

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEE COUNTY,
Petitioners

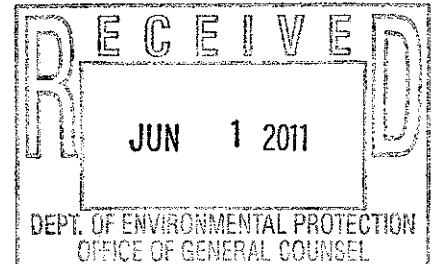
and

THE SNOOK FOUNDATION, INC.,
GREATER PINE ISLAND CIVIC ASSOCIATION, INC.,
SOUTHWEST FLORIDA WATERSHED COUNCIL, INC.,
Proposed Petitioners/Intervenors,

v.

DEP File No. 36-0295854-002
DEP Consent Order OGC 06-2345
Lee County, Florida

DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
STATE OF FLORIDA and
CITY OF CAPE CORAL
Respondents.



PETITION FOR FORMAL ADMINISTRATIVE HEARING
AND
MOTION TO INTERVENE IN SUPPORT OF LEE COUNTY

Petitioners THE SNOOK FOUNDATION, INC., GREATER PINE ISLAND CIVIC ASSOCIATION, INC., and SOUTHWEST FLORIDA WATERSHED COUNCIL, INC., file this petition for a formal administrative hearing and to intervene in support of Lee County within 21 days of receipt of the Notice of Intent in the above styled action.

1. Petitioners seek full party status in the proceeding pursuant to §§ 120.569 and 120.57 and §403.412(6), Florida Statutes and Rules 28-106.201 and 62-110.106, Florida Administrative Code (FAC).

2. Petitioners were signatories in prior Settlement Agreement, attached as Exhibit A, in the previous proceedings on DEP Consent Order OGC 06-2345, Second Amended Consent Order.

3. The agency affected by this Petition is the FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("Department"). The Department's address is 2295 Victoria Avenue, Suite 364, Fort Myers, Florida 33901. The Department's identification number for this matter is File No. 36-0295854-002. The subject matter and activity is located within Lee County, Florida.

4. The CITY OF CAPE CORAL ("City") is an incorporated municipality under the laws of the State of Florida, whose primary mailing address is Post Office Box 150027, Cape Coral, Florida 33915-0027.

5. Petitioners are challenging the Department's denial of the City's ERP application (hereafter "Application") for the re-construction of a certain barrier and boatlift. The Application was applied for under the terms of the Second Amended Consent Order , in OGC Case No. 06-23455-DF, hereafter referred to as the "2nd Amd. Consent Order" as attached to Lee County Petition, Exhibit "B" incorporated herein by reference

6. Petitioners asserts that the activity, conduct, or product to be permitted or taken in the notice of intent on the proposed agency action: **DEP File No. 36-0295854-002** under state statutes and implementing regulations including Chapter 403 of the Florida Statutes has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state under F.S. 403.412, as set forth with

particularity in the petition filed by Lee County and incorporated by reference into this petition.

7. The county in which the subject matter is located is **Lee County**. The proposed location where Formal Administrative Hearing is requested is: **Lee County Florida** where subject facility and petitioners are located.

Statement how and when petitioner received Department Notice:

8. Petitioner received notice via written notice or public notice published in the Fort Myers News-Press on or after May 11, 2011. This Petition is filed within twenty-one (21) days of receipt of the Notice.

Petitioner's substantial interests are affected by the DEP's action:

9. Petitioners will continue to suffer direct and immediate and irreparable harm if the Ceitus boat lift and berm are removed and not replaced providing a direct connection to Matlacha Pass Aquatic Preserve and Pine Island Sound Aquatic Preserve.

10. Removal of these structures without constructing and providing a suitable replacement boat lift or boat lock (as set forth in the existing Consent Order) would allow direct flow of polluted canal waters into protected natural resource areas utilized by petitioners, thus directly affecting their use and enjoyment of the water quality and natural resources of the area including Matlacha Pass Aquatic Preserve and Pine Island Sound Aquatic Preserve.

11. Petitioner contends that failing to reinstall the barrier and boatlift adversely impacts the above mentioned land and water bodies by increasing surface water flows from the discharging bodies (Cape Coral-West Urban, Horseshoe Hermosa Canals, Gator Slough Canal,

each of which is designated as impaired by one or more parameter) to the receiving bodies (Matlacha Pass, Pine Island, Pine Island Sound-Upper Segment, Charlotte Harbor-Middle Segment, and the Caloosahatchee Estuary-Tidal Segment 1) each of which is currently designated as impaired by one or more parameters without adequate treatment, causing substantial increases in pollutants to the detriment of Petitioner's operations and regulating responsibilities upon said lands and water bodies.

12. Petitioner alleges that the activity, conduct, or product to be licensed or permitted has the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state and requests mediation or initiates a formal administrative hearing to present evidence and both factual and expert testimony under Florida Statutes, Section 403.412(6).

13. The organizational Petitioners are all Florida corporations not for profit with at least 25 current members residing within Lee county where the activity is proposed, and were formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, and are Florida corporations not for profit formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action. Petitioner asserts standing to request and to intervene in an administrative hearing under Chapter 120 and Section 403.412(6), Florida Statutes.

14. Petitioners, including a substantial number of the members of the organizational Petitioners, will be directly and immediately adversely affected by the proposed action as follows:

a. **The Snook Foundation, Inc.** is an active Florida not-for-profit corporation whose address is 1600 Ken Thompson Parkway, Sarasota, FL 34236. It was formed in 1997 and has some 4,000 members. Its vision includes “achieving snook habitat protection, culturing, stocking, enlightened regulation, research, and education [as well as] “improved understanding and protection of critical snook habitat.....” The Snook Foundation Inc.’s substantial interests are affected because of the immediate and direct adverse impacts resulting from the decisions made in this proceeding on snook habitat utilized by a substantial number of members who fish for snook and enjoy fishing, boating, recreation, birding, and wildlife observation of the flora and fauna in the Matlacha Pass Aquatic Preserve, Pine Island Sound Aquatic Preserve and the Charlotte Harbor Estuary. Petitioners will suffer direct and immediate and irreparable harm if the Ceitus boat lift and berm are removed and the canal dredged providing a direct connection to Matlacha Pass Aquatic Preserve and Pine Island Sound Aquatic Preserve under the proposed amended consent order. Removal of these structures without first constructing and providing a suitable replacement boat lift or boat lock (as set forth in the existing Consent Order) would allow direct flow of polluted canal waters into areas into protected natural resource areas utilized by petitioners, thus directly affecting their use and enjoyment of the water quality and natural resources of the area including Matlacha Pass Aquatic Preserve and Pine Island Sound Aquatic Preserve. The Snook Foundation, Inc. is a Florida not-for-profit corporation with at least 25 current members residing within Lee county where the activity is proposed, and was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of water quality, and is a Florida not-for-profit corporation formed at least 1 year

prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action. The Foundation members received notice of the amended consent order by the News-Press notice of March 9, 2008. For purposes of this proceeding, the Board's contact address and information is that of its undersigned counsel.

b. **The Greater Pine Island Civic Association, Inc.** is an active Florida not-for-profit corporation whose address is P.O. Box 3044, Pineland, FL 33945. The Greater Pine Island Civic Association, Inc. has a long history of working to protect the natural resources and water quality in the Matlacha Pass Aquatic Preserve, Pine Island Sound Aquatic Preserve and the Charlotte Harbor Estuary. The Greater Pine Island Civic Association, Inc. was organized and exists for the betterment of the Greater Pine Island area, and towards that end engages in activities to protect the property interests and preserve water quality, natural resources for the enjoyment of its membership, including residents, property owners, and businesses of Greater Pine Island, St James City, Bokeelia, Matlacha, and Pineland. The Association's substantial interests are affected because of the immediate and direct adverse impacts resulting from the decisions made in this proceeding on water quality and natural resources utilized by a substantial number of members who enjoy fishing, boating, recreation, birding, and wildlife observation of the flora and fauna in the Matlacha Pass Aquatic Preserve, Pine Island Sound Aquatic Preserve and the Charlotte Harbor Estuary. Petitioners will suffer direct and immediate and irreparable harm if the Ceitus boat lift and berm are removed and the canal dredged providing a direct connection to Matlacha Pass Aquatic Preserve and Pine Island Sound Aquatic Preserve under the proposed amended

consent order. Removal of these structures without first constructing and providing a suitable replacement boat lift or boat lock (as set forth in the existing Consent Order) would allow direct flow of polluted canal waters into areas into protected natural resource areas utilized by petitioners, thus directly affecting their use and enjoyment of the water quality and natural resources of the area including Matlacha Pass Aquatic Preserve and Pine Island Sound Aquatic Preserve. The Greater Pine Island Civic Association, Inc. is a Florida not-for-profit corporation with at least 25 current members residing within Lee county where the activity is proposed, and was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of water quality, and is a Florida not-for-profit corporation formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action. The Association members received notice of the amended consent order by the News-Press notice of March 9, 2008. For purposes of this proceeding, the Board's contact address and information is that of its undersigned counsel.

c. **The Southwest Florida Watershed Council, Inc.** is a Florida not-for-profit corporation whose address is P.O. Box 61063, Fort Myers, FL 33906-1063. The mission of SWFWC is "to protect, conserve, manage, and/or restore the land and water resources of the Caloosahatchee and Big Cypress Watersheds. Through increased awareness, participation and cooperation among all stakeholders in consensus building, planning and decision making, we are working to meet the economic, natural, and cultural needs for this and succeeding generations. The Council's substantial interests are affected because of the immediate and direct adverse impacts resulting from the decisions made in this proceeding

on water quality and natural resources utilized by a substantial number of members who enjoy fishing, boating, recreation, birding, and wildlife observation of the flora and fauna in the Matlacha Pass Aquatic Preserve, Pine Island Sound Aquatic Preserve and the Charlotte Harbor Estuary. Petitioners will suffer direct and immediate and irreparable harm if the Ceitus boat lift and berm are removed and the canal dredged providing a direct connection to Matlacha Pass Aquatic Preserve and Pine Island Sound Aquatic Preserve under the proposed amended consent order. Removal of these structures without first constructing and providing a suitable replacement boat lift or boat lock (as set forth in the existing Consent Order) would allow direct flow of polluted canal waters into areas into protected natural resource areas utilized by petitioners, thus directly affecting their use and enjoyment of the water quality and natural resources of the area including Matlacha Pass Aquatic Preserve and Pine Island Sound Aquatic Preserve. The Southwest Florida Watershed Council, Inc. is a Florida not-for-profit corporation with at least 25 current members residing within Lee county where the activity is proposed, and was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of water quality, and is a Florida not-for-profit corporation formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action. The council's members received notice of the amended consent order by the News-Press notice of March 9, 2008. For purposes of this proceeding, the Board's contact address and information is that of its undersigned counsel.

BACKGROUND

15. In 2008, the Department proposed an amendment to the Consent Order in OGC Case No. 06-2345-DF (Consent Order 15 and subsequent amendments) which would have allowed the City to remove the Ceitus barrier and boatlift. Petitioner and other parties petitioned the proposed amendment pursuant to Chapter 120 Florida Statutes. Subsequently, the Petitioner agreed to withdraw its petition and become a signatory to a Settlement Agreement adopting the 2nd Amd. Consent Order. By entering into the 2nd Amd. Consent Order, the Petitioner, the City and the Department consented to the removal of the barrier and boatlift under certain conditions, more specifically the City was required to identify and implement certain Net Ecosystem Benefit ("NEB") projects as agreed upon by a Stakeholder Group. The NEB projects were to provide an overall net environmental benefit to the receiving waters. If the Stakeholder Group failed to approve the NEB projects, the City would be required to rebuild a permanent stormwater barrier and boatlift. In order to rebuild the permanent stormwater barrier and boatlift, the City was required to submit an ERP application for the reconstruction of the barrier and boatlift and reconstruct the barrier and boatlift within 275 days after receiving all applicable permits. The Stakeholder Group failed to achieve consensus as to a list of NEB projects. Following the Stakeholder Group's failure to approve NEB projects, the City submitted an ERP application on November 19, 2010. The Department issued a Request for Additional Information (RAI) on December 17, 2010. The City responded to the RAI on March 16, 2011. On May 11, 2011, the Department issued its Notice of Intent to Deny the application.

DISPUTED ISSUES OF MATERIAL FACT

16. Petitioners adopt and intervene in support of the disputed issues of material fact as set forth in the Lee County Petition as reprinted herein below:

Without waiving any rights, and based upon Petitioner's best information and belief as it exists at the time of filing this Petition, Petitioner disputes the following issues of material fact:

a. Whether the Department's denial of the ERP is in compliance with the terms of the 2nd Amd. Consent Order. Specifically:

1. In questions three and four of the Department's December 17, 2010 RAI, the Department stated that the City must build an extended wall to fix all of the existing breaches along the western portion of the Spreader Canal in an effort to prevent the exchange of canal waters with waters of the State. This requirement is contrary to the obligations of the City, mandated under the 2nd Amd. Consent Order. Exhibit "A" of the 2nd Amd. Consent Order clearly shows the limited length of the barrier along the western portion of the Spreader Canal. The 2nd Amd. Consent Order also states that "Nothing contained herein shall impose upon the City any obligation to undertake the design and construction of any other work to repair or prevent further erosion along the spreader canal other than the design and construction of the stormwater barrier and boatlift."⁷

⁷ 2nd Amd. Consent Order, page 6.

2. In its denial and in accordance with the 2nd Amd. Consent Order, the Department requested the City submit a modified design within 90 days of the notice of denial addressing all of the reasons identified by the Department for why the original design was not acceptable. However, the possible changes identified by the Department to the project design that Department suggests may enable the permit to be granted are inconsistent with the terms of the 2nd Amd. Consent Order. In bullet point one of the proposed changes, the Department again suggests fixing the existing breaches by changing the design to “prevent the exchange of water along the western bank and at the southern end of the North Spreader Canal with the waters of the state...”⁸ As mentioned above, the 2nd Amd. Consent Order specifically limits the City’s obligation to preventing the exchange of water and the southern end of the North Spreader Canal, not the entire length of the North Spreader Canal.⁹

3. In bullet point three of the proposed changes, the Department also suggests a change to the design that would “meet all applicable rule criteria, providing a net improvement to water quality, *without permanently* installing a structure at the southern end of the North Spreader Canal and along the western bank”¹⁰ (emphasis added). However, the 2nd Amd. Consent Order does not authorize this option. The opportunity for “net improvement” without permanently installing the structure is no longer available due to the failure of the Stakeholder Group to approve NEB projects. The only option now available under

⁸ *Notice of Denial*, pg. 11, 2011.

⁹ *2nd Amd. Consent Order*, pg. 6.

¹⁰ *Denial*, pg. 11.

the 2nd Amd. Consent Order is reconstructing the barrier and boatlift at the southern end of the North Spreader Canal.

- b. Whether the City is complying with the terms of the 2nd Amd. Consent Order. Specifically:

1. Instead of providing the requested information to the Department in its RAI response, the City simply provided its own conclusions that reconstructing the barrier and boatlift “will likely result in additional damage to the estuary and ecosystem, and at best, not be effective in providing environmental benefit.”¹¹ Furthermore, the City recommended the Department “determine that the construction of the NSTD (barrier and boatlift) cannot be permitted.”¹² In its most blatant disregard for the 2nd Amd. Consent Order, the City states that it “intends to continue working towards completion of the Ecosystem Management Agreement (EMA) proposed NEB projects regardless of the decision on this permit”¹³ and the City suggests “that the remaining EMA funds be set aside to fund these alternatives.”¹⁴ The City fails to recognize that it is a respondent in an enforcement action. It cannot violate the terms of the enforcement order nor dictate the terms under which they will comply with the enforcement order. The City is overtly avoiding its obligation under the 2nd Amd. Consent Order to create a permissible design of the barrier and boatlift. At a minimum, the City must act in good faith in its efforts to create a permissible design of the barrier and boatlift. Additionally, the City is pushing for an unlawful use of the Escrow Account

¹¹ *City RAI Response*, Page 2, 2011.

¹² *Id.* at pg. 2.

¹³ *Id.*

¹⁴ *Id.*

Funds set aside for the now limited purpose of reconstructing the barrier and boatlift.

- c. Whether the Department is enforcing its laws, rules and orders under Florida Statutes 120.69, 373.129, 373.430, 403.121, and 403.161.
- d. Whether the denial of the ERP complies with the applicable criteria in Florida Statutes, Chapters 370, 373, 376, and 403.
- e. Whether denial of the ERP complies and is consistent with Florida's Coastal Zone Management Program, as required by Section 307 of the Coastal Management Act, 15 (CFR part 90, subpart H) and Florida Statutes Section 380.23.
- f. Whether City has provided reasonable assurances that installing the barrier and boatlift will not cause adverse water quantity and quality impacts to receiving waters and adjacent lands.
- g. Whether City has provided reasonable assurances that installing the barrier and boatlift will not cause adverse flooding to on-site or off-site property, in particular, off-site properties and facilities owned by Petitioner.
- h. Whether City has provided reasonable assurances that the installing the barrier and boatlift will not cause adverse impacts to existing surface water storage and conveyance capabilities.
- i. Whether City has provided reasonable assurances that installing the barrier and boatlift will not adversely affect the quality of receiving waters such that the

water quality standards set forth in Chapters 40E-4.301, 40E-4.302, 62-4, 62-40, 62-301, 62-302, 62-330, 62-341, 62-343, 62-520, 62-522, 62-621, 62-624 and 62-550, F.A.C., including any antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), subsections 62-4.242(2) and (3), and Rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C. will be violated.

- j. Whether City has provided reasonable assurances that installing the barrier and boatlift will not cause adverse impacts to the Petitioner owned or owned and maintained roadway facilities and related drainage facilities.
- k. Whether City has provided adequate assurances that installing the barrier and boatlift will not adversely impact groundwater conservation.
- l. Whether City has provided reasonable assurances that installing the barrier and boatlift will not adversely impact the maintenance of surface levels or surface water flows.
- m. Whether City has provided reasonable assurances that the installing the barrier and boatlift is clearly in the public interest.
- n. Whether City has provided reasonable assurances that installing the barrier and boatlift will not cause unacceptable cumulative impacts upon wetlands and other surface waters.

- o. Whether installing the barrier and boatlift will cause adverse water resources or environmental impacts.
- p. Whether installing the barrier and boatlift will adversely affect the public health, safety or welfare or the property of others in Lee County.
- q. Whether installing the barrier and boatlift will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats.
- r. Whether installing the barrier and boatlift will adversely affect the navigation or the flow of water or cause harmful erosion or shoaling.
- s. Whether installing the barrier and boatlift will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity.
- t. Whether installing the barrier and boatlift will adversely affect the regulated activity will be of a temporary or permanent nature.
- u. Whether installing the barrier and boatlift will adversely affect the significant historical and archaeological resources under the provisions of Section 267.061, Florida Statutes.
- v. Whether installing the barrier and boatlift will adversely affect the current condition and relative value of functions being performed by areas affected by the proposed regulated activity.

ULTIMATE FACTS WARRANTING REVERSAL

The City and the Department have failed to comply with the terms of the 2nd Amd. Consent Order.

Notwithstanding the City's attempts to submarine its own Application, the City has demonstrated and provided reasonable assurances establishing compliance with applicable State and Federal law, Department permitting regulations, or Department policy.

STATUTES AND/OR RULES WARRANTING REVERSAL

Florida Statutes, Chapters 370, 376, 380 and 403 and Chapters 62-4 and 62-312 of the F.A.C. entitle Petitioner to relief.

Relief sought in this Proceeding:

Petitioners seek a formal administrative hearing and respectfully requests that a Division of Administrative Hearings Administrative Judge hold a hearing to consider the disputed issues of fact and law and enter a Recommended Order recommending issuance of the permit and that DEP issue a Final Order approving the application.

Respectfully submitted,



Ralf Brookes Attorney
for Petitioner/Intervenors
Fla Bar No. 0778362
1217 E Cape Coral Parkway #107
Cape Coral, FL 33904
(239) 910-5464
(866) 341-6086 fax
ralf@ralfbrookesattorney.com

CERTIFICATE OF SERVICE

I certify that the foregoing petition requesting a formal administrative hearing has been filed by fax on **June 1 2011** with the:

Department of Environmental Protection,

Agency Clerk

Mail Station 35

3900 Commonwealth Boulevard,

Tallahassee, Florida 32399

FILED BY FAX WITH DEP at (850) 245-2303 and (850) 921-6847

Also as .pdf to Lea.crandall@dep.state.fl.us

And

City of Cape Coral

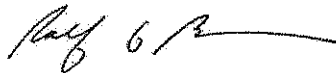
Mayor and City Attorney

P.O. Box 150027,

Cape Coral, Florida,

33915-0027

Respectfully submitted,



Ralf Brookes Attorney

Fla Bar No. 0778362

1217 E Cape Coral Parkway #107

Cape Coral, Fl 33904

(239) 910-5464(866) 341-6086 fax

ralf@ralfbrookesattorney.com

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL REGULATION**

THE SNOOK FOUNDATION, INC.
AUDUBON OF SOUTHWEST FLORIDA, INC.
CALOOSAHATCHEE RIVER CITIZENS ASSOCIATION, INC. ("RIVERWATCH")
RESPONSIBLE GROWTH MANAGEMENT COALITION, INC.
GREATER PINE ISLAND CIVIC ASSOCIATION, INC.
CALUSA LAND TRUST AND NATURE PRESERVE OF PINE ISLAND, INC.
PURRE Water Coalition Foundation, Inc.
SOUTHWEST FLORIDA WATERSHED COUNCIL, INC.
SANIBEL-CAPTIVA CONSERVATION FOUNDATION, INC.
PHILLIP G. BUCHANAN, AND
NOEL ANDRESS,
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v.

DEP File No. OGC 06-2345

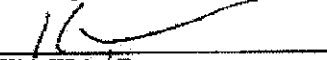
DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
STATE OF FLORIDA and
CITY OF CAPE CORAL FLORIDA
Respondents.

SETTLEMENT AGREEMENT

The Petitioners, through undersigned counsel, hereby agree to settlement of the above styled request for a formal administrative hearing under the terms and conditions set forth in the revised Amended Consent Order (attached hereto as Exhibit A), with each party bearing their own attorney's fees and costs.



Raif Brookes Esq.
Attorney for Petitioners



Kirk White, Esq.
Asst General Counsel, Department of Environmental Protection



Mark Lupe, Esq.
Asst City Attorney, City of Cape Coral

**EXHIBIT A to PETITION- PRIOR SETTLEMENT AGREEMENT
referencing 2nd Amended Consent Order (attached as Ex B to Lee Co Petition)**