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MCDONNELL TRIAL LAWYERS

*Jennifer -
Attached includes
your changes.
Jasni*

MICHAEL R.N. McDONNELL, B.A., J.D., LL.M.
BOARD CERTIFIED CIVIL TRIAL LAWYER

COLLEEN J. MACALISTER, J.D.
ASSOCIATE

**Via Facsimile & Regular Mail
561-682-6010**

January 2, 2007

Ms. Jackie McGorty
South Florida Water Management
3301 Gun Club Road
West Palm Beach, FL 33406

Re: Conservancy of Southwest Florida v. SFWMD

Dear Ms. McGorty:

Enclosed for filing is a Petition for Administrative Hearing concerning the above referenced matter.

If you have any questions or concerns, please contact this office. Thank you for your assistance in this matter.

Very truly yours,

Michael R.N. McDonnell
MRM/nmg

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**STATE OF FLORIDA
SOUTH FLORIDA WATER MANAGEMENT DISTRICT**

CONSERVANCY OF SOUTHWEST)	
FLORIDA,)	
)	
Petitioner,)	
)	
v.)	Case No. _____
)	
SOUTH FLORIDA WATER)	
MANAGEMENT DISTRICT,)	
)	
Respondent.)	
_____)	

PETITION FOR ADMINISTRATIVE HEARING

PRELIMINARY STATEMENT

1. Pursuant to Sections 120.569 and 120.57(1), Fla. Stat., and Section 403.412, Fla. Stat., Petitioner Conservancy of Southwest Florida ("Conservancy") files this petition seeking a formal evidentiary hearing and final order denying South Florida Water Management District's ("SFWMD") proposed agency action on the application of Agripartners Ltd. Partnership and Edison Farms, Inc., for an Environmental Resource Permit ("ERP"), federal Clean Water Act ("CWA") water quality certification, and a finding of consistency with the federal Coastal Zone Management Act ("CZMA") program for a proposed drainage canal called the South Lee Conveyance in Lee County, Florida.

2. The proposed South Lee Conveyance project is a proposed 4-mile long drainage canal that would drain part of a 3,937-acre property in South Lee County which is predominantly wetlands and is important endangered species habitat. Although the property is currently identified by the owners as agricultural, the owner has plans to develop the property as a large-scale residential development, has previously sought to drain the wetlands on the property and

has sought to annex the property into the City of Bonita Springs to increase the allowable residential density.

3. The construction of the drainage canal would directly impact 15.76 acres of wetlands, but it is likely to indirectly drain several hundred acres of wetlands which were not considered in the proposed ERP.

4. SFWMD has identified this permit application as Permit Application No. 0501 12-18. SFWMD's permitting authority is pursuant to Chapter 373, Part IV, Fla. Stat.; Chapters 40E-4, 62-330, and 62-343 of the Fla. Admin. Code; the federal CWA; and the federal CZMA. The proposed South Lee Conveyance project is not exempt from the requirements to obtain this requested ERP, obtain a CWA water quality certification, and a new CZMA consistency determination.

PARTIES

5. The affected agency and Respondent, SFWMD, is the state agency whose proposed agency actions are at issue. The address of SFWMD for purposes of this proceeding is c/o Elizabeth Vegaulla, SFWMD Deputy Agency Clerk, 3301 Gun Club Road, West Palm Beach, Florida 33406, Facsimile No. (561) 682-6010.

6. Petitioner Conservancy is duly incorporated under the laws of the State of Florida as a not-for-profit corporation. The address of the Conservancy is 1450 Merrihue Drive, Naples, FL 34102.

7. The attorney representing the Conservancy in this matter is Mike McDonnell, McDonnell Trial Lawyers, Suite 501 Newgate Tower, 5150 Tamiami Trail North, Naples, FL 34103, 239-434-7711, 877-613-7485 (fax), mike@metrial.com.

8. The Conservancy has over 6,000 members in Southwest Florida, most residing in Collier and Lee Counties. The mission of the Conservancy is to protect the environment and natural resources of Southwest Florida. The Conservancy conducts scientific and educational activities on the waters of Estero Bay downstream of the project site. Members of the Conservancy regularly recreate on, use and enjoy waters of the Estero River and Estero Bay, and regularly view and appreciate wildlife in the area.

9. The Conservancy has standing pursuant to Section 403.412(6), Fla. Stat., because more than 25 current members of the Conservancy reside within Lee County, and the corporate purposes of the Conservancy include the protection of the environment, fish and wildlife resources, and the protection of air and water quality.

10. The Conservancy has standing under Section 403.412(5), Fla. Stat., and Chapter 120, Fla. Stat., because the proposed activity will determine and affect its substantial interests by affecting its interest in scientific and educational activities, as well as its members' use and enjoyment of the waters and natural resources protected by Chapters 373 and 403, Fla. Stat. Additionally, the waters and natural resources the Conservancy and its members use will be adversely affected by the cumulative impacts of the proposed SFWMD agency action, including foreseeable future impacts related to the development of the subject property.

11. The Conservancy also has standing pursuant to Section 403.412(7), Fla. Stat., and Chapter 120, Fla. Stat., because the state water quality standards and CWA water quality certification proposed by SFWMD's agency action are part of Florida's CWA approved program, and the Conservancy, itself, and members of the Conservancy use and enjoy the waters and natural resources affected by the proposed project, including the cumulative and secondary

impacts of the proposed project, thereby meeting the standing requirements for case and controversy pursuant to Article III of the U.S. Constitution.

FACTS

Receipt of Notice

12. The Conservancy first received written notice of the subject SFWMD proposed permit action on the South Lee Conveyance project application on December 13, 2006.

Agripartners Property

13. The Agripartners/Edison Farms property is one of the largest tracts of undeveloped land in South Lee County. It is located east of Interstate 75 and north of Bonita Beach Road in an area designated by Lee County's Future Land Use Plan as Density Reduction/Groundwater Resource ("DR/GR"), which is reserved for drinking water aquifer recharge and low-density and low-intensity land uses. The allowable residential density in the DR/GR is 1 unit per 10 acres on the uplands and 1 unit per 20 acres for the wetlands.

14. The land owners' history of attempting any means to develop this property more intensely belies the purpose of the proposed ERP. In 1991, the property was included as part of the proposed 7,100-acre, 15,000 home Cultview Communities Development of Regional Impact. In 1999, the owner attempted to obtain a U.S. Army Corps of Engineers permit to fill over 1,000 acres of wetlands to create pasture, a step to make development a forgone conclusion. The application was withdrawn before the Corps of Engineers denied it based on the Corps' conclusion that the proposed wetlands destruction was not really for agricultural purposes but for subdivision development.

15. In 2002, the owners proposed annexation of the property into the City of Bonita

Springs, requesting a future land use designation of moderate density (up to 6 units per acre) in the proposed annexation agreement.

16. In 2004 Agripartners sought to have the property annexed into the City of Bonita Springs to change the allowable density for the property. Bonita Springs rejected the annexation.

17. Agripartners was also behind a \$10 million federal transportation budget line item to study the extension of Coconut Road for a new I-75 interchange adjacent to its property after the Metropolitan Planning Organization rejected the idea.

18. The 3,900 acres of property on which the drainage ditch would be constructed are nearly 90% wetlands, most of which are high-quality wetlands. It is adjacent to land owned by SWWMD in the Corkscrew Regional Ecosystem Watershed ("CREW"). The site is documented habitat for the Florida panther, wood stork, little blue heron, tricolored heron, snowy egret, white ibis, and roseate spoonbill. It is also designated Primary Panther Habitat by the Multi-Species/Ecosystem Recovery Implementation Team (MERIT) subteam convened by the US Fish and Wildlife Service, which defined Primary Panther Habitat as "all lands essential for the survival of the Florida panther in the wild".

Wetland Impacts and Proposed Mitigation

19. Although the application and District staff report speaks of a project area of about 200 acres and assumes only 16 acres of wetland impacts, the wetland impacts will likely go far beyond the immediate area directly impacted by digging the canal. The Southwest Florida Regional Planning Council has estimated the overall wetland impacts as 1,283 acres due to the long-term drainage of the area that would result from the canal proposed to be built in this permit application. Such large wetland impacts would destroy habitat for wading birds, including core

foraging habitat for the endangered wood stork colonies in Corkscrew Swamp. Drainage would also impact groundwater recharge in the area designated by Lee County for that purpose.

20. The District permit does not adequately deal with the potential for such widespread wetland impacts due to the drainage likely to be caused by the canal, stating only that if wider impacts occur in the future, reconfiguration of the canal will be required.

21. The mitigation accepted by the District for the likely impacts is deficient in that it only addresses the direct 16-acre impacts from the construction of the canal and only requires preservation of existing high quality wetlands that would be unlikely to be converted to agriculture or residential development.

22. The applicant did not provide an adequate demonstration that there are no further practicable modifications that would eliminate or further reduce wetland impacts.

Downstream Water Quality Impacts

23. The proposed drainage canal would discharge into the Estero River at a point where it is has been designated as Outstanding Florida Waters ("OFW") by the Florida Department of Environmental Protection ("DEP"), a designation which is supposed to protect a waterbody from any further water quality degradation.

24. The proposed drainage canal would also discharge to Hallway Creek and eventually to Estero Bay, both of which have been designated as Outstanding Florida Waters ("OFW") by the Florida Department of Environmental Protection ("DEP").

25. In addition, Estero River has been identified as failing to meet water quality standards by DEP, including water quality standards for nutrients, dissolved oxygen and copper.

26. The District staff report erroneously assumed that the drainage canal will not

create any water quality impacts because no land use change was proposed as part of the application. The drainage canal, itself, however, will result in changes in the timing and quantity of water flowing into Halfway Creek, Estero River and Estero Bay, as well as water quality changes inherent in replacing functioning wetlands with a drainage canal, including decreased dissolved oxygen and higher levels of nutrients and biochemical oxygen demand.

27. In addition, future development, which should have been anticipated by SFWMD in its consideration of the proposed ERP, will result in significant water quality degradation on the property and in downstream waters.

28. The currently proposed South Lee Conveyance project would likely cause and contribute to the degradation of OFW and to existing water quality impairments in downstream waters.

29. The proposed South Lee Conveyance project will also degrade downstream water quality and productivity due to alteration of the distribution and timing of flows from the project into the downstream waters.

30. The proposed South Lee Conveyance project will cause and contribute to surface water quality violations and the existing water quality impairment in the Estero River and Estero Bay. (Section 373.414(1), Fla. Stat.; Fla. Admin. Code R. 62-302.300).

Public Interest Test

31. The proposed South Lee Conveyance project is not clearly in the public interest and is contrary to the public interest, in accordance with Section 373.414(1)(a), Fla. Stat..

32. The proposed South Lee Conveyance project will adversely affect the property of others.

33. The proposed South Lee Conveyance project will adversely affect the conservation of fish and marine productivity, fishing, and recreational values, contrary to the public interest.

34. The proposed South Lee Conveyance project will adversely affect the flow of water.

35. The proposed South Lee Conveyance project will adversely affect endangered and threatened species, adversely affect the habitats of endangered and threatened species, and adversely affect the recovery of endangered and threatened species.

36. The proposed SFWMD agency action will create adverse cumulative and secondary impacts to biologically sensitive wetland habitat and to endangered species habitat without adequate consideration of practicable modifications or mitigation.

DISPUTED ISSUES OF LAW AND FACT

37. Whether the applicant has provided reasonable assurances of compliance with the applicable water quality standards as required by Section 373.414(1), Fla. Stat. This includes reasonable assurance of compliance with: Florida's anti-degradation policy in Fla. Admin. Code R. 62-4.242(1)(a) and 62-302.300(7); Florida's cause and contribute to water quality violations or degradation of existing uses (Fla. Admin. Code R. 62-302.300); Florida's minimum standards in Rule 62-302.500; Florida's rules and requirements concerning discharges to OFW; and Florida's Class III standards in Rule 62-302.560. This specifically includes the issues of whether the proposed project causes and contributes to any impairment of Class III or OFW Waters, whether the applicant has provided reasonable assurances concerning Florida's antidegradation policy that requires water quality activities which degrade state waters be "necessary and

desirable under federal standards and under circumstances which are clearly in the public interest." The federal standards include, but are not limited to, the federal practicable alternatives, avoidance, and minimization standards set forth in Section 404(b)(1) Guidelines (40 C.F.R. Part 230).

38. Whether the applicant has provided reasonable assurances of compliance with the public interest criteria of Section 373.414(1)(a), Fla. Stat.

39. Whether the applicant has provided reasonable assurances of compliance with the elimination and avoidance criteria of: Section 373.414(1)(b), Fla. Stat.; SFWMD's BOR 4.2.1, 4.2.1.1, 4.2.1.3; and Florida's anti-degradation policy (Rules 62-4.242(1)(a) and Rule 62-302.500(7) ("necessary and desirable under federal standards and under circumstances which are clearly in the public interest" which include the federal practicable alternative requirement of 40 C.F.R. § 230.10).

40. Whether the applicant failed to provide reasonable assurance concerning the secondary impacts of its proposed activity under SFWMD BOR 4.2.7.

41. Whether the applicant failed to provide reasonable assurances concerning the past, present and foreseeable cumulative impacts, especially including cumulative impacts on the endangered manatee. (Section 373.414(8), Fla. Stat.; Fla. Admin. Code R. 40E-4.301(1); Fla. Admin. Code R. 40E-4.302; SFWMD BOR 4.2.8).

42. Whether the applicant has provided reasonable assurances that its proposed activities are consistent with Florida's Coastal Zone Management Program and the federal CZMA.

43. Whether the applicant has provided reasonable assurances concerning its proposed mitigation, including mitigation for the likely wetland impacts of the drainage of the applicants' property as a result of the canal.

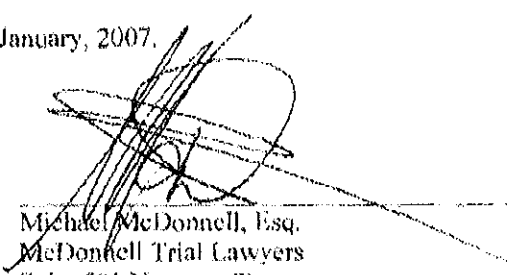
APPLICABLE RULES AND STATUTES

44. The rules and statutes which support denial of the subject permit application are listed in Chapter 120, Fla. Stat.; Chapter 187, Fla. Stat.; Chapter 373, Fla. Stat.; Chapter 403, Fla. Stat.; Fla. Admin. Code Chapters 40E-4, 62-4, 62-302 and 62-343; SFWMD Basis of Review; and 40 C.F.R. Parts 131 and 230.

RELIEF SOUGHT

45. Petitioner respectfully requests that this Petition be forwarded to the Division of Administrative Hearings to conduct a formal administrative hearing, and that the South Florida Water Management District issue a final order denying Individual Environmental Resource Permit Application No. 0501 12-18 for the proposed South Lee Conveyance project.

Respectfully submitted this 2nd day of January, 2007.

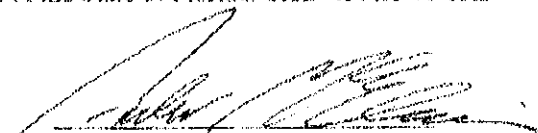


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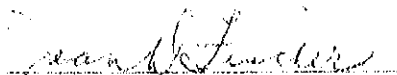
Attorneys for Petitioner

Verification

I, Andrew McElwaine, after being duly sworn, state I am the President and CEO of the Conservancy of Southwest Florida, I am authorized by the Conservancy of Southwest Florida to sign this verification, I have read the above Petition for Administrative Hearing, and I hereby adopt the above petition for hearing and the facts asserted concerning the Conservancy of Southwest Florida, and state that the proposed SFWMD agency action concerning the South Lee Conveyance permit application (SFWMD Permit Application No. 0501 12-18) and that the proposed activity to be permitted will have the effect of impairing, polluting, or otherwise injuring the waters and natural resources of the State of Florida. THE AFFIANT SAID NOTHING FURTHER.


Andrew McElwaine

SWORN TO AND SUBSCRIBED before me this 2nd day of January, 2007, by Andrew McElwaine, who is known to me or has produced a valid driver's license as identification.


Notary Public-State of Florida

Print Name: Jean D. Fischer
My commission expires: July 11, 2010
My commission no.: 000595546

