STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ENVIRONMENTAL CONFEDERATION
OF SOUTHWEST FLORIDA, INC.,

Petitioner,

Case No. 15-4107

v.

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.
_____/

PETITIONER'S UNOPPOSED MOTION
TO AMEND PETITION FOR ADMINISTRATIVE HEARING

Pursuant to Rule 28-106.202, F.A.C., Petitioner Environmental Confederation of Southwest Florida, Inc. ("ECOSWF") respectfully submits this unopposed motion for entry of the Third Amended Petition for a formal administrative hearing challenging the Florida Department of Environmental Protection's ("DEP") February 13, 2015 Environmental Resource Permit ("ERP") and state-owned Submerged Lands Authorization (File No. 22-0303652-003; Modification of Permit No. 22-0303652-001), which authorizes the Florida Fish and Wildlife Conservation Commission ("FWC" or "the Commission") to mine sand from a wetland to fill a portion of Fisheating Creek. As grounds for the motion, Conservationists submit the following:

1. Petitioners seek entry of the Third Amended Petition attached in Exhibit A.

2. Amendment of pleadings should be freely granted so that cases may be resolved upon their merits. *Adams v. Knabb Turpentine Co.*, 435 So.2d 944, 946 (Fla. 1st DCA 1983). "As a general rule, refusal to allow amendment of a pleading constitutes an abuse of discretion

unless it clearly appears that allowing the amendment would prejudice the other party; the privilege to amend has been abused; or amendment would be futile." *Bill Williams Air Conditioning and Heating, Inc. v. Haymarket Co-op. Bank*, 592 So.2d 302, 305 (Fla. 1st DCA 1991). Neither DEP nor FWC will be prejudiced by this proposed amendment because no new allegations have been added.

3. Petitioners seek entry of the attached Third Amended Petition to narrow and clarify the disputed issues of fact and law.

4. Entry of the Third Amended Petition will serve the interests of justice and promote the public policy of finality and resolving disputes as a whole and on their merits.

5. Counsel for Petitioner has consulted with counsel for DEP and FWC on their position regarding this motion. Neither DEP nor FWC oppose the motion.

For these reasons, Petitioner ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, INC. respectfully requests that the Administrative Law Judge enter the Third Amended Petition attached hereto as Exhibit A.

Respectfully submitted on this 10th day of November, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was served electronically on this 20th day of November, 2015 to the following counsel of record:

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/s/ Alisa Coe
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BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ENVIRONMENTAL CONFEDERATION
OF SOUTHWEST FLORIDA, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION AND
FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Respondents.
_____/

Case No. 15-4107
ERP File No. 22-0303652-003;
Modification of Permit No. 22-0303652-001

THIRD AMENDED PETITION FOR ADMINISTRATIVE HEARING

This petition challenges a proposed sovereignty lands environmental resource permit to fill in a portion of Fisheating Creek with approximately 70 million pounds of sand from a sand mine on a wetland in a publicly owned conservation easement. The February 13, 2015 Environmental Resource Permit and state-owned Submerged Lands Authorization (File No. 22-0303652-003; Permit No. 22-0303652-003 and Major Modification of existing Permit No. 22-0303652-001) is the second attempt to destroy important ecological functions of the Creek and surrounding lands. The Petitioner requests a formal administrative hearing, pursuant to sections 120.569 and 120.57, Fla. Stat., by filing this amended petition.

I. IDENTIFICATION OF THE PARTIES

1. Petitioner Environmental Confederation of Southwest Florida, Inc. ("ECOSWF") is a nonprofit corporation composed of member organizations, corporations, groups, business entities, governmental agencies, and individuals devoted to the conservation of Florida's natural resources. Specifically, the corporate mission is to conserve, maintain, and protect the air, water,

soil, wildlife, historic and architecturally significant structures, flora and fauna, and other natural resources of Southwest Florida, the State of Florida, and the United States. A substantial number of ECOSWF's members live, work, and/or recreate in Glades County and use and enjoy Fisheating Creek and its surrounding conservation and management lands.

2. ECOSWF's offices are at 421 Verna Road, Sarasota, Florida 34240 and the phone number is (941)735-0469.

3. Respondent Florida Department of Environmental Protection ("DEP") is the permitting authority in this proceeding and its offices are located at 2600 Blair Stone Road, MS #5505, Tallahassee, Florida, 32399-2400.

4. Respondent Florida Fish and Wildlife Conservation Commission ("FWC") is the recipient of the proposed sovereignty lands environmental resource permit. Its offices are located at 620 South Meridian Street, Tallahassee, FL 32399-6543.

5. ECOSWF filed a petition challenging this permit on February 27, 2015.

6. On March 3, 2015, DEP granted an extension of time to file a petition for hearing on this matter until 5:00 pm on March 6, 2015 and an amended petition was filed. A second amended petition was filed pursuant to the Order of April 10, 2015. This Third Amended Petition is filed to narrow the issues presented in this case.

II. PETITIONER'S SUBSTANTIAL INTEREST

7. ECOSWF was a party to a 1997 lawsuit and subsequent Settlement Agreement that conclusively established the existence of a historic, navigable channel through Cowbone Marsh, the portion of Fisheating Creek at issue in this action. As a result, ECOSWF and its members have a unique legal right and a substantial interest in the conservation easement lands.

Because those interests will be injured by the implementation of the fill project authorized by DEP, the organization has a substantial interest in the agency action at issue.

8. Additionally, a substantial number of the members of ECOSWF use and enjoy the Fisheating Creek area, including the surrounding conservation and management lands for a variety of purposes, including wading, walking, hiking, canoeing, boating, wildlife observation, photography, personal and commercial research, fishing, and other recreational purposes.

9. If FWC is permitted to harm conservation lands, a substantial number of Petitioner's members will suffer substantial harm to those recreational, aesthetic, and economic interests.

10. As stated above, ECOSWF's mission includes protecting and maintaining water and natural resources and DEP's action in approving this permit falls within that mission by harming the Creek's surrounding conservation and management lands, and the flora and fauna that depend on them. Specifically, filling the Creek with sand from a sand mine on wetlands in a conservation area will decrease the ecological and wetland functions of the surrounding conservation and management lands.

11. These injuries are sufficiently immediate and of the type and nature that Chapters 373, 403, and 120, Florida Statutes, are designed to protect.

12. The Administrative Law Judge in Save Our Creeks v. FWCC, DOAH Case No. 12-3427 found that ECOSWF is a non-profit Florida corporation with its offices in Sarasota, Florida; that a substantial number of the members of ECOSWF use and enjoy the waters of Fisheating Creek for a variety of purposes, including canoeing, boating, fishing, and wildlife observation; and that their substantial interests would be affected by filling in the Creek through

Cowbone Marsh. That action involved a previous attempt to modify the state lands environmental resource permit at issue in this action and involved substantially the same project.

III. NOTICE

13. Petitioner, through their counsel, obtained knowledge of the challenged permit via a search of Occulus on February 13, 2015. Petitioners requested notice pursuant to section 120.60(3), Florida Statutes and did not receive notice from the agency until February 16, 2015. The original petition was filed within fourteen (14) days of actual discovery and was therefore timely filed pursuant to section 120.569(1), Florida Statutes, and Rule 62-110.106(3), F.A.C. Additionally, an extension of time to file was granted until March 6, 2015.

IV. DISPUTED ISSUES OF MATERIAL FACT

14. Whether Lykes Bros., Inc. agreed to sell to the Trustees of the Internal Improvement Fund thousands of acres of land along Fisheating Creek and a conservation easement adjacent to the upland areas of Fisheating Creek and Cowbone Marsh for millions of dollars to be held and managed for the benefit of the public and the preservation of natural resources.

15. Whether it's in the public interest to authorize a sand mine to be created on the Lykes conservation easement considering the functions and values served by the conservation easement lands.

16. Whether the proposed sand mine for FWC's fill project is located on wetlands.

17. Whether DEP adequately evaluated the impacts of mining seventy million pounds of sand from wetlands subject to a conservation easement and the functions those wetlands serve.

18. Whether new evidence since the 2012-2013 proceedings (Save Our Creeks v. FWCC, DOAH Case No. 12-3427) indicates that the proposed sand mine for FWC's fill project is located on wetlands.

19. Whether mining sand from a wetland will have adverse environmental impacts.

20. Whether using conservation easement wetlands to mine sand is contrary to public's interest in the preservation of those lands.

21. Whether sand could be feasibly obtained and transported directly from a mine on private property, thereby avoiding the use of conservation easement lands for mining.

V. ULTIMATE FACTS DEMONSTRATING THAT THIS ACTION SHOULD NOT PROCEED

22. The proposed sand mine is located upon wetlands, as defined by section 373.019(27), Florida Statutes.

23. DEP failed to properly analyze the impacts of developing a sand mine on conservation easement wetlands by not adequately considering the functions that those conservation lands and wetlands serve.

24. The use of conservation easement wetlands to mine sand is contrary to the public's interest in the preservation of those lands and the ecological value of those lands.

25. The conservation easements on which the sand mine is located were purchased by the State for tens of millions of dollars as part of the settlement designed to protect Fisheating Creek and surrounding lands.

26. The plan to mine sand from a borrow pit on conservation easement lands held by the Trustees for the benefit of the public will impair the public's interest in those lands.

27. The sand filling project would require seventy million pounds of sand from the sand mine.

VI. APPLICABLE STATUTES AND RULES OF LAW

28. Rule 62-110.106(12), F.A.C. and sections 120.569 and 120.57, Fla. Stat., allow ECOSWF to challenge this action.

29. The Respondents are collaterally estopped from challenging the standing of Petitioner as the issue was already litigated between the parties involving the same permit at issue here, Petitioner was found to have standing, and that issue was essential to the findings in Save Our Creeks v. FWCC, DOAH Case No. 12-3427.

30. Section 253.03(1), Fla. Stat., vests the Board of Trustees of the Internal Improvement Fund with administration of sovereignty submerged lands and DEP is its agent or assign. § 253.002, Fla. Stat.; Rule 18-21.002, F.A.C.

31. Section 373.413, Florida Statutes, provides DEP with authority to require "permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions" of Chapter 373 "and applicable rules promulgated thereto and will not be harmful to the water resources of the district."

32. FWC and DEP have failed to provide reasonable assurances that the proposed project is not contrary to the public interest, because mining sand in a wetland, as defined by section 373.019(27), Florida Statutes, and Rule 62-340.300, F.A.C.; constructing a mine on conservation lands; and diminishing wetland and ecological functions is contrary to the public interest, pursuant to section 373.414, Florida Statutes.

33. For the purposes of section 373.414, "wetlands" means:

> those areas that are inundated or saturated by surface water or groundwater at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils. Soils present in wetlands generally are classified as hydric or alluvial, or possess

> characteristics that are associated with reducing soil conditions. The prevalent vegetation in wetlands generally consists of facultative or obligate hydrophytic macrophytes that are typically adapted to areas having soil conditions described above. These species, due to morphological, physiological, or reproductive adaptations, have the ability to grow, reproduce, or persist in aquatic environments or anaerobic soil conditions. Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps and other similar areas.

§373.019(27), Fla. Stat.

34. Under Rule 62-340.300, F.A.C., the delineation of wetlands "shall be determined by applying reasonable scientific judgment to evaluate the dominance of plant species, soils, and other hydrologic evidence of regular and periodic inundation and saturation . . . ."

35. Applying the regulatory wetland delineation factors, the Lykes conservation easement lands that will be used as a sand mine constitute wetlands. See Rules 62-340.300 and 62-340.500, F.A.C.

36. In determining whether an activity, which is in, on, or over surface waters or wetlands is not contrary to the public interest or is clearly in the public interest, the department shall consider and balance the following criteria:

> 1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
> 2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
> 3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
> 4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
> 5. Whether the activity will be of a temporary or permanent nature;
> 6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and
> 7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

§ 373.414(1)(a), Fla. Stat.

37. These factors weigh against the proposed fill project:

a. The factor in section 373.414(1)(a)2. (whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats) weighs against the project because it will adversely affect the numerous, diverse populations of wildlife—including many threatened, endangered, and sensitive species—that inhabit the conservation easement lands from which FWC plans to mine sand for the purpose of filling the Marsh.

b. The factor in section 373.414(1)(a)3. (whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling) weighs against the project because the Commission's plan to remove sand from wetlands on publicly-owned, conservation easement lands will cause erosion on those lands.

c. The factor in section 373.414(1)(a)5. (whether the activity will be of a temporary or permanent nature) weighs against the project because FWC plans to mine seventy million pounds of sand from wetlands on conservation easement lands which will permanently impact those lands.

d. The factor in section 373.414(a)7. (the current condition and relative value of functions being performed by areas affected by the proposed activity) weighs against the project because the project calls for mining seventy million pounds of sand from wetlands subject to a conservation easement, thereby adversely impacting the condition and functions being performed by those wetlands.

38. DEP's regulations also incorporate SFWMD's "Basis of Review for Environmental Resource Permit Applications," which provides that in considering and balancing

the public interest factors under section 373.414(a), Florida Statutes, the Department "will consider the current condition and relative value of the functions performed by wetlands and other surface waters affected by the proposed regulated activity." Basis of Review § 4.2.3.7. This factor weighs against the proposed fill plan, which would reduce the ecological functions of the conservation lands for wildlife habitat.

39. DEP's regulations also provide that an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, and abandonment of a project located in, on, or over wetlands or other surface waters "will not be contrary to the public interest" and "will not cause unacceptable cumulative impacts upon wetlands and other surface waters." Rule 62-330.302, F.A.C. FWC's fill plan is contrary to the public interest because it will cause unacceptable cumulative impacts to wetlands.

VII. RELIEF SOUGHT

40. ECOSWF respectfully requests that DEP refer this matter to the Division of Administrative Hearings for a formal administrative hearing and that the Administrative Law Judge enter a Recommended Order again setting aside DEP's attempt to fill the channel with sand from a wetland.

Respectfully submitted this 30th day of October, 2015.

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