Florida PEER

Public Employees for Environmental Responsibility

P.O. Box 14463 • Tallahassee, FL 32317-4463 • **Phone**: 850-877-8097 • **Fax**: 850-942-5264
E-mail: flpeer@peer.org • **Web**: www.peer.org

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— Ridaught Landing Wastewater Treatment Facility-- NPDES Permit Number FL003972

Dear Mr. Glenn:

Public Employees for Environmental Responsibility (PEER) formally requests that the U.S. Environmental Protection Agency initiate immediate action against the Ridaught Landing Wastewater Treatment Facility (Facility) in Middleburg, 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's wastewater discharges.

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 Ridaught Landing Wastewater Treatment Facility is located in Middleburg, Florida and operated by Clay County (the County, or Clay County, or the Permittee). The County operates the Facility under NPDES Permit Number FL0039721 (Permit). The Facility is a major discharger and is authorized to discharge wastewater at a rate of 2.37 million gallons per day (MGD) Annual average Daily Flow (AADF). The discharge is through two discharge points, the primary one (D-001) being a 1.3125 MGD discharge to Little Black Creek, a Class III fresh waterbody. The second discharge (D-002) is a backup discharge that is permitted under Florida's Apricot Act.[1] This 1.875 MGD AADF backup discharge is a discharge of reclaimed water directly to the St. Johns River, which is a Class III Marine waterbody. 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. As was noted by the FDEP on the Fact Sheet that was issued at the time of permitting, Little Black Creek is an impaired waterbody for fecal coliform. Accordingly, a TMDL for fecal coliform has been established for this water segment. In addition, the Fact Sheet notes that this segment is designated as impaired for Dissolved Oxygen, although the FDEP is currently attempting to remove this designation. Mercury is also an impaired parameter, as is Iron, though the Facility is only required to monitor for Mercury. Further, Black Creek, to which the Facility does not directly discharge, is impaired for Lead, Cadmium, and Silver. The FDEP has not required the Facility to monitor for these parameters, however. The Facility is also authorized to use land application via R-001. The permit was renewed on October 3, 2017.

As is more fully described below, what is occurring at the site is a repeated pattern of violations, some of which 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 14 out of 56 quarters from the 4th quarter of 1999 through the 4th quarter of 2013. The listings were initially for reporting violations, although of late they have been the result of effluent violations. The Facility was listed on Significant Noncompliance Reports (SNC) for 3 quarters in 2015, and, according to ECHO the Facility is currently in violation. Historically, the effluent violations have tended to be for TSS, Nitrogen, Total Phosphorus, and BOD.

FDEP's enforcement response against Clay County has fallen far short of both EPA's and FDEP's own standards and policies. Accordingly, 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.

[1] Florida's Apricot Act, § 403.086(7), Fla. Stat., authorizes backup wastewater discharges by facilities that use advance wastewater treatment practices.

A. Clay County's History of Noncompliance

As we noted above, the FDEP issued a Fact Sheet at the time that it was proposing to renew the Facility's Permit. This is a customary practice for the FDEP and is meant to give the public an overview of a wastewater facility's historical performance, as well as the permitting requirements that are expected to be included in the new permit. Such was the case with this Permit. The Fact Sheet is thorough, but we found that it glossed over the Facility's history of noncompliance. Further, it misrepresented the fact that the County had previously entered into a consent order with the FDEP.[2] In fact, it told the public that no consent order had been entered, even though the FDEP and the County had entered into a consent order less than a year before the FDEP issued the Fact Sheet and its notice of intent to renew the current permit.

Going back to 2014 we found that the Facility was inspected on January 15, 2014, and rated as being in compliance, even though the inspection report noted that there was a history of Total Phosphorus and Fecal Coliform violations, as indicated on discharge monitoring reports (DMRs). Shortly after that inspection, the FDEP was notified that samples taken on January 8, 2014 had showed a Fecal Coliform violation, something which should have concerned the FDEP, since the receiving waterbody is impaired for Fecal Coliform. This was followed by an overflow of 9,2012 gallons of reclaimed water on April 19, 2014. This overflow discharged to a stormwater pond. One month later (May 17, 2014) 4,200 gallons of reclaimed water was illegally discharged to another stormwater pond. On October 7, 2014, 2,000 gallons of untreated sewage was illegally discharged to the ground due to an unidentified blockage in the force main. Just 9 days later, on October 16, 2014, the FDEP then conducted a Sanitary Sewer Overflow (SSO) Inspection and found the Facility to be in compliance. There was no mention of the previous overflows. Then, two months later, on December 4, 2014, over 3,500 gallons of reuse water was again illegally discharged. All of this was occurring at a Facility that the FDEP's inspectors, according to their January inspection, considered to be well maintained. No enforcement was taken for any of these events.

2015 brought more violations that were not addressed by the FDEP. On May 28, 2015, there was another break in a force main. This resulted in 27,450 gallons of raw sewage being discharged. The report submitted by the Facility states that a "[c]racked force main leaked into heavily wooded easement area behind properties at 2944 and 2932 South Bank Circle including the backyard of 2932 South Bank Circle. Easement borders a large retention pond but the spill did not enter the pond." Less than a month later, on June 11, 2015, there was another discharge. This time 1,665 gallons of reclaimed water were illegally discharged to a stormwater pond when a delivery truck ran over a meter. Then, on October 19, 2015, the Facility notified the FDEP via email that there were multiple effluent violations in the previous month. Specifically, the Facility stated that the violations were:

[2] See, Section 9 of the Fact Sheet, wherein the FDEP states that "This permit is not accompanied by an AO and has not entered into a CO with the Department."

> "CBOD Annual Average reported at 14.60 mg/l, limit is 5.0 mg/l.
> CBOD Monthly Average reported at 12.10, limit is 6.25 mg/l.
> CBOD Single Sample Max reported at 44.0 mg/l, limit is 10.0 mg/l.
> TN Annual Average reported at 3.88 mg/l, limit is 3.0 mg/l.
> TN Monthly Average reported at 5.33, limit is 3.75 mg/l.
> TN Single Sample Max reported at 7.60 mg/l, limit is 6.0 mg/l.
> TP Annual Average reported at 1.12 mg/l, limit is 1.0 mg/l."

The year concluded with yet another illegal discharge of reclaimed water on December 23, 2015. This time the volume discharged was 2,220 gallons and it was discharged to a storm basin that was connected to a stormwater pond. There were also multiple effluent violations (some of which are identified above) in 2015, for which the FDEP eventually took enforcement (and will be discussed below). But it did not inspect the Facility in 2015.

The sewage overflows continued in 2016. On January 19, 2016, 600 gallons of reclaimed water were illegally discharged into a wooded area behind a reuse building. This was followed by a "leak" of 468 gallons on February 8, 2016. On July 13, 2016, there was another sewer spill on a county road. Clay County "presumed" that the spill was caused by a lightning strike at a pine tree next to a force main. A tree limb allegedly fell on the force main, breaking it. However, there was no confirmation that this was the cause of the spill, and the issue of whether the area had been properly maintained was not addressed. Ultimately, 130,000 gallons of raw sewage was discharged. The next inspection occurred on September 19, 2016, and the Facility was again found to be in compliance. However, the FDEP found that there were no records confirming that thermometers used by the Facility were NIST certified. The September inspection was followed by another SSO inspection on November 18, 2016, that concluded that the Facility was in compliance. The November inspection did not mention any actual, documented, overflows.

2016 was also eventful, because it was in 2016 that the FDEP decided to take enforcement against the County. This enforcement addressed the effluent violations in 2015, and it was in the inspector's mind when the September 19, 2016, inspection was conducted. That report noted that:

> "The exceedances of BOD, Tot-P, and Tot-N from February 2015 through January 2016 are specifically covered in LFCO-16-0009. Due to the timing of consent order preparation, signature approvals, and the generation of further effluent data; the February 2016 exceedances are also considered covered by the consent order. The consent order was executed by DEP on March 10, 2016 and since then, the facility has been in-compliance with all limits in the permit and the interim limits in the consent order."

The Consent Order set a penalty of $3,000, plus $500 in costs. This penalty addresses 37 effluent exceedances in 2015 alone. There were 14 BOD violations, 13 TN violations, and 10 TP violations. The effluent violations in 2016 that were noted in the September 2016, inspection, contrary to the written report, were not covered by the Consent Order. Further, the $3,000 civil penalty is less than what Department originally proposed in a February 2016 draft. The penalty calculation worksheet shows that the penalty was reduced 50% due to cooperation with the FDEP and alleged low harm to receiving waters because the discharges were intermittent. In addition, the FDEP did not assess penalties for the economic benefit derived from the violations. Finally, as the final report concerning these violations noted, the violations were the result of equipment malfunctions. Yet, no penalties were assessed due to the failure by the County to properly maintain the Facility. And the inspection reports are apparently incomplete, because they do not mention a failure on the part of the County to properly maintain the Facility.

The files do not reflect any inspections conducted by the FDEP in 2017. Fortunately, the only SSOs in 2017 were the result of Hurricane Irma. However, in discussing Hurricane Irma's impacts, a report on September 11, 2017, notes that an unknown quantity of untreated wastewater was discharged to stormwater ponds. The report notes that these discharges were not cleaned up by the Facility. Bypasses were installed and used in response to these discharges. Despite the discharges being tied to Hurricane Irma, the FDEP concluded that the Facility's handling of this situation justified enforcement. But it addressed the situation by sending a Compliance Assistance Offer to the County on October 20, 2017, thus waiving any penalty assessment.

2018 has seen a continuation of violations at the Facility. An inspection was conducted on January 30, 2018, and the FDEP found it to be out-of-compliance. Once again, the problem was effluent violations, this time the violations were of TP, BOD and Fecal Coliform (for which the receiving water is impaired). The FDEP responded to the findings on February 27, 2018, by once again sending the County a Compliance Assistance Offer and waiving penalties.

In addition to the problems found during inspections and the multiple SSOs, it should be remembered that the Facility has recently been listed on multiple QNCRs and 3 Significant Noncompliance Reports in 2015. Moreover, the Exceedances Report from EPA shows continued, current exceedances of both BOD and total Phosphorus.

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 further jeopardize the

public's health and the environment. This was readily apparent to the Department at the time of the Permit renewal.

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

Except for the effluent violations in 2015, 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 aggressively take steps to prevent continued SSOs, as well as to prevent continued effluent violations has met with little resistance from the FDEP. Meanwhile, the public's health, safety and welfare, seems to be a secondary concern. 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 the Department's approach to finding violations is all about making the Permittee look good to the public. It does this by:

- Issuing a Fact Sheet that misrepresents the Facility's enforcement history to the public. Indeed, Section 2 of the Fact Sheet states that "[t]he Department records show that the facility has been generally incompliance with the permit requirements during five years of permit cycle. There were two CEI 'out-of-compliance' scores (CEI on 01/15/2014 and CEI on 09/19/2016). The facility was placed back 'incompliance' when corrections were made." This statement gives no indication that formal enforcement (though limited) was taken, and, in fact, the FDEP later affirmatively stated that no consent orders had been issued to the Facility when such was not the case,
- 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,
- Ignoring documented effluent violations found on DMRs, and
- Ignoring documented SSOs reported to the FDEP.

We continue to maintain that the FDEP's actions constitute evidence 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 only takes

enforcement on a select group of violations, rather than on all violations that it knows to exist. It also 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 (as it did in this case) that the facility does not have a history of formal enforcement. And even when the Department notes that violations have occurred (as happened with this 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). In this regard, EPA has long had a policy of requiring that economic benefits from environmental violations be recovered, something that the FDEP is loathe to do. 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). 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. 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 the 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 be 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.

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

cc: Noah D. Valenstein, Secretary, Florida, Department of Environmental Protection: 3900 Commonwealth Boulevard, M.S. 49, Tallahassee, Florida 32399

Lawrence Starfield, Acting Assistant Administrator, Office of Enforcement and Compliance Assurance: Environmental Protection Agency 1200 Pennsylvania Avenue, N.W., Mail Code 2201A, Washington, DC 20460