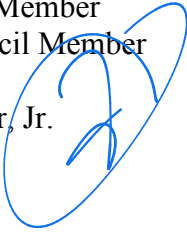


*Reply To: Tallahassee***MEMORANDUM**

TO: John Gunter, Mayor
William E. Steinke, Council Member
Dan Sheppard, Council Member
Tom Hayden, Council Member
Patty L. Cummings, Council Member
Robert Welsh, Council Member
Keith Long, Council Member
Jessica Cosden, Council Member

FROM: Frederick L. Aschauer, Jr. 

DATE: October 12, 2023

SUBJECT: Short Form Consent Order OGC Case. No. 22-1794
Everest Pkwy. WRF

The Florida Department of Environmental Protection (DEP) is proposing to address sanitary sewer overflows (SSOs) experienced by the City of Cape Coral since January 1, 2020, through the joint execution of a Short Form Consent Order (SFCO). The City Council is being asked to approve the execution of this SFCO. Lewis, Longman & Walker, P.A. (LLW), for the reasons expressed herein, recommends that the City Council approve execution of the SFCO.

SSOs and the Clean Water Act

SSOs are fairly common. Indeed, the United States Environmental Protection Agency estimates that there are 23,000 – 75,000 SSOs each year.¹ There are numerous potential causes for SSOs. While SSOs may be caused by improper maintenance or system design (not the case

¹ See, United States Environmental Protection Agency, *Sanitary Sewer Overflows (SSOs)*, <https://www.epa.gov/npdes/sanitary-sewer-overflows-ssos> (last visited October 5, 2023).

with the City), they can also be caused by auto accidents or contractor error (the cause for many of the SSOs within the City).

As an entity regulated under the National Pollution Discharge Elimination System (NPDES) permitting program,² the City has an obligation to avoid unauthorized discharges. In those instances where the actions of others cause an SSO – i.e. an auto accident – the regulatory authorities still place the responsibility on the regulated utility. This is based upon the premise that the Clean Water Act – the law creating the NPDES permitting scheme – applies strict liability against regulated utilities.³

The Basic Information

First, City Staff reviewed carefully the location, spill date and reported date, volume of discharge, and characteristic of each SSO described in the attachment to SFCO to ensure that such information was accurately captured by DEP. When considering entering into a SFCO, it is important that the information therein represent accurate, fact-based information. With regards to the SSOs listed in the SFCO, City Staff was able to confirm that the location, spill date and reported date, volume of discharge, and characteristic of each SSO. Due to City Staff's excellent records retention, was accurately and efficiently accomplished.

The Cause of the SSOs

Regarding the cause of each SSO, DEP's stated cause is generally accurate. LLW thinks it is important to note that many of the SSOs were caused by actions beyond the control of the City. For instance, of the 39 discharges over nearly half were the result of factors beyond the City's control. Many of the discharges were also fairly minor in volume.

Furthermore, most of the discharges involving reclaimed water included a mix of reclaimed water and canal water. In fact, of the total volume of discharge water addressed in the exhibit attached to the SFCO, reclaimed water discharges made up over 78% of the total volume of discharges. That said, these discharges associated with the reclaimed water system make up only 0.0025% of the total reclaimed water delivered by the City to its customers during this time

² 33 U.S.C. § 1342. This program is administered by the State of Florida through an memorandum of agreement (MOA) between the US EPA and DEP. A copy of this MOA may be found at the EPA's website at <https://www.epa.gov/compliance/memorandum-agreements-between-epa-and-states-authorized-implement-national-pollutant>.

³ *Hawaii's Thousand Friends v. City & Cnty. of Honolulu*, 821 F. Supp. 1368, 1392 (D. Haw. 1993) ("The Clean Water Act imposes strict liability for NPDES violations and does not excuse 'de minimis' or 'rare' violations. Courts throughout the country have held that NPDES compliance is a matter of strict liability, and a defendant's intent and good faith are irrelevant to the liability issue.") (interior citations omitted); see also, United States Department of Justice, Environment and Natural Resources Division, *Water: The Clean Water Act*, <https://www.justice.gov/enrd/water#:~:text=One%20of%20the%20statute's%20principal,to%20prove%20intent%20or%20causation> (last visited October 5, 2023) ("Liability is strict, and there is no requirement to prove intent or causation.")

period. This is particularly noteworthy given that the largest spill during the time period addressed herein was reclaimed water (a spill that was approximately 1/3 canal water).

As for the raw water discharges, the City recovered more than twice the amount discharged. Finally, most of the discharges were limited to spills on the ground that did not impact surface water quality.

In each instance, whether it was in response to a reclaimed water or raw water discharge, the City promptly reacted to the spill by performing the necessary clean-up and making the required reports to the Department.

SSOs are a priority for DEP

I can personally attest that SSOs were a focus of the DEP when I was the DEP's General Counsel. It has remained a focus of the DEP since that time. Indeed, much of my environmental enforcement work since leaving DEP in 2017 has involved SSOs. By example, the DEP's South District (the District in which the City lies) has a designated staff member whose sole responsibility is SSO enforcement.

I can also personally attest that the DEP disfavors making changes to its Short Form Consent Orders. That said, LLW made several attempts at negotiating edits to the SFCO. Many of our proposed edits included background information reflecting the good stewardship of the City over the environment. For instance, as you are aware, the City has over the last several years constructed wastewater collection systems in areas within the City that were previously served by septic systems, resulting in significant environmental benefits to the water quality of the abundant freshwater canals and other water bodies within the City.

The DEP acknowledged the City's efforts over the years and quick action in every instance for each individual SSO. Indeed, an SFCO is an implicit recognition that the matter reflects only a technical violation; the SFCO even notes that "there are no actions required to correct the violation(s)."

Ultimately, however, the DEP determined that it was unwilling to make changes to its SFCO.

The Penalty/In-Kind Project

LLW also engaged in negotiations with DEP regarding the civil penalty. In that regard, the DEP has developed a methodology to assess civil penalties for SSOs. In the case of the civil penalty proposed by DEP, it represents the minimum under DEP's methodology. DEP insisted on sticking with its methodology so it is uniform in its enforcement matters involving SSOs.

The SFCO allows the City to perform a project in lieu of paying the civil penalty. DEP calls these “in-kind penalty projects.” In that regard, the City will be proposing the Plato Canal Aerial Forcemain Project as such an in-kind project. While DEP would not “pre-approve” this project, the DEP has indicated that it is “approvable.” See the attached **Exhibit I**, an email from Ms. Landon Reigelman. The City will need to make a formal submittal (the form is attached to the SFCO) after the execution of the SFCO; however, we believe that approval of this in-kind project will occur rather quickly after the submission.

Conclusion

Based upon the foregoing, LLW recommends that the City execute the SFCO.

Exhibit I

Fred Aschauer

From: Reigelman, Landon <Landon.Reigelman@FloridaDEP.gov>
Sent: Monday, September 18, 2023 10:43 AM
To: Fred Aschauer; Jeff Pearson
Cc: Sweigert, Elizabeth; Newburg, Deanna; McSurley, Alexandria
Subject: RE: Plato Canal Aerial Force Main Crossing In-kind Project Map

External Email

Good morning, Mr. Aschauer,

After further review and in consideration of the information provided to our office, it appears that the Plato Canal Aerial Force Main Replacement Project is approvable.

As discussed, please be advised that a formal in-kind project proposal submission will be required for formal approval pending execution of the City's SFCO.

Should you have any questions or concerns, please do not hesitate to contact me.

Thank you,



Landon Reigelman
Environmental Manager
South District
Florida Department of Environmental Protection
2295 Victoria Avenue, Suite 364
Fort Myers, FL 33901
Landon.Reigelman@FloridaDEP.gov
Main: 239-344-5600
Office: 239-344-5633

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From: Fred Aschauer <faschauer@llw-law.com>
Sent: Friday, September 15, 2023 8:49 AM
To: Reigelman, Landon <Landon.Reigelman@FloridaDEP.gov>
Cc: Sweigert, Elizabeth <Elizabeth.Sweigert@FloridaDEP.gov>; Newburg, Deanna <Deanna.Newburg@FloridaDEP.gov>
Subject: RE: Plato Canal Aerial Force Main Crossing In-kind Project Map

EXTERNAL MESSAGE

This email originated outside of DEP. Please use caution when opening attachments, clicking links, or responding to this email.

Landon,

My apologies for the delay. I've been consumed with two cases (both set for a week or more) that are going to trial in the next couple months. Please see the attached.

Regards,
Fred

Frederick L. Aschauer, Jr. | Shareholder
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[vCard](#) | [Website](#) | [Bio](#) | [join us online](#)



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From: Reigelman, Landon <Landon.Reigelman@FloridaDEP.gov>
Sent: Friday, September 15, 2023 7:22 AM
To: Fred Aschauer <faschauer@llw-law.com>
Cc: Sweigert, Elizabeth <Elizabeth.Sweigert@FloridaDEP.gov>; Newburg, Deanna <Deanna.Newburg@FloridaDEP.gov>
Subject: Plato Canal Aerial Force Main Crossing In-kind Project Map

External Email

Good morning, Mr. Aschauer,

Just checking in on our request for a project map delineating the area of the proposed aerial force main crossing replacement over Plato Canal. After that item is received, we will review the project and send a correspondence indicating the approvability. As discussed, we can then move forward with the issuance of the SFCO.

Please let me know if you have any questions or concerns. Happy Friday.

Thank you,



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