

Mayor

Joe Coviello

Council Members

District 1: John Gunter

District 2: John M. Carioscia Sr.

District 3: Marilyn Stout

District 4: Jennifer I. Nelson

District 5: Dave Stokes

District 6: Richard Williams

District 7: Jessica Cosden



1015 Cultural Park Blvd.
Cape Coral, FL

City Manager

John Szerlag

City Attorney

Dolores Menendez

City Auditor

Andrea R. Butola

City Clerk

Rebecca van Deutekom

**AGENDA FOR THE SPECIAL MEETING OF THE
CAPE CORAL CITY COUNCIL**

September 24, 2018

2:00 PM

Council Chambers

PLEDGE OF CIVILITY

We will be respectful of each other even when we disagree.
We will direct all comments to the issues. We will avoid personal attacks.

1. MEETING CALLED TO ORDER

A. MAYOR COVIELLO

2. INVOCATION/MOMENT OF SILENCE

3. PLEDGE OF ALLEGIANCE

4. ROLL CALL

A. MAYOR COVIELLO, COUNCIL MEMBERS CARIOSCIA,
COSDEN, GUNTER, NELSON, STOKES, STOUT, WILLIAMS

5. CHANGES TO AGENDA/ADOPTION OF AGENDA

6. CITIZENS INPUT TIME

A maximum of 60 minutes is set for input of citizens on matters concerning the City Government; 3 minutes per individual.

7. BUSINESS

A. Potential petition to challenge South Florida Water Management District's proposed rule changes to Rule 40E-8.221 pertaining to Minimum Flow and Levels (MFLs) for the Caloosahatchee River

8. TIME AND PLACE OF FUTURE MEETINGS

A. A Regular Meeting of the Cape Coral City Council is Scheduled for

Monday, September 24, 2018 at 4:30 p.m. in Council Chambers

9. MOTION TO ADJOURN

This agenda should not be viewed as containing definitive information on matters of law with respect to ordinance and resolution summaries.

GENERAL RULES AND PROCEDURES REGARDING THE CAPE CORAL CITY COUNCIL AGENDA

In accordance with the Americans with Disabilities Act and Section of 286.26, Florida Statutes, persons with disabilities needing special accommodation to participate in this meeting should contact the Office of the City Clerk at least forty-eight (48) hours prior to the meeting. If hearing impaired, telephone the Florida Relay Service Numbers, 1-800-955-8771 (TDD) or 1-800-955-8770 (v) for assistance.

Persons wishing to address Council under Citizens Input or the Consent Agenda may do so during the designated times at each meeting. No prior scheduling is necessary. All speakers must have their presentations approved by the City Clerk's office no later than 3:00 PM the day of the meeting.

Any citizen may appear before the City Council at the scheduled PUBLIC HEARING/INPUT to comment on the specific agenda item being considered. No prior scheduling is necessary.

When recognized by the presiding officer, a speaker shall address the City Council from the designated speaker's lectern, and shall state his or her name and whom, if anyone, he or she represents. An address shall only be required if necessary to comply with a federal, state or local law.

Copies of the agenda are available in the main lobby of Cape Coral City Hall and in the City Council Office, 1015 Cultural Park Boulevard. Copies of all back-up documentation are also available for review in the lobby of Council Chambers. You are asked to refrain from removing any documentation. If you desire copies, please request they be made for you. Copies are 15 cents per page. Agendas and back-up documentation are also available on-line on the City website (capecoral.net) after 4:00 PM on the Thursday prior to the Council Meeting.

***PUBLIC HEARINGS DEPARTMENT OF COMMUNITY DEVELOPMENT CASES**

In all public hearings for which an applicant or applicants exist and which would affect a relatively limited land area, including but not limited to PDPs, appeals concerning variances or special exceptions, and small-scale rezonings, the following procedures shall be utilized in order to afford all parties or their representatives a full opportunity to be heard on matters relevant to the application:

1. The applicant, as well as witnesses offering testimony or presenting evidence, will be required to swear or affirm that the testimony they provide is the truth.
2. The order of presentation will begin with the City staff report, the

presentation by the applicant and/or the applicant's representative; witnesses called by the applicant, and then members of the public.

3. Members of the City Council may question any witness on relevant issues, by the applicant and/or the applicant's representative, City staff, or by any member of the public.
4. The Mayor may impose reasonable limitations on the offer of testimony or evidence and refuse to hear testimony or evidence that is not relevant to the issue being heard. The Mayor may also impose reasonable limitations on the number of witnesses heard when such witnesses become repetitive or are introducing duplicate testimony or evidence. The Mayor may also call witnesses and introduce evidence on behalf of the City Council if it is felt that such witnesses and/or evidence are necessary for a thorough consideration of the subject.
5. After the introduction of all-relevant testimony and evidence, the applicant shall have the opportunity to present a closing statement.
6. If a person decides to appeal any decision made by the City Council with respect to any matter considered at such meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

Item Number: 7.A.
Meeting Date: 9/24/2018
Item Type: BUSINESS

AGENDA REQUEST FORM
CITY OF CAPE CORAL



TITLE:

Potential petition to challenge South Florida Water Management District's proposed rule changes to Rule 40E-8.221 pertaining to Minimum Flow and Levels (MFLs) for the Caloosahatchee River

REQUESTED ACTION:

Approve or Deny

STRATEGIC PLAN INFO:

1. Will this action result in a Budget Amendment? No
2. Is this a Strategic Decision? Yes
If Yes, Priority Goals Supported are listed below.
If No, will it harm the intent or success of the Strategic Plan?

ELEMENT G: WORK TOWARD EFFICIENT AND COST-EFFECTIVE SOLUTIONS TO PROTECT AND CONSERVE NATURAL RESOURCES, WHILE PROMOTING ENVIRONMENTAL AWARENESS AND SUSTAINABILITY IN THE COMMUNITY.

PLANNING & ZONING/HEARING EXAMINER/STAFF RECOMMENDATIONS:

SUMMARY EXPLANATION AND BACKGROUND:

Rule 40E-8.221, "Minimum Flows and Levels (MFLs):Surface Waters" of the Florida Administrative Code provides standards for monthly minimum flows necessary to maintain sufficient salinity levels in the Caloosahatchee River. The South Florida Water Management District has recently proposed a change to the rule to increase the MFL for the Caloosahatchee River in order to meet the appropriate salinity level. The final public hearing on the rule change was held September 13, 2018.

The City of Sanibel is preparing a petition to challenge the proposed rule change and the City Attorney for Sanibel has informed Cape Coral that the Mayor for each of the cities in the area are in favor of joining in the petition. Mayor Coviello has called a special meeting for City Council to consider joining the petition being prepared to be filed on Monday, September 24th.

The petition challenging the proposed rule change calls for a higher minimum moving average flow rate of 720 cubic feet per second (cfs) rather than the currently proposed 400cfs. The change is supposed to be one way to contribute to resolving the blue-green algae crisis.

LEGAL REVIEW:

EXHIBITS:

Letter from Sanibel City Attorney with proposed rule change

PREPARED BY:

Division- Department- City
Attorney

SOURCE OF ADDITIONAL INFORMATION:**ATTACHMENTS:**

Description	Type
□ Letter from Sanibel City Attorney with draft rule change	Backup Material

From: [John Agnew](#)
To: ["Audrey.vance@cityofbonitasprings.org"](#); ["Carly.sanseverino@cityofbonitasprings.org"](#); ["bpritt@naples.gov.com"](#); ["rpritt@ralaw.com"](#); [Dolores Menendez](#); [Steven Griffin](#); ["burt.saunders@gray-robinson.com"](#); ["Grant Alley \(GAlley@cityftmyers.com\)"](#); ["PetersonLaw@fmbgov.com"](#)
Cc: ["James Evans"](#)
Subject: Petition to challenge SFWMD's proposed MFL Rule change
Date: Thursday, September 20, 2018 4:40:49 PM
Attachments: [Draft Rule Language.pdf](#)
Importance: High

Good Afternoon Everyone,

For those of you who don't know me, I am Ken Cuyler's successor as the City Attorney for Sanibel. Ken retired on 7/11/18, and the City of Sanibel contracted with me/Henderson Franklin to provide City Attorney services thereafter.

I have spoken with some of you today but am reaching out to everyone with this email for the sake of expediency. Sanibel has decided to file a petition to challenge SFWMD's proposed rule changes to Rule 40E-8.221, pertaining to Minimum Flow and Levels (MFLs) for the Caloosahatchee River. A copy of the draft rule is attached.

It is my understanding our respective Mayors have all spoken and are collectively in favor of making this a joint petition among our cities. I am not familiar with each of your respective codes or charters, so I defer to you to determine whether or not you can proceed with joining the petition at the direction of your mayor or if you need full city council approval.

This will be a challenge pursuant to Section 120.56(2), Florida Statutes. The final public hearing on this proposed rule amendment was 9/13/18, and a petition to challenge must be filed within 10 days, to wit: 9/23/18. Since 9/23/18 falls on a Sunday, we have until Monday, 9/24/18 to file. The case will thereafter be assigned to and heard by an administrative law judge.

To establish standing, we must show we would be "substantially affected by the proposed rule." Our position is that whether directly by the health of the river/local waters and/or by economic impact, all Southwest Florida communities are substantially affected by the proposed rule.

Although the current blue-green algae crisis we have is directly related to too much water in the wet season, too little water in the dry season is also a significant problem (and a contributing cause to our current problem). The reason is that if there is not enough fresh water being released from the lake during the dry season, the river below the Franklin Lock becomes too salty, and the tape grasses, clams and other natural filtration systems die off, reducing the ability of the river to act as a filter, as it should.

Generally, the rule at issue is one that establishes what the *minimum* flow levels should be and, relatedly, maximum salinity levels of the river. The proposed amended rule is admittedly an improvement from the existing rule (increasing the mandatory average flow rate from 300 to 400 cubic feet per second); however, it does not go nearly far enough. The science by our Environmental Director, James Evans, and other local reputable experts support that the level needs to be at or above 720cfs to maintain salinity levels at or below 10 parts per thousand (also a requirement of the

rule) and thereby maintain a healthy estuary. Therefore, the relief sought in the petition is to seek to have the minimum moving average flow rate increased from the currently-proposed 400cfs to 720cfs.

The water issues we currently have are obviously complicated and will require a number of different solutions to address it. This is one.

I am in the process of preparing an initial draft of the petition. To the extent you/your cities wish to join in the petition and/or assist in the preparation/argument of the case, please let me know.

Sincerely,

John

John Agnew

Attorney at Law

Henderson, Franklin, Starnes & Holt, P.A.

1715 Monroe Street

P.O. Box 280

Fort Myers, FL 33901

Direct Dial: 239.344.1364

Direct Fax: 239.344.1538

John.Agnew@henlaw.com

www.henlaw.com

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CONFIDENTIALITY STATEMENT

Henderson, Franklin, Starnes & Holt, P.A.

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