

August 12, 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—CITY OF BOCA RATON, FLORIDA

Dear Mr. Meiburg:

Public Employees for Environmental Responsibility (PEER) formally requests that the U.S. Environmental Protection Agency initiate immediate action against City of Boca Raton, 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 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 City of Boca Raton, Florida'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 City of Boca Raton (the City, or Boca Raton, or the permittee) operates a wastewater discharge facility (Facility) under NPDES Permit Number FL0026344 (Permit). The Facility is a major discharger and is authorized to discharge 17.5 MGD of effluent into the Atlantic Ocean via an ocean outfall. It is also authorized to discharge 26.2 MGD of reclaimed water via two separate outfalls. The permit was renewed on April 1, 2009, and there have been two modifications

subsequent to the renewal. The most recent modification occurred on October 16, 2009, at which time the FDEP discontinued a requirement that Boca Raton monitor the levels of metals and oil and grease in its discharges.

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 at least eleven different Quarterly Noncompliance Reports (QNCRs) and one Significant Noncompliance Report (SNC) since 2000—the majority having occurred since 2005. In addition, there have been at least eight (8) documented violations since 2003. Enforcement was taken by the FDEP in only two of those instances. The largest violation resulted in an illegal discharge of over 25 million gallons of effluent for which Boca Raton was fined \$500.00. Another violation was resolved via consent order and it has now been learned that the circumstances surrounding Boca Raton's representation of its fulfillment of the terms of the consent order are questionable, at best. These issues will be more fully discussed below.

FDEP's enforcement response against Boca Raton 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. A History of Noncompliance

While the City has experienced numerous violations during the 1990s, we are beginning our recitation of its history with the year 2000. Those violations are as follows:

1. *QNCR—2nd Quarter 2000*

According to the QNCR filed by the FDEP with the EPA, the facility had total residual chlorine violations during this quarter. The facility was listed as being in reportable non-compliance. The FDEP took no enforcement.

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

2. *QNCR—1st Quarter 2002*

According to the QNCR filed by the FDEP with the EPA, the facility had experienced numerous effluent violations on March 31, 2001. The facility was listed as being in continuing non-compliance; however, the QNCR indicates that the non-compliance had been resolved as of the issuance of the QNCR. The FDEP took no enforcement.

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

3. *December 16, 2002, Odor Complaint*

The FDEP received a complaint about odor emanating from the facility. This prompted an inspection that found a large amount of foam at the top of the basin due to *Nocardia*, a filamentous bacteria. In addition, there were equipment problems noted at the aeration basin, a non-functioning mag-meter and the clarifiers had an excessive amount of foam and pin floc.

The FDEP rated the facility as marginal, yet took no enforcement.

Permit Condition(s) Violated: I. C.5.; I.C.10.; IX. 7.

4. *April 15, 2003, Untreated Wastewater Discharge at 3900 Northeast 6th Drive*

On April 21, 2003, a lift station failed resulting in an untreated wastewater discharge at 3900 Northeast 6th Drive near Spanish River Boulevard. Approximately 45,000 gallons of untreated wastewater was discharged to a storm drain that served as a drain to the Intracoastal Waterway. Lab results from sampling at the time of the discharge indicated fecal coliform levels of 245,000 #/100ml. The discharge was reported to the FDEP. The FDEP enforcement file does not reflect that the agency responded to the scene either immediately or at any time during the pendency of the resulting enforcement action. Instead, the FDEP issued a warning letter to the permittee on May 7, 2003. A few weeks later, on May 28, 2003, the FDEP held a meeting with the permittee at which time it was agreed that a short-form consent order would be issued to resolve the matter.

On June 3, 2003, a penalty computation worksheet was completed by the FDEP on which it is noted that the Department did not adjust the penalty to consider the economic benefit gained from noncompliance. Neither was an adjustment made based on the violator's past enforcement history. The same day the FDEP sent the violator a proposed settlement agreement calling for the payment of a \$5,000 civil penalty plus \$250 for costs. In lieu of the penalty, the violator was told that it could elect to perform an in-kind project of at least \$7,500. On June 18, 2003, the violator objected in writing to the size of the penalty, but elected to undertake an in-kind project. The City attached a signed copy of the short-form consent order with this letter.

The in-kind project that the violator chose was the elimination of the lift station that failed. The violator advised the FDEP that the cost of the project was estimated to be \$25,000.00--\$17,500.00 more than required. This was accepted by the Department which signed the short-form consent order on June 15, 2003 (3 days before the City supposedly sent the agreement to the Department).

The FDEP's enforcement file reflects that the City then sent the Department a letter on October 28, 2003, advising the Department that the project was completed and was over budget. A signed

bid, together with a certificate of insurance and references were enclosed with this letter. The bid was in the amount of \$31,500.00 and it was from Coastal Pipeline, Inc.¹ Thus, the inference was that Coastal Pipeline completed the project for the City in the amount of \$31,500.00. Then, on August 8, 2004, the City paid the FDEP costs of \$250 and the Department closed its file.

Conspicuously absent from the FDEP's enforcement file is any indication that the FDEP ever inspected the in-kind project before it approved it. Further, there is nothing in the FDEP's file to suggest that the FDEP ever demanded, or received, proof that the City actually paid Coastal Pipeline, Inc. for the work on the project.

Florida PEER has now learned that the removal of the lift station (#196) was not done by Coastal Pipeline. Rather, it was performed in-house by the City. It was a rather simple job and, we highly suspect that it cost significantly less than \$31,500 to complete. In fact, it is likely that it cost less than the \$7,500 that the short-form consent order required.

There is also no indication that the settlement, as memorialized in the short-form consent order, was ever published or that any other means were taken to notify the public so that affected persons could challenge the settlement.

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

5. *June 18, 2003, Wastewater Discharge*

On June 18, 2003, the same day that the City signed the short-form consent order for the April 21, 2003, release, the facility discharged approximately 700 gallons of wastewater into a retention pond. Lab results showed a fecal coliform count of 780#/100 ml. There was no enforcement taken by the FDEP.

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

6. *January and February 2004, Wastewater Discharges*

On January 30 and February 1, 2004, the City had two additional discharges of wastewater. The January 30 discharge was 30,000 gallons of residuals and the February 1 discharge was in the amount of 28,000 gallons of wastewater. One or both of the discharges went into a well. However, samples were taken sometime later and did not show that the well was compromised.

¹ According to the Florida, Department of Business Regulation, Coastal Pipeline, Inc. held a license with a classification of CUC056917 which is important, because under Florida law an underground contractor with a CU designation is limited to the "construction, installation and repair" of utility lines (**not removal**). Removal of utility lines (which this project involved) would have required an EC designation, which the company did not possess at the time.

Therefore, even though the discharges occurred, on August 3, 2004, the FDEP chose not to take any enforcement.

Permit Condition(s) Violated: II.1. & 2.; IX. 7.

7. *QNCR—2nd Quarter 2005*

According to the QNCR filed by the FDEP with the EPA, the facility had numerous reporting violations on April 5, 2005. The data was finally entered into PCS after the QNCR date. Therefore, the FDEP took no enforcement.

Permit Condition(s) Violated: I. C.11.; IX. 7.

8. *QNCR—3rd Quarter 2005*

According to the QNCR filed by the FDEP with the EPA in this quarter, the facility's reporting violations on April 5, 2005, had apparently still not been resolved, yet the issue was marked as "resolved." The FDEP took no enforcement.

Permit Condition(s) Violated: I. C.11.; IX. 7.

9. *QNCR—4th Quarter 2005*

According to the QNCR filed by the FDEP with the EPA in this quarter, the facility experienced other (apparently reporting) violations on January 30, 2005, but for some reason they were not reported to EPA until this last quarter. The issue was listed as "resolved." The FDEP took no enforcement.

Permit Condition(s) Violated: I. C.11.; IX. 7.

10. *SNC—1st Quarter 2006; QNCR—1st Quarter 2006*

Once again the facility was listed as being out of compliance due to reporting violations; however, the FDEP advised the EPA that the data had been resolved after the quarter in which the violations took place. The facility is listed on the QNCR as being in non-compliant status. The FDEP took no enforcement.

Permit Condition(s) Violated: I. C.11.; IX. 7.

11. High Chloride, Rock Salt and Fecal levels—January – August 2006

According to correspondence from the City to FDEP, in January and August 2006 there were spills of sodium hypochlorite and rock salt that contaminated a monitoring well, as well as some of the grounds. In addition, on March 4, 2006, fecal levels of 2900#/100ml were recorded, together with low chlorine levels at the facility. The City alleged that the problems associated with these violations were quickly corrected. The FDEP therefore took no enforcement.

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

12. July 15, 2006, Wastewater Discharge

On July 15, 2006, a private contractor (Weekly Asphalt, Inc./Beyel Brothers Crane and Rigging of South Florida, Inc.) for the Florida, Department of Transportation (FDOT) damaged a 42 inch ocean outfall discharge pipe and caused a release of treated wastewater into the El-Rio Canal. Approximately 25.744 million gallons of treated wastewater was released. On July 25, 2006, the City notified Weekly Asphalt in writing that the City expected Weekly Asphalt to reimburse the City for any costs associated with the accident, including fines associated therewith. The City sent a copy of this correspondence to the FDEP, as well as the FDOT.

On August 4, 2006, Kevin Neal, the District Director for the FDEP sent a warning letter to Beyel Brothers Crane and Rigging of South Florida, Inc. advising them that they may have been in violation of FDEP's rules when they damaged the City's discharge pipe. The FDEP copied this letter to the City. That same day the City sent Weekly Asphalt a bill for \$122,345.17 for the costs associated with repairs to the damaged pipe. This letter was copied to FDEP and FDOT.

The FDOT notified the FDEP via email on September 26, 2006, that both the City and Weekly Asphalt were denying any responsibility for the wastewater discharge. As a result of those positions, the FDOT notified the FDEP that it would fund the needed repairs, and that it would also pay any fines associated with the wastewater discharge. The FDOT further advised the FDEP in the email that it intended to seek reimbursement from the City and Weekly Asphalt for any monies paid by FDOT.

The environmental specialist for FDEP then prepared and forwarded a civil penalty authorization to the FDEP's Office of General Counsel on October 17, 2006. The ES advised in this request that fecal coliform results showed "significant impact to water quality."² Although no adjustments were made for economic benefit or for multi-day assessments, the ES categorized the violation as causing a major potential for harm. She therefore requested a civil penalty of **\$36,000.00** against the Florida, Department of Transportation, no penalties were sought against the City.

² As late as July 27, 2006, water samples from the El-Rio Canal were showing fecal coliform levels as high as 11,600#/100ml.

The proposed civil penalty was not assessed. Instead, on November 14, 2006, the District Director forwarded the proposal directly to FDEP Secretary, Michael Sole. One month later, on December 15, 2006, Secretary Sole responded to the District Director. Sole advised him that he had spoken with FDOT and that he

“[saw] no benefit of assessing a fine, as a punitive measure that merely takes state taxpayers funds from one trust fund and moves them to another. The purpose of a penalty is to discourage future incidents, and I would rather see DOT take the initiative and make programmatic changes that reduces these occurrences than receiving a check.”

What the Secretary failed to understand was that civil penalties are also designed to punish wrongful conduct. He also neglected to mention that, as has been pointed out above, both the FDOT and the City fully intended to obtain reimbursement from the private contractor that punctured the outfall pipe, something which the FDEP knew, because it had been routinely copied on the correspondence from the City to the FDOT and private contractor. Thus, the alleged concern for the taxpayers was unnecessary.

Two months later, after persistent questions from the FDEP’s Environmental Manager, the new District Director advised the Environmental Manager of the Secretary’s position. Then, on April 4, 2007, the District Director forwarded a short-form consent order to the FDOT. This document required none of the remedial actions, e.g. a Quality Assurance Plan, that the Secretary indicated in his email that the FDOT would undertake. **Instead, the short-form consent order merely required FDOT to reimburse the FDEP \$500.00 in costs associated with the case, thus carrying out the Secretary’s wishes.**

The FDEP took no enforcement against the City or against the private contractor.

There is also no indication that the settlement, as memorialized in the short-form consent order, was ever published or that any other means were taken to notify the public so that affected persons could challenge the settlement.

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

13. *QNCR—1st Quarter 2007*

According to the QNCR filed by the FDEP with the EPA, the facility had numerous reporting violations on December 31, 2006. The QNCR simply states that the violations were resolved. The FDEP took no enforcement.

Permit Condition(s) Violated: I. C.11.; IX. 7.

14. *QNCR—2nd Quarter 2007*

According to the QNCR filed by the FDEP with the EPA, the facility was in violation on February 28, 2006, due to “flow or thru treat” issues. The QNCR simply states that the violations were resolved. The FDEP took no enforcement.

Permit Condition(s) Violated: I. C.11; I.A.1.; IX. 7.

15. *Whistleblower Revelations in 2007, et. seq.*

In 2007, the Utility Coordinator for the City began raising several concerns with the City about illegal discharges and improper cross-connections. Numerous meetings were held between the City and its employee; however, the employee realized that the issues were not going to be resolved by the City. The employee therefore brought the concerns to the FDEP. At least one meeting was held with the FDEP. The FDEP initially informed the employee that the employee should not disclose her communication with the FDEP because a criminal case against the City was being opened. The FDEP felt that the City’s activities constituted felonies. The employee did as she was told; however, she was then told by the FDEP that they had decided that the actions constituted misdemeanors, yet no criminal case was pursued. In addition, it is now alleged that the FDEP compromised the employee’s identity, after which the employee was terminated. A whistleblower case against the City is now pending in the Circuit Court for Palm Beach County. The purpose of this correspondence is not to litigate the whistleblower case; but rather, to shed light upon how the FDEP handles environmental issues with the City.

- Wash Rack Drainage—The employee notified the FDEP that she had learned that for as much as 12 years the City had been washing city work vehicles into a drain that discharged into a stormwater retention area. The rinseate from the vehicles included, inter alia, pesticides, herbicides and sludge. The FDEP was told that City employees had openly acknowledged this practice and, in correspondence to the FDEP on July 28, 2008, Chris Helfrich, Director of Utility Services, acknowledged the violations and advised the FDEP that the practice was being discontinued. Despite this, the FDEP took no samples of its own, instead relying upon reports from the City. The files also do not reflect any interviews with other City employees in order to further corroborate the nature and extent of the violations. Accordingly, the FDEP simply asserted that the 12 years of violations had been corrected. No enforcement was taken.

Permit Condition(s) Violated: I. A.1.; VIII.4.; IX.22; IX. 7.

- Propane leak—A propane leak was reported at the facility generator. Once again, the violation was acknowledged; however, the FDEP asserted that it lacked jurisdiction over the matter even though it also alleged that such leaks must be reported to the FDEP’s Storage Tanks Program.

Permit Condition(s) Violated: I. C.5.; IX.7.

- Swimming Pool Discharges—the City was discharging filter backwash from its swimming pools to stormwater retention pond(s). Once again, the City acknowledged the practice and also maintained that it was redirecting the discharge to the sanitary sewer. That was sufficient for the FDEP to forego enforcement.

Permit Condition(s) Violated: VIII. 4.; IX.7.

- Cross-connection issues:
 - Single check backflow preventers were being used throughout the City at properties that were connected to reclaimed water. The City's ordinances prohibited cross connections and required that dual check valves be installed in such circumstances. The FDEP took the position in this case that it would not pursue enforcement since the City allegedly "self-reported" the problem—this, even though, the FDEP would not have known of the situation were it not for the whistleblower. The FDEP also predicated its decision not to take enforcement because the violations had "little impact" and were "inadvertent." However, as late as April 24, 2009, the Florida, Department of Health³ (DOH), sent a *warning letter* to the City advising the City that it had concluded that single check valves had been used by the City, a violation of 62-555.360, F.A.C. Those violations constituted violations of the NPDES Permit.
 - Cross Connection of reuse or reclaimed water at 1650 S. Federal Hwy, Boca Raton. At this site, people inside this building were drinking reclaimed water for at least 4 hours or maybe longer because the reclaimed water line was connected to the potable line. There was a break in the potable line up the road, causing a drop in potable water pressure. This created the right situation for back pressure and backsiphage. The people inside the building started noticing a very strong pungent order and called into the City to complain.
 - On or about May 8, 2008, there was a discharge of reclaimed water at a fountain at Royal Palm Plaza located at 315 SE Mizner Blvd, BR, 33432. This fountain is located adjacent to Federal Highway. This fountain had been turned off and was empty for a month prior to the overflow. It had both a direct connection to the City's water main and the reclaimed main from Federal Highway. The cross connection was discovered by the Royal Palm Plaza maintenance crew when the City turned off valves on Federal Highway because of an unrelated water line

³ The DOH has been delegated the authority by the FDEP to administer the drinking water program for Florida.

break. Reclaimed water then began overflowing from the fountain onto the street and from there into a storm drain.

Apparently the City does not have any as builds and therefore many of the employees did not know of the situation.

This cross connection was not reported to the FDEP or the DOH at the time, neither was it reported in the 2007-2008 Reclaimed Annual Report.

- Corinthian Gardens, located at 501 SW 11th Place, BR 33427. This cross connection was discovered during a cross connection inspection before the City would allow a final connection to reclaimed water for irrigation. It was learned that Corinthian Gardens was also connected to a force main several streets away, which would have been considered a Homeland security risk. This was not reported to the FDEP in the City's 2007-2008 Reclaimed Annual Report.
- 2821 Spanish River Road, Boca Raton, the Estates. On March 11, 2010, a contractor called to say that they connected to the reclaim meter thinking it was potable water. Unbeknownst to the contractor, the potable water meter was buried under construction and only the reclaimed water connection was available. The reclaimed water meter was not colored purple as required and this meter box was the only one to have a meter, so naturally the contractor assumed it was potable water.

City management planned on taking enforcement action against the contractor for illegally connecting up to the reclaimed meter but the City backed off on sending this enforcement letter out because the city was actually at fault. The City never addressed that the workers drank this reclaimed water or cleaned out any of the potable lines in this home. The City failed to lock out this reclaimed meter connection at the start of the construction as additional safety.

This connection was done by the City crew and the contractor crews were drinking reclaimed water. This was not reported to the regulatory agencies.

Permit Condition(s) Violated: IV. 4. 8. & 11.; V. 5.; IX.7. & 20.

- Distribution System Pressure—In 2007 there were repeated drops in pressure below the 20 psi requirement. Under 62-555.335, F.A.C., the City was required to notify the public of these pressure drops and to institute boiled water notices until 24 hours after the receipt of clean bacteriological sample results. No such notification took place. The DOH (the delegated authority) was not notified of the violations. These violations were identified in

the above-reference warning letter sent by the DOH to the City. No enforcement has been taken beyond the issuance of the warning letter.

Permit Condition(s) Violated: IX.7.

The FDEP files do not reflect that inspections were conducted or any witnesses interviewed in any of the above situations. This, despite telling the whistleblower not to mention the case to anyone because of an alleged criminal investigation into the allegations. It appears that the whistleblower received nothing more than lip service from the FDEP and lost her job as a result of trying to help the agency enforce the Clean Water Act.

16. *QNCR—4th Quarter 2007*

According to the QNCR filed by the FDEP with the EPA, the facility had numerous reporting violations on September 30, 2007. The issue was resolved without enforcement.

Permit Condition(s) Violated: I. C.11.

17. *QNCR—2nd Quarter 2008*

According to the QNCR filed by the FDEP with the EPA, the facility was out of compliance due to high total residual chlorine levels on January 31, 2008. The issue was apparently resolved. The FDEP took no enforcement.

Permit Condition(s) Violated: I. A.1.

18. *February 2, 2009, Total Residual Chlorine Exceedance*

On February 2, 2009, the City recorded a TRC level of 1.67 mg/l in its effluent that was discharged to the ocean outfall. Operator error was to blame for the non-compliance. No enforcement was taken.

Permit Condition(s) Violated: I. A.1.

19. *June 2009, Cross Connection—4001 North Ocean Boulevard*

There is a Boca Raton resident⁴ (in Palm Beach County) who resides at 4001 North Ocean

⁴ This resident is a certified investigator who states a cover-up of this information was attempted by the agencies involved.

Boulevard that had contaminates in his drinking water, (in his 18th floor penthouse condominium) consisting of nathalene, acetone and extremely high THM's that exceeded the MCL's during the summer of 2009.⁵ The City was notified immediately and it sent someone to assess the situation; however, the City never investigated to determine if cross connections were attributable to the distribution line or problems within the building itself. The City then told the resident that the City is only responsible up to the meter and to contact the Palm Beach County Department of Health. For 72 days he was notified by the Palm Beach DOH not to use the drinking water until an investigation was conducted.

This situation occurred due to a loss of pressure which resulted in backsiphonage. The backflows were never tested. It was later determined that this area within the complex is not covered by the proper backflows and missing backflows.

None of the agencies involved provided a notice to the approximate 250 residents in the building that their water was contaminated or the TTHM's exceeded the MCL's. Every expert contacted by this resident stated that it is not a question of whether this will happen again, it is only a question of when.

The problem was further compounded when the resident determined that the City (and it is believed the DOH and the FDEP) had, in an effort to hide their failure to properly investigate this issue, willfully failed to provide him with public records that he had requested on this issue. Under Chapter 119, Florida Statutes, the City, as well as the DOH and the FDEP were obligated to fully comply with these requests. Failure to so comply constitutes a first degree misdemeanor under §119.110 (2) (a), Fla. Stat.

Permit Condition(s) Violated: IV. 4., 8 & 11.; V. 5.; IX.7. & 20.

20. September 2009, Cross Connection—1615 South Federal Rd.

In early September 2009, the City discovered an illegal cross connection on the potable water line at the above-referenced commercial property. The length of time that the occupants of the building were drinking unsafe potable water is unknown. It is also unknown whether the City reported this violation to the FDEP or the DOH.

Permit Condition(s) Violated: IV. 4., 8 & 11.; V. 5.; IX.7. & 20.

⁵ The presence of the contaminates and TTHM's exceeding the MCL's were confirmed through laboratory results after the resident took samples to a laboratory for testing. The resident paid for these tests. The regulatory agencies did nothing.

21. *September 24, 2009, Annual Inspection/Report*

On September 24, 2009, the FDEP conducted an annual inspection of the facility. The inspection report associated with that inspection notes that the facility had 3 exceedances of Total Dissolved Solids. According to the report, the exceedances were as follows:

- 1st Quarter 2009—TDS of 569 mg/L in MWC-1
- 2nd Quarter 2009—TDS of 533 mg/L in MWC-2
- 3rd Quarter 2009—TDS of 599 mg/L in MWC-1

The facility was rated as being in compliance and no enforcement was taken for these exceedances.

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

22. *May 20, 2010, Sewage Spill*

This was a major raw sewage spill from a 12 inch sewage force main that broke at 1281 Spanish River Road in the Estates in Boca Raton. It was called in by a police officer at 2:54 a.m. on May 20, 2010. The break was flooding the streets and the raw sewage flowed down to the corner to a storm drain and then was discharged into the Intracoastal Waterway. This waterway was about 100 feet from the break. According to the crews that fixed the break, this was a significant spill. It is unclear how many gallons were illegally discharged or whether the City ever reported this spill to the FDEP.

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

23. *Reclaimed Water Issues*

The City has had a number of reclaimed water issues dating at least as far back as 1996. These issues included such things as what was known as the Mizner Park “Lemonade Incident” in which a vendor hooked up to a hose bibb connected to reclaimed water and used it to make lemonade for the public. Current issues include:

- The reclaimed water is experiencing a high amount of worms and solid material, like toilet paper, into the final product of the reclaimed water. Due to illegal cross connections many people just this past year have been drinking this non-potable water not knowing about the dangers. It is unknown whether these situations were ever reported. The City received \$900,000.00 in grant money for a single project to upgrade its reclaimed water facilities. It has also applied for at least three other grants to fund other improvements. Yet this situation still continues and the City now plans to empty and clean 2-3 million

gallon tanks to physically remove the worms and other microbes. Once again, it appears that the violations were not reported to the FDEP or the DOH.

Permit Condition(s) Violated: IV.4.; IV.9.; IV. 16.

- 2006-2007 Reclaimed Annual Report. This report was not provided to the FDEP until March 25, 2010—3 years late. It was during that year that single checks were used instead of dual or double checks valves, and several other deficiencies in the reclaimed water program occurred at the City. The FDEP apparently did nothing more than stamp the report received without reviewing it to determine permit compliance. This report shows two cross connections events, with documents for only one.

Permit Condition(s) Violated: I. C.11.; IX. 7.

- 2007-2008 Reclaimed Annual Report. This report shows one cross connection with no documents. This cross connection reported did not occur. The report did not include the cross connections at Corinthian Gardens or the Royal Palm Plaza fountain, above.

Permit Condition(s) Violated: I. C.11.; IX. 7.

- 2008-2009 Reclaimed Annual Report. The City submitted this annual report to the FDEP and improperly indicated therein that it had notified the FDEP of a cross connection at 1615 South Federal Hwy. It was later learned that the City had improperly restricted the delivery of emails from staff to the FDEP when the staff was reporting violations to the FDEP.

Permit Condition(s) Violated: I. C.11.; IX. 7.

24. *Pretreatment Issues*

The FDEP in a letter dated August 16, 2005, revised the City's Permit, by deactivating the City's pretreatment program. This revision replaced Section VII of the Permit with two new requirements made in accordance with 62-625.500(2)(b) and 62-625.500(1)(c), F.A.C. The significance of the revision is:

- Said revision required per Rule 62-625.500(2)(b) a yearly Industrial Waste Survey (IWS) along with a statement *certifying* that there are no significant industrial users discharging, or

having the reasonable potential to discharge, process wastewater or slug loads to the City's collection and treatment system.

- Said revision *required* per Rule 62-625.500(1)(c) that the pretreatment program be reactivated in full compliance with Chapter 62-625 F.A.C., if either (a) the IWS identifies significant industrial users discharging to the Permittee's Wastewater Facilities (WWF) or (b) there is a justifiable need for a pretreatment program.
- The Permit revision mandated, that if at *any* time a significant industrial user is discharging to the Permittee's WWF the Permittee *shall* notify the Department in writing within ten (10) days of the determination as per Rule 62-625.500(1)(c) F.A.C.

Lately the Facility has been experiencing slugs (improperly treated pretreatment) coming into the plant. Sometime in late February 2010 to March 2010 the City (in connection with Section III. of the Permit) collected routine monitoring well samples and found extremely high fecal coliform levels and, it is believed, other contaminants. The monitoring well in question is apparently next to one of the City's lift stations. This occurred around the same time as the first slug entered the Facility. Another loading occurred on or about May 20, 2010.

Significantly, it is believed that the City has not notified the FDEP about the slug loading, a clear violation of the Permit.

Permit Condition(s) Violated: III. Groundwater Requirements, Operation Requirements, 5.; VII. Industrial Pretreatment Program Requirements, 6.c.; VIII. Specific Conditions, 2.; IX. General Conditions, 9. & 20.

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. The practice of washing equipment (with pollutants including petroleum based products) directly into storm drains over a period of twelve or more years should give serious pause to anyone reviewing this matter. The pollutants in question are known carcinogens. 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.

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

Over the past months 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 at BP's Macondo Well. 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 City has seen formal enforcement in only two of the more than 24 noncompliance situations. Each and every time no enforcement was taken because of an attitude that the City was doing the best that it can and is supposedly trying to abide by the Permit. The result is that years pass with a consistent pattern of excused misconduct.

It is clear from the facility's history is that the FDEP has consistently failed or refused to consider previous violations when deciding whether or not to take enforcement. The history of noncompliance is even disregarded as an upward adjustment in those few situations in which enforcement is taken. For example, during the major discharge in July 2006, no less than the FDEP Secretary pushed for, and achieved, no penalties against the City even though there were other violations that had occurred that year and even though the facility had been listed as a Significant Noncomplier with the EPA.

The failure of the City 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. Such is the case before you in which it took courageous behavior on the part of people closely associated with the operation of the facility in order to shed light upon the ongoing disregard for laws designed to protect the public's health, safety and welfare. Instead of aggressively moving on the evidence presented the FDEP chose to treat it as an inconvenience.

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 Boca Raton as appropriate in connection with the environmental violations described above and any others that may be discovered. PEER suggests that these measures should include reopening the enforcement case associated with the April 15, 2003 discharge (see, Section A. 4. above) inasmuch as it would appear that the City intentionally misrepresented its efforts in complying with the in-kind project, such misrepresentation itself would be considered a violation of Chapter 403, Florida Statutes.⁶

PEER has in its possession voluminous materials from the FDEP case files substantiating the violations committed by Boca Raton. 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

⁶ To the extent that a determination is made that enforcement cannot be initiated in the April 13, 2003, case because of applicable statutes of limitations we submit that the same should be considered as evidence of FDEP's substantial failure to properly administer the requirements of the CWA. FDEP clearly should have confirmed that the work was done and that the amount paid for the project did, in fact, meet or exceed the \$7,500.00 required under the terms of the short-form consent order.