## RESOLUTION 298 - 23

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CAPE CORAL, FLORIDA, APPROVING A CONSENT ORDER BETWEEN THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE CITY OF CAPE CORAL; AUTHORIZING THE CITY MANAGER OR HIS DESIGNEE TO EXECUTE THE AGREEMENT; PROVIDING SEVERABILITY AND AN EFFECTIVE DATE.

WHEREAS, the City of Cape Coral and the Florida Department of Environmental Protection desire to resolve outstanding matters related to wastewater operations within the City of Cape Coral; and

WHEREAS, the City Manager recommends that the City Council approve a Consent Order (OGC Case No. 22-1794) to reach settlement of certain matters at issue between the State of Florida Department of Environmental Protection and the City of Cape Coral.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF CAPE CORAL, FLORIDA, AS FOLLOWS:

SECTION 1. The City Council approves the Consent Order (OGC Case No. 22-1794) to reach settlement of certain matters at issue between the State of Florida Department of Environmental Protection and the City of Cape Coral and authorizes the City Manager or his designee to execute the Consent Order. The Consent Order is attached hereto as Exhibit 1.

SECTION 2. The City Council approves the implementation an in-kind project to satisfy all obligations pursuant to the terms of the Consent Order attached hereto as Exhibit 1.

SECTION 3. Effective Date. This Resolution shall take effect immediately upon its adoption by the Cape Coral City Council.

ADOPTED BY THE CITY CO SESSION THIS DAY O	UNCIL OF THE CITY OF CAPE, 2023.	CORAL AT ITS REGULAR
	JOHN GUNTE	R, MAYOR
VOTE OF MAYOR AND COU	NCILMEMBERS:	
GUNTER STEINKE SHEPPARD HAYDEN	CUMMINGS WELSH LONG COSDEN	
ATTESTED TO AND FILED 2023.	IN MY OFFICE THIS I	DAY OF,
	KIMBERLY BR	RUNS
	CITY CLERK	

APPROVED AS TO FORM:

ALEKSANDR BOKSNER CITY ATTORNEY res/FDEP Consent Order

CVB)

# EXHIBIT 1



# FLORIDA DEPARTMENT OF Environmental Protection

South District
PO Box 2549
Fort Myers FL 33902-2549
SouthDistrict@FloridaDEP.gov

Ron DeSantis Governor

Jeanette Nuñez Lt. Governor

Shawn Hamilton Secretary

September 25, 2023

Jeff Pearson, Utilities Director City of Cape Coral PO Box 150027 Cape Coral, FL 33915

Email: jeff.pearson@capecoral.net

SUBJECT: Department of Environmental Protection v. City of Cape Coral

OGC File No.: 22-1794

Everest Parkway WRF - FL0030007

Mr. Pearson:

The State of Florida Department of Environmental Protection ("Department") finds that City of Cape Coral ("Respondent") had 39 unauthorized discharges or unpermitted sanitary sewer overflows ("SSOs") at their Everest Parkway WRF, of approximately 1,402,077 gallons from January 1, 2020, to September 4, 2023, in violation of Chapter 403, Florida Statues ("Fla. Stat."), and Rules 62-620 and 62-604, Florida Administrative Code ("Fla. Admin. Code"). Although there are no actions required to correct the violation(s), the Respondent remains subject to civil penalties as a result of the violation(s). The Respondent is also responsible for costs incurred by the Department during the investigation of this matter.

# The Department's Offer

Based on the violations described above, the Department is seeking \$55,572.32 in civil penalties and \$500.00 for costs and expenses the Department has incurred in investigating this matter, which amounts to a total of \$56,072.32. The civil penalty in this matter includes nineteen violation(s) of \$2,000.00 or more.

#### Respondent's Acceptance

If you wish to accept this offer and fully resolve the enforcement matter pending against the Respondent, please sign this letter and return it to the Department at Florida Department of Environmental Protection, South District, 2295 Victoria Ave, Suite 364, P.O. Box 2549, Fort Myers, Florida 33902 (or via e-mail at Landon.Reigelman@FloridaDEP.gov) by October 6, 2023. The Department will then countersign it and file it with a designated clerk of the Department. Once the document is filed with the designated clerk, it will constitute a final order of the Department pursuant to Section 120.52(7), F.S. and will be effective unless a request for

an administrative hearing is filed by a third party in accordance with Chapter 120, F.S. and the attached Notice of Rights.

By accepting this offer you, Jeff Pearson:

- (1) certify that you are authorized and empowered to negotiate, enter into, and accept the terms of this offer in the name and on behalf of Respondent;
- (2) acknowledge and waive Respondent's right to an administrative hearing pursuant to Sections 120.569 and 120.57, F.S., on the terms of this offer, once final;
- (3) acknowledge and waive Respondent's right to an appeal pursuant to Section 120.68, F.S.; and
- (4) acknowledge that payment of the above amount does not constitute a waiver of the Department's right, if any, to recover emergency response related costs and expenses for this matter.

The Department acknowledges that the Respondent's acceptance of this offer does not constitute an admission of liability for the violation(s) referenced above.

## Respondent's Performance

After signing and returning this document to the Department,

- (1) Respondent must pay \$ 55,572.32 in civil penalties and \$500.00 in Department costs in full within 30 days of the effective date of this order.
- (2) Respondent shall make all payments required by this Order by cashier's check, money order or on-line payment. Cashier's check or money order shall be made payable to the "Department of Environmental Protection" and shall include both the OGC number assigned to this Order and the notation "Water Quality Assurance Trust Fund." Online payments by e-check can be made by going to the DEP Business Portal at: <a href="http://www.fldepportal.com/go/pay/">http://www.fldepportal.com/go/pay/</a>
  - It will take a number of days after this order is final, effective and filed with the Clerk of the Department before ability to make online payment is available.
- (3) In lieu of making cash payment of \$55,572.32 in civil penalties as set forth in Item 1 above, Respondent may elect to off-set this amount by implementing an in-kind penalty project, which must be approved by the Department. An in-kind project must be either an environmental enhancement, environmental restoration or a capital/facility improvement project and may not be a corrective action requirement of the Order or otherwise required by law. The Department may also consider the donation of environmentally sensitive land as an in-kind project. The value of the in-kind penalty project shall be one and a half times the civil penalty off-set amount, which in this case is the equivalent of at least \$83,358.48. If Respondent chooses to implement an in-kind project, Respondent shall notify the Department of its election by certified mail within 15 days of the effective date of this Consent Order. Notwithstanding the election to implement an in-kind project,

payment of the remaining \$500.00 in costs must be paid within 30 days of the effective date of the Consent Order.

(4) If Respondent elects to implement an in-kind project as provided in Item 3 of Respondents' Performance, then Respondent shall comply with all the requirements and time frames in Exhibit A entitled In-Kind Projects.

The Department may enforce the terms of this document, <u>once final</u>, and seek to collect monies owed pursuant to Sections 120.69 and 403.121, F.S.

<u>Until clerked by the Department, this letter is only a settlement offer and not a final agency action.</u> Consequently, neither the Respondent nor any other party may request an administrative hearing to contest this letter pursuant to Chapter 120, F.S. Once this letter is clerked and becomes a final order of the Department, as explained above, the attached Notice of Rights will apply to parties, other than the Respondent, whose interests will be substantially affected.

Electronic signatures or other versions of the parties' signatures, such as .pdf or facsimile, shall be valid and have the same force and effect as originals. No modifications of the terms of this Order will be effective until reduced to writing, executed by both Respondent and the Department, and filed with the clerk of the Department.

Please be aware that if the Respondent declines to respond to the Department's offer, the Department will assume that the Respondent is not interested in resolving the matter and will proceed accordingly.

If you have any questions, please contact Landon Reigelman at (239) 344-5633 or at <u>Landon.Reigelman@FloridaDEP.gov</u>.

Sincerely,

Jennifer Carpenter

Director of District Management

Jawl Carpete

South District Office

Florida Department of Environmental

Protection

FOR 7	THE RESPONDENT:		
I,		[Type or Print Name], HEREBY ACCE	PT
THE	TERMS OF THE SETTLI	EMENT OFFER IDENTIFIED ABOVE.	
By:		Date:	
	[Signature]		
Title:			
	[Type or Print]		

FOR DEPARTMENT USE ONLY					
	day of,,	, in			
Lee County, Florida.					
	STATE OF FLORIDA DEPARTMENT				
	OF ENVIRONMENTAL PROTECTION				
	Jennifer L. Carpenter				
	Director of District Management South District Office				
	Florida Department of Environmental Protection				
Filed, on this date, pursuant to section receipt of which is hereby acknowled	n 120.52, F.S., with the designated Department Clerk, lged.				
Clerk	 <u>Date</u>				
Attachments: Notice of Righ	its				
Final clerked copy furnished to:					
Lea Crandall, Agency Clerk (	lea.crandall@FloridaDEP.gov)				

#### **NOTICE OF RIGHTS**

Persons who are not parties to this Order, but whose substantial interests are affected by it, have a right to petition for an administrative hearing under Sections 120.569 and 120.57, Florida Statutes. Because the administrative hearing process is designed to formulate final agency action, the filing of a petition concerning this Order means that the Department's final action may be different from the position it has taken in the Order.

The petition for administrative hearing must contain all of the following information:

- a) The OGC Number assigned to this Order;
- b) The name, address, and telephone number of each petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding;
- c) An explanation of how the petitioner's substantial interests will be affected by the Order;
- d) A statement of when and how the petitioner received notice of the Order;
- e) Either a statement of all material facts disputed by the petitioner or a statement that the petitioner does not dispute any material facts;
- f) A statement of the specific facts the petitioner contends warrant reversal or modification of the Order;
- g) A statement of the rules or statutes the petitioner contends require reversal or modification of the Order; and
- h) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the Department to take with respect to the Order.

The petition must be filed (<u>received</u>) at the Department's Office of General Counsel, 3900 Commonwealth Boulevard, MS# 35, Tallahassee, Florida 32399-3000 or <u>received</u> via electronic correspondence at <u>Agency Clerk@FloridaDEP.gov</u>, within <u>21 days</u> of receipt of this notice. A copy of the petition must also be mailed at the time of filing to the District Office at the address indicated above. Failure to file a petition within the 21-day period constitutes a person's waiver of the right to request an administrative hearing and to participate as a party to this proceeding under Sections 120.569 and 120.57, Florida Statutes. Mediation under Section 120.573, Florida Statutes, is not available in this proceeding.

#### Exhibit A

# **In-Kind Projects**

# I. <u>Introduction</u>

### **Proposal**

a. Within 60 days of the effective date of this Consent Order, or, of the Department's notification that applying stipulated penalties to an in-kind project is acceptable, Respondent shall submit, by certified mail, a detailed in-kind project proposal to the Department for evaluation. The proposal shall include a summary of benefits, proposed schedule for implementation and documentation of the estimated costs which are expected to be incurred to complete the project. These costs shall not include those incurred in developing the proposal or obtaining approval from the Department for the in-kind project.

## **Proposal Certification Form**

b. The proposal shall also include a Certification by notarized affidavit from a senior management official for City of Cape Coral who shall testify as follows:

My name is \_\_\_\_\_\_ (print or type name of senior management official) and do hereby testify under penalty of law that:

A. I am a person with management responsibilities for Cape Coral Utilities budget and finances. During the eighteenth month period prior to the effective date of Consent Order OGC Case No.: 22-1794 there has not been any transfer or use of funds obtained by Cape Coral Utilities from the collection of sewer rates for any purpose not related to

the management, operation, or maintenance of the Sewer System or to any capital improvement needs of the Sewer System.

9	nificant penalties for submitting false information, imprisonment for knowingly submitting false
Sworn to and subscribed before me, notarization, this day of	by means of □ physical presence or □ online, 20 by
Personally, known or by Production	of the following Identification
Notary Public, State of Florida	
Printed/typed or stamped name:	
My Commission Expires:	
Commission/Serial No.:	
Annual Certification Form	
My name is	(print or type name of senior
management official) and do hereby testify	under penalty of law that:

A. I am a person with management responsibilities for Cape Coral Utilities budget and finances. During the twelve month period immediately preceding the notary date on this Certification, there has not been any transfer or use of funds obtained Cape Coral Utilities from the collection of sewer rates for any purpose not related to the management, operation, or maintenance of the Sewer System or to any capital improvement needs of the Sewer System.

B. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowingly submitting false information in this certification.

Sworn to and subscribe notarization, this		•	1 2 1	sence or $\square$ online
			·	
	_			
Personally, known or b	y Production o	of the following	g Identification	on
Notary Public, State of	Florida			
Printed/typed or stampe	ed name:			
My Commission Expire	es:			
Commission/Serial No.	:			

- c. If the Department requests additional information or clarification due to a partially incomplete in-kind project proposal or requests modifications due to deficiencies with Department guidelines, Respondent shall submit, by certified mail, all requested additional information, clarification, and modifications within 15 days of receipts of written notice.
- d. If upon review of the in-kind project proposal, the Department determines that the project cannot be accepted due to a substantially incomplete proposal or due to substantial deficiencies with minimum Department guidelines; Respondent shall be notified, in writing, of the reason(s) which prevent the acceptance of the proposal. Respondent shall correct and redress all the matters at issue and submit, by certified mail, a new proposal within 30 days of

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receipt of written notice. In the event that the revised proposal is not approved by the

Department, Respondent shall make cash payment of the civil penalties as set forth in Item 1 of

Respondent's Performance above, within 30 days of Department notice.

e. Within 120 days of the effective date of this Consent Order, or, of the

Department's notification that applying stipulated penalties to an in-kind project is acceptable

Respondent shall obtain approval for an in-kind project from the Department. If an in-kind

project proposal is not approved by the Department within 120 days of the effective date of this

Consent Order, or, of the Department's notification that applying stipulated penalties to an in-

kind project is acceptable then Respondent shall make cash payment of the civil penalties as set

forth in Item 1 of Respondent's Performance above, within 30 days of Department notice.

f. Within 180 days of obtaining Department approval for the in-kind proposal or in

accordance with the approved schedule submitted pursuant to paragraph (a) above, Respondent

shall complete the entire in-kind project.

g. During the implementation of the in-kind project, Respondent shall place

appropriate sign(s) at the project site indicating that Respondent's involvement with the project

is the result of a Department enforcement action. Respondent may remove the sign(s) after the

project has been completed. However, after the project has been completed Respondent shall

not post any sign(s) at the site indicating that the reason for the project was anything other than a

Department enforcement action.

h. In the event, Respondent fails to timely submit any requested information to the

Department, fails to complete implementation of the in-kind project or otherwise fails to comply

with any provision of this paragraph, the in-kind penalty project option shall be forfeited, and the

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entire amount of civil penalties shall be due from the Respondent to the Department within 30 days of Department notice. If the in-kind penalty project is terminated and Respondent timely remits the entire amount under Item 1 of Respondent's Performance above for failure to complete the requirements of Exhibit A.

- i. Within 15 days of completing the in-kind project, Respondent shall notify the Department, by certified mail, of the project completion and request a verification letter from the Department. Respondent shall submit supporting information verifying that the project was completed in accordance with the approved proposal and documentation showing the actual costs incurred to complete the project. These costs shall not include those incurred in developing the proposal or obtaining approval from the Department for the project.
- j. If upon review of the notification of completion, the Department determines that the project cannot be accepted due to a substantially incomplete notification of completion or due to substantial deviations from the approved in-kind project; Respondent shall be notified, in writing, of the reason(s) which prevent the acceptance of the project. Respondent shall correct and redress all the matters at issue and submit, by certified mail, a new notification of completion within 15 days of receipt of the Department's notice. If upon review of the new submittal, the Department determines that the in-kind project is still incomplete or not in accordance with the approved proposal, the in-kind penalty project option shall be forfeited, and the entire amount of civil penalty shall be due from the Respondent to the Department within 30 days of Department notice. If the in-kind penalty project is terminated and Respondent timely remits the entire amount of civil penalties, no additional penalties shall be assessed under Item 1 of Respondent's Performance above for failure to complete the requirements of Exhibit A.

Exhibit B

SSOs January 1, 2020 – September 4, 2023

Location	Spill Date & Reported Date	SSO Vol & Recovere d (GAL)	Characteristi c	Cause	Area Affected	Cleanup	SWO
4 SE 21 <sup>st</sup>	9/4/2023	200	Raw	Accident	SW (Meade	Wash;	2023
Ave	9/5/2023	-		(ARV)	Canal)	Samples	7334
6 Burnt Store Rd	7/17/2023	100	Raw	Accident (ARV)	SW (Shadroe Canal)	Vac; Lime;	NA
Store Ku	7/19/2023	50		(AKV)	Canai	Wash; Samples	
4901	6/14/2023	50,000	Raw	Equipmen	SW (Nassau	Vac;	2023
Normand y Ct	6/14/2023	30,000		t (Bypass Failure)	Canal)	Lime; Wash; Samples	4782
916 NE	3/7/2023	200	Raw	Accident	Ground	Vac;	NA
Pine Island Rd	3/7/2023	900		(ARV)		Lime; Wash	
400 W	2/23/2023	200	Raw	Contracto	Ground	Lime; Wash	NA
Kennedy Lake Dr	2/23/2023	-		r		wasn	
3014	11/7/2022	200	Raw	Contracto	SW (Killer	Vac;	NA
Chiquita	11/8/2022	100		r	Lake)	Lime; Wash	
4318 SW 9 <sup>th</sup>	10/15/202	450	Raw	Contracto r	Ground	Vac; Lime;	NA
	10/18/202	4,000				Wash	
423 SE	9/15/2022	10,000	Treated	Contracto	Ground	Replace	2022
26 <sup>th</sup> Ter	9/16/2022	-		r		d displace d earth	7219

Pag	e i	13

4411	9/10/2022	882,353	Treated	Equipmen	SW	Repair;	2022
Skyline		<u> </u>		t	(Caloosahatche	Sample	-
Blvd	9/12/2022	-			e Estuary)		7026
4901 Del	8/3/2022	7,500	Raw	Equipmen	SW	Vac;	2022
Prado S	8/3/2022	9,500		t	(Caloosahatche	Lime;	-
	0/3/2022	7,500			e Estuary)	Samples	5858
1600	7/31/2022	500	Raw	Rain	Ground	Vac;	NA
Cape	8/1/2022	1,500				Lime;	
Coral	0/1/2022	1,500				Wash	
Pkwy E							
1803	7/13/2022	105,884	Treated	Contracto	SW (Cape	Samples	2022
Cape	7/15/2022	_		r	Coral Tidal		-
Coral Pkwy W	771372022				Segment)		5257
PKWy W							
1003	6/27/2022	50	Raw	Equipmen	Ground	Vac;	NA
Santa	7/1/2022	50		t (ARV)		Wash	
Barbara	7/1/2022	30					
Blvd							
515	6/7/2022	50,000	Treated	Equipmen	SW	Repair;	2022
Gleason	6/14/2022	_		t (ARV)	(Barkentine	Samples	-
Pkwy	0/14/2022	-			Canal)		4106
1140 SE	6/4/2022	200	Raw	Equipmen	Ground	Vac;	NA
32 <sup>nd</sup> Ter	6/7/2022	250		t		Lime;	
	0/1/2022	230				Wash	
3829	4/4/2022	50	Raw	Equipmen	Ground	Lime;	NA
Pelican	4/4/2022	0		t		Repair	
Blvd	4/4/2022	0					
241 SW	2/18/2022	1,800	Raw	Line	SW (Shadroe	Vac;	2022
24 <sup>th</sup> Ave	0/10/2022	1.500		Break	Canal)	Lime;	-996
	2/18/2022	1.500				Repair;	
						Samples	
1220	2/16/2022	5,000	Raw	Equipmen	NA	Vac;	2022
Tropicana	2/17/2022	4.600		t		Lime	-958
Pkwy LS	2/17/2022	4,600					
617							

4402 SW	12/16/202	10,000	Treated	Contracto	NA	Repair	2021
8 <sup>th</sup> Ct	1			r			- 7104
	12/16/202	0					/104
1101 NE 7 <sup>th</sup> St	11/12/202	800	Raw	Line Break	Ground	Vac; Lime; Wash;	NA
	11/13/202	25,000				Repair	
812 SE 34 <sup>th</sup> St	10/26/202	300	Raw	Line Break	Santa Fe Canal (SW)	Vac; Lime; Repair;	2021 - 6128
	10/27/202	1,000				Samples	0120
3501 Del Prado Blvd	10/17/202	15,000	Raw	Line Break	Glen Cove Canal (SW)	Vac; Lime; Wash;	2021 - 5957
	10/18/202	22,000				Repair; Samples	0,0,
2905 SE Santa Barbara	10/11/202	300	Treated	Line Break	Anchor Canal (SW)	Vac; Wash; Repair;	NA
Pl	10/12/202	400				Samples	
1199 SW 57th Pl	9/20/2021	20	Raw	Equipmen t (ARV)	Casaba & Citrus Canal	Repair, Samples	NA
371111	9/21/2021	0		(mix)	(SW)	•	
1832 Hancock	8/31/2021	200	Treated	Line Break	Ground	Repair	NA
Bridge Pkwy	9/1/2021	0					
4711 Academy	8/27/2021	400	Treated	Line Break	Ground	Wash; Repair	NA
Blvd	8/28/2021	0		Dioux		Торин	
2710 Ceitus	7/8/2021	20	Raw	Equipmen t (ARV)	Ground	Vac; Wash	NA
Pkwy	7/8/2021	20				*** 4511	

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1140 SE 32 <sup>nd</sup> Ter	7/7/2021 7/8/2021	1,000	Raw	I & I	Stormwater; Ground	Vac; Lime; Wash; Repair	NA
2401 SW 24 <sup>th</sup> St	6/10/2021	50	Raw	Contracto r	Stormwater, Ground	Vac; Lime; Wash; Repair	2021 - 2999
509 NE 7 <sup>th</sup> Pl	4/12/2021 4/13/2021	900	Raw	Accident (ARV)	Ground	Vac; Lime; Repair	NA
519 Chiquita Blvd	12/21/202 0 12/21/202 0	1,175	Treated	Contracto r	Ground	Repair	2020 - 7024
510 NE 7 <sup>th</sup> Pl	10/28/202 0 10/28/202 0	350	Raw	Accident (ARV)	Ground	Vac; Lime; Wash	NA
614 SE 46 <sup>th</sup> St	8/20/2020 8/21/2020	75	Raw	Line Break	Ground	Lime; Wash	NA
659 NE 7 <sup>th</sup> Pl	4/30/2020 5/5/2020	12,400	Raw	Contracto r	Arrowhead Lake (SW); Stormwater; Ground	Wash; Repair	2020 - 2237
SW 49 <sup>th</sup> Ter & Chiquita Blvd	4/8/2020 4/9/2020	40,000	Treated	Contracto r	Orion Canal (SW); Stormwater; Ground	Wash; Repair	2020 - 1914
1740 Everest Parkway	3/20/2020	200,000	Raw	Contracto r	Ground	Wash; Repair	2020 - 1644
	2/17/2020	4,000	Treated			Repair	

1420	2/18/2020	0		Line	Stormwater;		2020
Gleason				Break	Ground		-
Parkway							1019
1926 SW	1/31/2202	500	Raw	Contracto	Stormwater;	Vac;	NA
30 <sup>th</sup> Ter	0			r	Ground	Lime;	
						Wash	
	1/31/2020	1,300					
1600	1/3/2020	400	Raw	Dlaskasa	Ground	Lima	NA
	1/3/2020	400	Raw	Blockage	Ground	Lime;	INA
Cape						Wash	
Coral							
Pkwy E							

REV. 03/20 SFCO – Business