

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

LEE COUNTY,

Petitioner,

v.

THE CITY OF CAPE CORAL AND
THE FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.

PETITION FOR FORMAL ADMINISTRATIVE HEARING

Petitioner, LEE COUNTY (hereafter “Petitioner” or “County”), by and through its undersigned counsel and pursuant to Sections 120.569 and 120.57, Florida Statutes and Rules 28-106.201 and 62-110.106, Florida Administrative Code (“F.A.C.”) hereby files this Petition for Formal Administrative Hearing (“Petition”), and states:

PARTIES

1. Petitioner is a Charter County of the State of Florida, created and operating in accordance with Article VIII, Section 1, Florida Constitution and Chapter 125, Florida Statutes, whose primary mailing address is 2115 Second Street, Fort Myers, Florida 33901.
2. 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.

3. 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.
4. For the purposes of this proceeding, all communications and correspondence should be directed to the undersigned attorney.

NOTICE

5. On May 11, 2011, the Petitioner issued a Notice of Denial Environmental Resources Permit (“Notice”). The Notice was the Department’s formal denial of the City’s application for an Environmental Resource Permit (“ERP”), ERP File No. 36-0295854-002. The Notice of Denial is attached hereto as Exhibit “A”. Without addressing sufficiency or validity, Petitioner received the Notice via e-mail on May 11, 2011.
6. This Petition is filed within twenty-one (21) days of receipt of the Notice.

THE CHALLENGED ACTION

7. Petitioner is challenging the Department’s denial of the City’s ERP application (hereafter “Application”) for the reconstruction 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.” The 2nd Amd. Consent Order is attached hereto as Exhibit “B” and included herein by reference.

BACKGROUND

8. 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 the 2nd Amd. Consent Order for the limited and exclusive purposes of contributing and committing \$1,500,000.00 to future project(s) to be completed by the City under the terms of the 2nd Amd. Consent Order.¹

9. 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.² If the Stakeholder Group failed to approve the NEB projects, the City would be required to rebuild a permanent stormwater barrier and boatlift.³ 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.⁴
10. The Stakeholder Group failed to achieve consensus as to a list of NEB projects⁵. Following the Stakeholder Group’s failure to approve NEB projects, the City submitted an ERP application on November 19, 2010, attached hereto as Exhibit “C.” The Department issued a Request for Additional Information (RAI) on December 17, 2010, attached hereto as Exhibit “D.” The City responded to the RAI on March 16, 2011,

¹ *2nd Amd. Consent Order*, pg. 6, 2008.

² *Id.* at pg. 3-5.

³ *Id.* at pg. 5.

⁴ *Id.*

⁵ *NSEMA Process and Summary Documentation*, pg.1-5, 2010.

attached hereto as Exhibit "E." On May 11, 2011, the Department issued its Notice and requested that the City submit a modified design within 90 days.

PETITIONER'S SUBSTANTIAL INTERESTS

11. The Petitioner finds itself in the unique and unenviable position of defending a permit application when the permit applicant does not want the permit. It is clear that the City, notwithstanding its obligations under the 2nd Amd. Consent Order, has made every attempt to undermine its own Application. The City's disinterest in honoring its obligations under the 2nd Amd. Consent Order calls into question whether the City intends to honor its obligation to submit a modified design within 90 days. Therefore, in order to protect its interests, and because this 90-day window for the City to submit a modified design comes after the jurisdictional deadline to file this Petition, the Petitioner has no choice but to file the instant Petition. Subsequent submission of a modified design for the barrier and boatlift, as required per the 2nd Amd. Consent Order, and approval by the Department may allow the Petitioner to dismiss the instant Petition.
12. Petitioner has standing in this matter as it is a signatory to the 2nd Amd. Consent Order and because Petitioner has contributed and committed \$1,500,000.00 into an interest bearing account for work associated with the permitting, designing and reconstructing of the barrier and boatlift.⁶ Use of these funds outside the terms of the 2nd Amd. Consent Order would be a misappropriation of Petitioner's public funds and a violation of the 2nd Amd. Consent Order.

⁶ *Id.* at pg. 6.

13. Furthermore, Petitioner has standing in this matter as it owns, controls, manages and/or regulates land and water bodies downstream and upstream of the North Spreader Waterway System, and its associated canals. The continuing absence of the barrier and boatlift, without adequately addressing water quality and quantity, has adversely impacted and continues to adversely impact land and water bodies under Petitioner's ownership, control, management and/or regulation.
14. 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.
15. The Petitioner's substantial interests are impacted by failing to reinstall the barrier and boatlift because the challenged action will adversely impact the ecological condition of the regional watershed, cause adverse water quantity and quality impacts to receiving waters and adjacent lands and adversely impact Petitioner owned and/or operated facilities. This is a real and immediate impact to lands and water bodies owned, controlled, managed and/or regulated by the Petitioner. Specifically:

- a. Failing to reinstall the barrier and boatlift will cause adverse water quantity and quality impacts to the Petitioner owned and/or operated conservation lands. Such lands include, but are not limited to: Charlotte Harbor Preserve, Smoke House Bay Preserve, Cayo Pelau Preserve and San Carlos Bay-Bunche Preserve.
- b. Failing to reinstall the barrier and boatlift will adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and surface waters on Petitioner owned and/or operated lands and adjacent water bodies.
- c. Failing to reinstall the barrier and boatlift will have adverse water quantity and quality impacts on Petitioner owned lands and facilities downstream and upstream of the proposed Ceitus Boat Lift Site.
- d. Failing to reinstall the barrier and boatlift will adversely impact Petitioner's National Pollution Discharge Elimination System (NPDES) Permit as mandated by the Clean Water Act and Florida Statute 403.0885.
- e. Failing to reinstall the barrier and boatlift will adversely impact Petitioner's ability to comply with current and future Total Maximum Daily Loads (TMDLs), future numeric nutrient criteria and any other current or future water quality standards established by the Department or the Environmental Protection Agency (EPA).

- f. Failing to reinstall the barrier and boatlift will adversely impact Petitioner's cultural, recreational, tourist and economic benefits that are provided from the water bodies within Petitioner's jurisdiction and/or control.

DISPUTED ISSUES OF MATERIAL FACT

16. 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

17. The City and the Department have failed to comply with the terms of the 2nd Amd. Consent Order.
18. 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

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


DEMAND FOR RELIEF

20. WHEREFORE, Petitioner, LEE COUNTY, for the reasons stated herein requests:
 - a. A formal administrative hearing concerning the denial of ERP File No. 36-0295854-002.
 - b. That the Department issue said ERP and mandate installation of the barrier and boatlift in compliance with the 2nd Amd. Consent Order; or
 - c. That the Department enforce and ensure compliance with the 2nd Amd. Consent Order, OGC Case No. 06-2345-DF, by the City by striking bullet point options one and three from the recommended changes to the barrier and boatlift design on

page 11 of the denial and mandating that the City submit a modified design in compliance with bullet points two and four of its denial.

Respectfully submitted this 31st day of May, 2011.

LEE COUNTY
MICHAEL D. HUNT, COUNTY ATTORNEY
Fla. Bar No. 271251
2115 Second Street
Fort Myers, Florida 33901
Telephone (239) 533-2236
Facsimile (239) 485-2106

BY: 
JED R. SCHNECK, ASSISTANT COUNTY ATTORNEY
Fla. Bar No. 669792
2115 Second Street
Fort Myers, Florida 33901
Telephone (239) 533-2236
Facsimile (239) 485-2106