



Florida
PEER

Public Employees for Environmental Responsibility

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April 18, 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 — Lynn Haven WWTP (NPDES Permit FL0169978)

Dear Mr. Glenn:

Public Employees for Environmental Responsibility (PEER) formally requests that the U.S. Environmental Protection Agency initiate immediate action against the City of Lynn Haven, 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 federal Clean Water Act (CWA).

FDEP's enforcement response against the City of Lynn Haven 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, urges that EPA Region 4 take immediate and appropriate action against this violator under its concurrent authority to enforce the CWA in Florida.

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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 the Facility's numerous permit violations.

The permit in question is subject to the regulatory authority of the Florida Department of Environmental Protection (FDEP) under § 403.0885, et seq., Fla. Stat. The City of Lynn Haven (the City, or the Permittee) operates a wastewater discharge facility (Facility) under NPDES Permit Number FL0169978 (Permit). The Permit was issued on September 24, 2013, and it expires on September 23, 2018. The Facility is a major discharger and is authorized to discharge 2.5 MGD of effluent into St. Andrews Bay, a Class III marine waterbody. Class III waterbodies are those that 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 permit also allows land application of 1.0 MGD.

From the 2nd quarter of 2001 through the 3rd quarter of 2015, the Facility was listed on Quarterly Noncompliance reports (QNCRs) for 37 of 65 quarters. 13 of those quarters were due to effluent violations. Since 2012, the facility has been listed on the QNCRs 7 times and on 5 of those occasions the FDEP has listed the case as being resolved. 3 of the listings since 2012 have been for effluent violations and 4 have been for reporting. The facility was listed as SNC for the 4th quarter of 2013 (for Total Nitrogen exceedances).

A. The City of Lynn Haven's History of Noncompliance

Looking at the Facility's recent performance under the current Permit, we found that there have been 14 sanitary sewer overflow (SSO) incident reports in 2016 and 2 in 2017. Each of the SSOs constitutes a violation of Rule 62-600.740(2)(a), F.A.C., as well as § 403.161(1)(a), Fla. Stat. Each one also violates Permit General Condition X. 7., which requires the permittee to maintain the facility and appurtenances in proper working order.

Curiously, almost all of the incident reports state that the spill was exactly 1,000 gallons – largely, we suspect, because 1,000 gallons is the trigger point for a requirement that the facility notify the State Warning Point (SWP) that the discharge has occurred. Some incident reports indicate that the City didn't even know if any waterways were affected, showing a lack of due diligence, at best, if not cover-ups of significant pollution events that threatened public health and safety. There may well have been other SSO spills between 2012 and 2016.

In other aspects of the noncompliance history of the Lynn Haven Facility, a Compliance Enforcement Inspection (CEI) by FDEP conducted on September 14, 2015, found the facility to be in compliance despite 3 violations, three of which were for enterococci and one for copper. These dated back to 2014.

A CEI was next conducted on July 28, 2017, at which time the facility was found to be in non-compliance. Deficiency findings included:

1. The FDEP found that meters used to identify values of parameters such as chlorine, pH, turbidity, dissolved oxygen and specific conductance were not properly calibrated. The cause of the instability was unknown. This is a violation of General Condition IX. 7, which states that “The permittee shall at all times properly operate and maintain the facility and systems of treatment and control, and related appurtenances, that are installed and used by the permittee to achieve compliance with the conditions of this permit. The basis for the rating was poor effluent quality and groundwater violations, which will be discussed below. . .” Nevertheless, the CEI listed the facility’s performance under this section (Laboratory) as being in compliance.
2. The Facility had not submitted its 2016 pathogen monitoring report, a violation of Permit Condition I.A.1. Therefore, it was deemed “minor out of compliance” for reporting.
3. “The reject pond lining had a slight tear well above the water line and only in the upper layer of the lining.” A violation of Permit Condition VIII.1.
4. Effluent quality was found to be out-of-compliance. This is based upon DMRs submitted by the Permittee. In April 2017, there were 5 separate violations of ultraviolet light dosage. In June 2017 there were 2 separate fecal coliform violations. These are violations of Permit Condition I.A.1.
5. There were groundwater exceedances that also violated the Permit. Those were in March 2016 (total dissolved solids), June 2016 (fecal coliform), September 2016 (fecal coliform) and March 2017 (fecal coliform). Each of these was a violation of Permit Condition III.7.

The findings in #s 3, 4 and 5, above, were what resulted in the Facility being rated as being out of compliance. The CEI did not include an evaluation of SSOs. No other CEIs have been conducted during that relevant time period.

The only formal enforcement within the past 10 years against the Permittee was on June 20, 2007. This was an executed consent order that was necessitated because of numerous exceedances of total phosphorus (4) and total recoverable copper (2) parameters. The Facility was fined \$42,850.00 under the terms of this order. It was also ordered to submit a study addressing the means for stemming the copper exceedances.

The June 20, 2007, enforcement process stands in stark contrast to the manner in which the FDEP handled the subsequent violations in 2017. On September 8, 2017, the Department sent a copy of the above-discussed July 28, 2017, CEI to the Permittee. The CEI was accompanied by a

Compliance Assistance Offer (CAO) in which FDEP asked the City to address the violations identified in the CEI. No civil penalties were assessed and no formal enforcement was taken.

Other consent orders have been executed by the Department prior to 2007. They were issued in 1991, 1999 and 2002.

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. 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.

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

The FDEP has failed to take adequate 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.

A comparison of the QNCR history of the facility with the FDEP records also shows obvious discrepancies. The QNCRs from the 2nd quarter of 2013, through the 1st quarter of 2014 indicate that the facility was identified as having effluent excursions, for which enforcement was taken. Yet, the records do not reflect FDEP actually taking enforcement. Other excursions were identified in the CEI that was conducted in 2015, but not even a CAO was sent, apparently because the Facility was rated as being in compliance (a questionable rating given the effluent excursions). Had a CAO been sent with the 2015 CEI, it would have been harder for the Department to avoid formal enforcement in 2017, when the Facility was again found to be out of compliance.

This is nothing short of a governmental agency being complicit with a regulated entity's noncompliance. 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. In other words, in cases such as these, the facility is allowed to avoid formal enforcement, because the Department is essentially looking the other way.

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 will likely be no upward adjustment of the penalty amount because of a history of noncompliance. Basically, the FDEP is distorting reality.

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.

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. More recently, Administrator Pruitt, in an October 18, 2017, [interview](#) with *Time* stated: "I don't spend any time with polluters. I prosecute polluters." We maintain that the EPA, in keeping with Administrator Pruitt's assertions to *Time*, should take the lead in this case and prosecute polluters such as the Permittee in this case.

In addition, 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 the City of Lynn Haven 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 the City of Lynn Haven due to its years of non-compliance. Furthermore, we suggest that comprehensive studies are required to determine the extent to which repairs of the City's infrastructure are needed so that future SSOs are avoided. Finally, the City 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

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