limits for this parameter, imposed more aggressive testing requirements and required Clay County to issue reports on its efforts to come into compliance. In addition, as the Fact Sheet issued with the Permit states (page 13), the AO allowed the Facility to "change to marine toxicity species to accommodate an anticipated mixing zone for chronic toxicity." Compliance with regular Permit limits are required within 40 months of the issuance of the Permit (¶ III. 2.c.). To date there has been two revisions of the Permit. The most recent modification occurred on August 7, 2015, at which time the FDEP authorized the demolition of the 98,000-gallon dual compartment chamber that assists in screening grease balls. The previous revision (on June 11, 2014) required a 38% reduction of volatile solids in the sewage sludge.

As is more fully described below, what is occurring at the site is a repeated pattern of violations that have been systematically ignored by the FDEP. Historically, the site has had numerous reporting and effluent violations that have resulted in it being included on Quarterly Noncompliance Reports (QNCRs) for 16 out of 64 quarters from the 2nd quarter of 2001 through the 4th quarter of 2017.¹ Most of those appearances have been for reporting violations. According to the [Facility's page](#) on ECHO, the Facility is not currently in SNC, but it has been on QNCRs for 7 quarters since the 1st quarter of 2014. According to the [Discharge Exceedances Report](#), the majority of exceedances appear to be CBOD. But there are also [mercury violations](#). Recently, it has been listed on 2 Significant Noncompliance Reports (SNC): the 1st quarter of 2015 for ammonia violations; and the 3rd quarter of 2015 because of phosphorus violations.

¹ These listings are those that are indicated on documents supplied to PEER by the EPA in response to FOIA requests. PEER currently has a pending FOIA request for the most recent data. Therefore, there may be more QNCR listings than recited herein.

FDEP's enforcement response against Clay County 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 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 CWA in Florida.

A. Clay County's History of Noncompliance

Looking at the Facility's performance under the current Permit, we found that the Department conducted, what it termed a joint "Compliance Sampling Inspection (CSI) and Sanitary Sewer Overflow Preventive Inspection (SSOP)" of said Facility from October 7 to October 11, 2013. The report, which was mis-dated as October 7, 2012, was issued shortly before the Permit's renewal. The inspector's findings were that the Facility was in compliance at the time. A review of the report, however, shows that, in fact, there were effluent violations for whole effluent toxicity. In addition, the report notes that "[i]n March, July, and August 2012, the Reclaimed Water (R001) had high effluent TSS of 11, 9, and 11 mg/l versus a limit of 5.0 mg/l. there (sic) have been none in over a year." There were also TMDL data errors. Nevertheless, the Facility's effluent quality was rated as being in compliance. Finally, as will be discussed below, the Facility had a major SSO in approximately 6 months prior to this inspection. Nevertheless, the sanitary sewer aspect of the inspection report (Section 13) found the Facility to be in compliance with this parameter as well, and there is no mention of the major SSO that had occurred.

It should be noted that eight months after the October 2013, inspection, the Department would, in issuing the new Permit, issue an AO, precisely because the Facility's effluent was not in compliance. Further, the Fact Sheet, which was issued in advance of the new Permit stated, on page 3, that "[t]he Department record (From 2010 to 2013) indicates that the facility has been mainly deemed In-Compliance." The Fact Sheet, while stating that parameters were in compliance, does not allude to the fact that violations were found of whole effluent toxicity and TSS were found during the period covered by the October 2013 inspection.

The next inspection was conducted on September 24, 2015, 15 months after the new Permit was issued. It was a combined Compliance Evaluation Inspection and Reclaimed Water Inspection. During the inspection the Department found that:

- "... flow proportioned composite (FPC) samples were not being taken from the influent location." The report notes that this was corrected later. The inspector then rated the sampling as being in compliance.
- In similar fashion, the section discussing flow measurement indicates that "The R001 meter was within 10% of the 'true' value **but the D001 "River Reject" was outside the acceptable range.**" (Emphasis in original) Once again, the report notes that this was corrected. Flow measurement was thus considered to be in compliance.

- Effluent quality was handled in the same fashion. The report notes that in March 2014 (which was prior to issuance of the Permit), fish toxicity was found in the effluent. By the same token, the March 2014 sampling found fecal coliform to be too numerous to count in the reclaimed water. There were also data errors on the DMRs for four months in 2014. The DMRs were “revised.” While the report states that the violations were not considered to be significant non-compliance, the inspector went further and rated overall effluent quality as being in compliance instead of a rating of non-compliance (which would have accurately reflected the situation at the time of the inspection).

The FDEP inspector wrote via email to Clay County’s point-person the day after the September 24, 2015, inspection. In the email the inspector stated that: “[o]verall, the Miller St. WWTP appeared to be running in an acceptable manner and your records were in good order as well. However, there are some items that require follow up before a final rating of the WWTP can be assessed.” The inspector then detailed the deficiencies found at the time of the inspection. When the “final” copy of the inspection report was sent to Clay County on January 25, 2016, all aspects of the inspection were marked as “in compliance” and the Facility was given the same rating.

The Department next inspected the Facility on November 18, 2016. At the time of the inspection it was determined that the Facility was incorrectly reporting results for TSS and BOD in accordance with 62-620.200(57), F.A.C. The DMRs apparently indicated violations of these parameters. Consequently, effluent quality was rated as being “minor out of compliance.” In addition, the Facility’s ID was not found on biosolids manifests. This is a violation of 62-620.650(4), F.A.C. The inspector rated the biosolids/sludge aspect of the Facility’s performance as being “minor out of compliance.” Because of the violations found during the November 18, 2016, inspection the Facility was rated as being out of compliance.

Three days after the inspection, an inspector sent an email to Clay County and recited the violations found at the time of the inspection. Just as happened the year before, Clay County was given a pass, provided that the violations were fixed. The inspector stated that, “[i]f they are “completed/addressed” and proof sent to me, that will be ‘credited’ in our final report.” Clay County complied and as a result the Department sent the Permittee a letter on December 16, 2016, and stated that the Facility was in compliance and that deficiencies had been corrected. No further action was taken despite the violations, and the Permittee’s history of non-compliance with reporting requirements.

This Facility has also had problems with sanitary sewer overflows (SSOs). The Department’s files reflect that there have been twenty-two (22) SSOs associated with the Facility since 2012. Two of those occurred in 2016, and there have been four thus far in 2017 (one of which was associated with Hurricane Irma). A little over a month ago, on September 28, 2017, there was an SSO resulting in the discharge of 6,505 gallons of partially treated wastewater into the St. Johns River. On April 8, 2015, a broken blowoff resulted in the unpermitted discharge of 7,620 gallons of reclaimed water onto a street and from there into a stormwater pond. The year before that, on July 11, 2014, a SSO resulted in the unpermitted discharge of 2,250 gallons of untreated effluent

onto a public parking lot. Fecal coliform results at the point of the spill were as high as 8,820 CFU/100ml. Even downstream the samples indicated counts of 5,800 CFU/100ml. On April 16, 2013, the Facility experienced a SSO of 271,000 gallons of raw sewage at the Miller Street Station. The sewage went into a drainage ditch, though some of it was recovered by the Permittee. On August 21, 2013, the FDEP entered into a short-form consent order with the Facility, and the fine was set at \$2,500, plus \$250 in costs.

The August 2013, SSO is the only recorded enforcement that has been taken against the Permittee since 2012, and it required no action on the Permittee's part, aside from paying the fine. It should be noted that this enforcement action was not mentioned in the Fact Sheet that was issued with the Notice of Intent to Issue the renewal permit. Section 9, of the Fact Sheet is designated for discussion of both administrative orders and consent orders. While the AO is discussed, the August 2013, SFCO is not. Consequently, the public would not know of this enforcement action unless a thorough review of the FDEP's file was conducted.

In addition to the problems found during inspections and the multiple SSOs, it should be remembered that the Facility has recently been listed on 2 Significant Noncompliance Reports: the 1st quarter of 2015 for ammonia violations; and the 3rd quarter of 2015 because of phosphorus violations. No enforcement has been taken for these violations either, even though a TMDL is in effect for nutrients, as noted above.

B. 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 have been improperly discharged to surface waters, stormwater retention ponds and/or to sanitary sewers. Yet in each and every case the FDEP chose to treat the matter as of little or no consequence. The numerous SSOs that have occurred at the Facility would suggest an aging Facility that is badly in need of repair, lest failures occur that jeopardize the public's health and the environment. This was readily apparent to the Department at the time of the Permit renewal and issuance of the AO, yet the AO does not require any studies of the collection/transmission system, or of the Facility's ability to comply with its other Permit conditions.

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

Except for the SSO that occurred in 2013, the FDEP has failed to take enforcement when it identified violations at the Facility. Each and every time no enforcement was taken because of a clear attitude that the Permittee was doing the best that it could at the time and was therefore supposedly trying to abide by the Permit. It is the direct result of administration efforts to curry

favor with the industry that it regulates. The result is that years pass with a consistent pattern of excused misconduct.

The Permittee's failure to 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 its reporting obligations under the Permit, as well as a disregard for the health, safety and welfare of the public. One thing that most inspectors know 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. Such is the case before you. Instead of aggressively moving on the evidence presented, the FDEP chose to treat it as an inconvenience.

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. The files in this case show that, except for the last inspection in 2016, the Department's approach to finding violations is all about making the Permittee look good to the public. It does this by:

- Allowing the Permittee to correct the violations and then rewarding the Permittee by granting a rating of being in compliance, when, in reality, the Facility was not in compliance at the time of the inspection, and
- Ignoring documented effluent violations found on DMRs.

This is nothing short of a governmental agency being complicit with a regulated entity's noncompliance. Yet, even when the agency does see fit to properly evaluate a facility and issue a deserved rating of noncompliance, it quickly side-steps enforcement by issuing a letter that lets the facility off the hook if it supposedly promises to operate in compliance down the road.

The FDEP's approach to situations such as this is not without consequence. By failing to accurately assign ratings after conducting inspections and creating an appearance of compliance, the result is that if subsequent violations occur (as has been the case here) any formal enforcement will be viewed as the first time that the Facility has failed to abide by its permit. Consequently, if civil penalties are sought there can be no upward adjustment of the penalty amount because of a history of noncompliance. In other words, reality is distorted. Further, when it comes time to renew the permit, the Fact Sheet that the Department issues with the Notice of Intent to renew the permit will state that the facility does not have a history of formal enforcement. And even when the Department (as happened with this permit) itemizes some of the effluent violations that occurred over the course of the prior permit, the average citizen would mistakenly conclude that the violations were of no consequence, because formal enforcement was not taken. This makes permit challenges less likely. We will never know whether or not this type of behavior avoided permit challenges in this case, but the point is that the public should be entitled to know that the FDEP has effectively gone out of its way to avoid taking any enforcement against this Facility, to the point of drafting inspection reports so that they lead the reader to falsely conclude that the Facility is being operated in compliance with its permit.

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.

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 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(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 under-penalized. 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 Utilities as appropriate in connection with the environmental violations described above and any others that may be discovered. PEER suggests that these measures should include the assessment of civil penalties for past violations occurring within the applicable statute of limitations, including an upward adjustment to account for the economic benefit enjoyed by Clay County due to its years of non-compliance. Furthermore, we suggest that comprehensive studies are required to determine the extent to which repairs of the County's infrastructure are needed so that future SSOs are avoided. Finally, the County should be required to hold more extensive educational programs for its employees so that they understand and comply with the reporting requirements imposed by the Permit.

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

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

Sincerely,

/s/

Jerrel E. Phillips
Director, *Florida* PEER

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