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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—City of Neptune Beach Wastewater Treatment Facility**

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 Neptune Beach Wastewater Treatment Facility (Facility) in Neptune Beach, Duval County, 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.

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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 City of Neptune Beach Wastewater Treatment Facility is in Neptune Beach, Florida and operated by the City of Neptune Beach (the City, or the Permittee). The City operates the Facility under NPDES Permit Number FL0020427 (Permit). The Permit was issued on March 16, 2014 and expires on March 15, 2019. No administrative order (AO) accompanied the Permit. The Facility is a major discharger and is authorized to discharge wastewater at a rate of 1.5 million gallons per day (MGD) Annual average Daily Flow (AADF). The discharge (D-001) is to the St. John's River, 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, the segment of the St. John's River to which the Facility discharges is listed on Florida's 303(d) list as impaired for Iron and Mercury. It is also listed for Chlorophyll-A, however, the FDEP has requested that this parameter be removed from the 303(d) list as relates to this water segment. The Permit does not require treatment, removal or monitoring of Mercury, inasmuch as the Facility's wastewater stream does not include significant quantities of Mercury. The Permit does grant a mixing zone to the Facility for total recoverable copper and cyanide. The Facility is also authorized to use land application via R-001. The permit was revised on March 31, 2014 to authorize "changing effluent nutrient, and ambient river sampling requirement from bi-monthly to quarterly."

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 40 out of 61 quarters from the 4<sup>th</sup> quarter of 2001 through the 4th quarter of 2016. The listings have been predominately for reporting violations. The Facility was listed on Significant Noncompliance Reports (SNC) for 1 quarter in 2014 (the same year that the Permit was renewed) and 2 quarters in 2015, and, according to ECHO the Facility is currently in violation. The effluent violations that resulted in the Facility's SNC listing were for Total Nitrogen violations.

FDEP's enforcement response against the City 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.

A. The City'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 (Page 17, Item 10) states that "[t]his facility does not have consent (sic) order or administrative order with the Department." In addition, the Fact Sheet inaccurately states (Page 5) that, "[r]ecords show that the facility was 'in compliance' in 2012 and 2013." This is simply not true. The FDEP conducted a file review of the Facility on February 27, 2013 and rated the Facility as "Out-of-Compliance." The basis for the rating was that:

- The Facility was not calculating percent capacity correctly,
- The June 2012 Discharge Monitoring Report (DMR) was missing,
- CBOD and Cyanide results were missing for May 2012,
- The 4<sup>th</sup> quarter 2012 TKN result was missing,
- There was a Total Cyanide exceedance in March 2012, and
- The Facility failed the toxicity test for ceriodaphnia for June 2012.

The FDEP conducted an annual Compliance Evaluation Inspection (CEI) one month later, on March 21, 2013. The FDEP rated the Facility as "In-Compliance" (IC) after this inspection. The laboratory was marked as IC, even though the inspection revealed that laboratory thermometers were not checked annually. In addition, the CEI noted that the DMR showed an exceedance for cyanide. Toxicity test results were also in violation of normal limits; however, the Facility was abiding by a compliance plan for this issue, and therefore the toxicity violations were forgiven. Groundwater and SSO not evaluated.

The next FDEP review of the Facility was another file review that was conducted on June 3, 2015. This review found that there were "[m]ultiple loading exceedances" and that these exceedances were addressed with a consent order. It also noted that there were 4 exceedances of Ceriodaphnia Dubia between June 2013 and December 2014. The FDEP again rated the Facility as being "Out-Of-Compliance."

On June 22, 2015, the FDEP conducted the next CEI at the Facility. This report rated all compliance areas as IC and the Facility was given an overall IC rating. The CEI notes multiple TN exceedances and states that they were being addressed by the April 10, 2015, consent order. The report also confirmed that there were recent failed toxicity tests, and indicated that on June 30, 2015, (8 days after the inspection) the FDEP had approved a revised Plan for Correction that addressed the violations. Finally, a Sanitary Sewer Overflow Prevention (SSOP) report, though

incomplete, was attached to the CEI. On July 1, 2015, the FDEP notified the Facility about the CEI results. The letter stated that, “[n]on-compliance identified in the inspection report has been corrected.”

The next CEI was conducted two years later, on June 2, 2017. Predictably, the Facility was rated as IC, even though there were exceedances found on the Facility’s DMRs from 2015. Specifically, there were TN exceedances for January through April 2015. In addition, there was an IC25 Statre Ceriodaphnia exceedance in June 2015, and a Total Cyanide exceedance in August 2015. The CEI states that since the TN exceedances were addressed by a consent order, they would be excused. The CEI indicates that an “Administrative Order” applied to the IC25 Statre Ceriodaphnia exceedance.<sup>1</sup> The Total Cyanide exceedance was simply disregarded as insignificant.

There have been 2 sanitary sewer overflows (SSOs) since the June 2015, CEI. The first, on November 8, 2015, was the result of a rain event that caused 2 manholes to surge. The City did not know the full extent of those surges. Another gravity line was reported as leaking the next day. Further, the Facility reported on February 22, 2016, that it had a CBOD exceedance on February 3, 2016 (this exceedance was not reflected on the June 2, 2017 CEI). It should also be remembered that the Facility has recently been listed on multiple QNCRs and Significant Noncompliance Reports since 2014. Moreover, [ECHO](#) indicates that the Facility is currently in non-compliance.

## B. Enforcement History

It bears repeating that the Fact Sheet that was issued with the Permit gives no indication that there are AOs or Consent Orders (COs) that govern the Facility’s compliance status. Thus, any member of the public who reviewed the Fact Sheet would assume that the only applicable permit limits would be those imposed in the Permit. The limits for parameters such as TN and Total Cyanide are found in Section I.A.1. of the Permit. Toxicity limits are located in Section I.A.17. If toxicity tests fail, the Permit provides that additional testing must be conducted, and plans put in place to resolve the failures within 60 days of the failure. (Section I.A.17.g) In addition, if such plans are put in place, Section I.A.17.g.(5) specifically states that “[t]he additional follow-up testing and the plan do not preclude the Department taking enforcement action for acute or chronic whole effluent toxicity failures.” In other words, exceedances are exceedances, even though a “Plan” is in place. With this in mind, we consider the enforcement history for this Facility.

The FDEP and the City entered into a long-form consent (LFCO) order on September 21, 2010. The basis for the LFCO was 4 Total Cyanide exceedance, together with 9 Enterococci

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<sup>1</sup> The files produced by the FDEP do not include an AO, nor do they otherwise suggest that an AO was ever issued. It appears, therefore, that this inspection was referring to the April 10, 2015, consent order.

exceedances that occurred in 2009 and 2010. Under the terms of the LFCO, the City was required to provide the FDEP with a compliance plan (Plan) “. . . that contains a schedule for compliance with the final effluent limits in Part I.A.1 of the Permit for Total Cyanide, Enterococci and all other parameters as specified in the Permit.” This Plan was due within 30 days of the LFCO being executed. Any activities recommended by the Plan were to have been completed within 18 months of the Plan’s submission. All actions to return to compliance were due to have been completed by June 30, 2012, “regardless of any intervening events or alternative time frames imposed in this Order.” (Paragraph 9, LFCO). The LFCO also required the City to pay a civil penalty of \$3,750.00 plus \$500.00 for costs associated with the enforcement action. (Paragraph 10, LFCO). There is no indication that the economic benefit of noncompliance was considered. Stipulated penalties were imposed (Paragraph 11, LFCO) for failures to comply with the requirements of the LFCO. Given the timeframes covered by the LFCO, this Facility should have conducted any modifications to its processes by June 30, 2012. Indeed, the FDEP notified the City on August 8, 2012, that all terms of the LFCO had been met.

Nevertheless, it is also clear from the LFCO itself that violations occurring during the pendency of those modifications would still be considered violations. Notably, the LFCO did not provide the City with an outlet, i.e. interim limits that would have given the City more leeway in failing to abide by normal permit limits. Therefore, all the violations found in the 2013 file review and CEI were still violations that should have been enforced. They were not.

The only enforcement taken by the FDEP since the Permit was issued is another long-form consent order (LFCO2). The LFCO2 was executed on April 10, 2015. In Paragraph 4. the LFCO2 noted 7 exceedances of TN. Another compliance schedule was put in place. (Paragraph 5). Interim limits were established raising the TN limits from 13,559 lbs/year to 25,000 lbs/year and then 19,200 lbs/year. (Paragraphs 6. (a) & (b)). Paragraph 9 of the LFCO2 required that all modifications to the Facility be completed by January 31, 2017.

LFCO2 also assessed civil penalties of \$4,000.00, plus \$500.00 in costs due to the 7 TN exceedances. This assessment is found in Paragraph 11. There is no indication that the economic benefit of noncompliance was considered. Remarkably, however, the FDEP also waived the \$4,000 assessment if the facility met the interim limits. However, per the LFCO2, if any provision of the LFCO2 was not met, the entire \$4,000 became immediately due. Under Paragraph 11, the facility was also required to meet all provisions of 62-4 and 62-600, i.e. meet all Permit requirements. Therefore, any Permit violation or violation of the interim TN limits would result in forfeiture of right to not pay the \$4000. Paragraph 12 imposed minimal stipulated penalties of \$25/day if the Facility failed to meet deadlines and \$100 if the interim limits were not met. Therefore, if the Facility failed to meet the interim limits, it would have to pay the \$4,000 penalty, plus the stipulated penalties. The FDEP closed the LFCO2 on February 27, 2017.

When we looked at the Facility’s performance in 2015 we found that only 2 of the TN exceedances found in the inspections were covered by the LFCO2. None of the toxicity violations were covered by that enforcement. Further, while the City submitted regular letters to

the FDEP demonstrating its compliance with the planned construction, the files do not reflect that the City filed a sealed Certificate of Completion upon the closure of all construction. This was required by Paragraph 7 of the LFCO2. Despite these violations, the FDEP has failed to assess any civil penalties for violations after 2013.

#### C. 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 involving violations of effluent exceedances, including toxicity violations. Since 2011, the FDEP has responded to these issues by using only token enforcement that, in the end, appears to be nothing more than an effort to ensure that the EPA believes that enforcement is taking place when it is not. If this pattern continues it is simply a matter of time before more serious violations occur that pose significant threats to the health, safety and welfare of the public.

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

Except for the effluent violations in 2009 and 2010, the FDEP has failed to take meaningful enforcement when it identified violations at the Facility. The enforcement history since 2011 is far less than stellar. While the LFCO2 was entered into in 2015, it:

- Did not address all the Total Nitrogen violations known to exist at the time,
- Assessed civil penalties, but then allowed the City to avoid paying the penalties if it complied with the terms of the LFCO2,
- Did not assess civil penalties to recover the benefit of economic noncompliance.

The FDEP's lack of seriousness on the issue of enforcement is further demonstrated by its failure to require that the City pay the full civil penalty, together with stipulate penalties, even though the terms of the LFCO2 provided for this assessment when the City continued to violate the terms of its Permit.

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 with the new Permit that misrepresents the Facility's enforcement history to the public. In this case, at the time that the Permit was issued the FDEP completely lead the public to believe that this Facility had no compliance problems. It knew, however, that this was not the case. Consequently, challenges to the Permit were potentially avoided. This is not the first case that we have seen in which such misrepresentations have been made to the public in an effort to secure the smooth renewal of a wastewater permit,
- 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.

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. And in this case, it compounded the problem by including provisions in the consent order that allowed the City to completely avoid the payment of imposed civil penalties if it complied with the new terms that it was offered. Then, when the City failed to comply, the FDEP simply looked the other way.

The FDEP's approach to the pattern of noncompliance in this case is bound to reinforce an attitude in the City that the terms of its Permit are mere guidelines that can be violated at will. While it is true that the LFCO2 required the City to initiate improvements designed to avoid future noncompliance, the fact is that a responsible permittee would have undertaken these improvements anyway if the objective was to protect the health, safety and welfare of the public that it serves. Such is not the case here. And then, the FDEP rewarded the noncompliance with a phantom penalty assessment that was no doubt used to telegraph to the EPA that it was taking meaningful enforcement. At the end of the day, this is not an example of appropriate enforcement. Neither is it an example of a system that is designed to protect the public from potential negative health effects associated with effluent violations. And it is not an example of a system that is designed to protect the environment from the effects of those violations, all of which are resulting in improper discharges to a surface water that is already listed on the 303(d) list as impaired. 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 the 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 act 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 the City of Neptune Beach 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 due to its years of non-compliance. 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

Trey Glenn  
Regional Administrator  
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May 25, 2018

cc: Noah D. Valenstein, Secretary, Florida, Department of Environmental Protection: 3900  
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