

SOUTH FLORIDA WATER MANAGEMENT DISTRICT

FLORIDA WILDLIFE FEDERATION,
INC., and MARTY BAUM,

Petitioners,

Vs.

CASE NO. _____

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Respondent.

_____ /

PETITION FOR FORMAL HEARING

Petitioners, Florida Wildlife Federation, Inc. (“Federation”) and Marty Baum, by and through their undersigned counsel and pursuant to Sections 120.569 and 120.57, Florida Statutes and Rule 28-106.204, Florida Administrative Code hereby file this Petition for Formal Administrative Hearing ("Petition") challenging Respondent, South Florida Water Management District's ("District’s"), proposed agency action to enter into a new 8-year agricultural lease agreement with New Hope Sugar Company, Inc. on 16,158 acres of land in the Everglades Agricultural Area (“New Lease”) and an amendment of the existing lease that releases 560 acres of EAA lands (“Amendment”). These lands are designated for use as a reservoir and stormwater treatment area (“EAA Reservoir”) that the Legislature has found is necessary to address emergency conditions on the East and West coasts caused by high volume discharges of heavily polluted water from Lake Okeechobee. However, the New Lease commits these lands to agricultural use for a minimum of 2 years and for a maximum of 8 years. This proposed agency

action was taken pursuant to District Resolution No. 2018-2110. As grounds for this petition, Petitioners state:

PARTIES

1. Since 1971, the Federation has been duly incorporated under the laws of the State of Florida as a not for profit conservation protection corporation. The Federation has its office headquarters in Tallahassee, Florida, and it has a regional office in Naples, Florida. The corporate purposes of the Federation include the protection of aquatic environments, fish and wildlife resources, protection of water quality, and the initiation of legal and administrative actions to implement the Federation's corporate purposes.

2. The Federation has over 14,000 members and approximately 60,000 supporters. A substantial number of Federation members use and enjoy the St. Lucie and Caloosahatchee River and Estuaries and related off shore waters for recreational and aesthetic purposes, including fishing, boating, canoeing, kayaking, swimming, wading, research, photography, and observation of Florida's aquatic ecosystems. The members' use and enjoyment of these waters is adversely impacted by discharges of toxin-laden Lake Okeechobee water which create public health impacts and cause extensive harm to wildlife and the aquatic ecosystems.

3. The Federation has over twenty-five (25) current dues paying members in who reside in Palm Beach County where the District proposes to lease EAA Reservoir lands to New Hope Sugar Company, Inc. for agricultural purposes. Therefore, the Federation is also a Florida corporate citizen with standing to file a challenge to the District's action pursuant to Section 403.412 (6), Fla. Stat. (2017).

4. Marty Baum, a resident of Jensen Beach, Florida, and a citizen and taxpayer of the State of Florida, lives one block from the St. Lucie River in the area most impacted by the

toxic algal blooms, *i.e.*, on the north shore of the Middle Cove of the River where prevailing winds push algae toward his house and disturb his use and enjoyment of his property. He uses and enjoys the St. Lucie River and Estuary by himself and with his family for recreational purposes such as boating, fishing, and observation of fish and wildlife and intends to continue doing so in the future. He has tested positive for microcystin, a toxin released by the cyanobacteria *Microcystis*, which can cause serious liver damage and neurological damage. Massive outbreaks of the cyanobacteria *Microcystis* have taken place in Lake Okeechobee and have been conveyed into the St. Lucie River in recent years. *Microcystis* releases a toxin (microcystin) that can cause serious liver damage and neurological damage. He has been exposed to the toxin so frequently that in 2018 he tested positive for the presence of this toxin in his bloodstream.

5. The South Florida Water Management District is an independent special district of the State of Florida created by and currently existing pursuant to section 373.069, Florida Statutes. The District is the agency authorized to lease District owned lands subject to the constraints set forth in section 373.093, Florida Statutes, and in furtherance of the policies set forth in section 373.4598, Florida Statutes. The District is the agency that adopted Resolution 2018-1110 authorizing the issuance of a new agricultural lease on 16,156 acres of EAA reservoir lands. The address of the District's principal office is 3301 Gun Club Road, West Palm Beach, Florida 33406.

PETITIONERS' SUBSTANTIAL INTERESTS

6. The New Lease states that the District is issuing the lease pursuant to its authority under sections 373.093 and 373.4598, Florida Statutes.

7. Chapter 373.093, Florida Statutes is a legislative grant of authority to the District to lease district owned lands but only if “the lease is consistent with the purposes for which the land or any interest in land was acquired” *and* if the lands are acquired “for the best price and terms obtainable” (to be determined by the Board) *and* the District publishes notice of its intention to lease in the following manner:

Before leasing any land, or interest in land including but not limited to oil and mineral rights, the district shall cause a notice of intention to lease to be published in a newspaper published in the county in which said land is situated and such other places as the board may determine once each week for 3 successive weeks (three insertions being sufficient), the first publication of which shall be not less than 30 nor more than 90 days prior to the date the board executes the lease, which said notice shall set forth the time and place of leasing and a description of the lands to be leased.

§ 373.093(1)&(2), Fla. Stat.

8. Section 373.4598, Florida Statutes, enacted into law in 2017, is titled “Water Storage Reservoirs.” In this statute the Legislature declares that: a) an emergency exists regarding the St. Lucie and Caloosahatchee Estuaries as a result of high-volume discharges of Lake Okeechobee water to the East and West coast; b) that increasing water storage through construction of reservoirs, including the EAA reservoir, is necessary to reduce the high-volume discharges which have manifested as widespread algal blooms and which have caused public health impacts and extensive environmental harm to wildlife and the aquatic ecosystem, and c) that these high-volume discharges threaten both the ecological integrity of the estuaries and the economic viability of the affected communities:

(a) The Legislature declares that an emergency exists regarding the St. Lucie and Caloosahatchee estuaries due to the high-volume freshwater discharges to the east and west of the lake. Such discharges have manifested in widespread algae blooms, public health impacts, and extensive environmental harm to wildlife and the aquatic ecosystem. These conditions, as outlined in the state of emergency declared by the Governor under Executive Orders 16-59, 16-155, and 16-156, threaten the ecological integrity of the estuaries and the economic viability of the state and affected communities.

(b) The Legislature finds that increasing water storage is necessary to reduce the high-volume freshwater discharges from the lake to the estuaries and restore the hydrological connection to the Everglades. CERP projects necessary to reduce the discharges and improve the flows to the Everglades should receive priority funding, such as the Lake Okeechobee Watershed project to the north of the lake; the Everglades Agricultural Area reservoir project to the south of the lake; the C-43 West Basin Reservoir Storage project to the west of the lake; and the Indian River Lagoon-South project to the east of the lake.

§ 373.4598(1)(a)&(b), Fla. Stat.

9. Thus, the Legislature’s intent in enacting section 373.4598, Florida Statutes was to prioritize and facilitate the construction of the EAA reservoir, in order to provide the increased storage necessary to reduce the high-volume discharge of polluted Lake Okeechobee water to the East and West coast estuaries, for the purpose of reducing the environmental and economic devastation wrought by those discharges. *See* § 373.4595(1)(a), (b), & (d), Fla. Stat.

10. In furtherance of these goals, the Legislature approved the District’s amendment or termination of leases on EAA reservoir lands, either voluntarily or in accordance with lease terms. § 373.4595(3)(a), Fla. Stat. However, the legislature allowed continued farming of the Reservoir lands following termination until lease operations became “incompatible with implementation of the EAA reservoir project.” *Id.* The Legislature also allowed the lessee to be compensated for unharvested crops following termination. *See* § 373.4595(3)(c), Fla. Stat.

which reads:

(3) EAA LEASE AGREEMENTS.—

(a) The district and the board are authorized to negotiate the amendment or termination of leases on lands within the EAA for exchange or use for the EAA reservoir project. Any such lease must be terminated in accordance with the lease terms or upon the voluntary agreement of the lessor and lessee. In the event of any such lease termination, the lessee must be permitted to continue to farm on a field-by-field basis until such time as the lessee’s operations are incompatible with implementation of the EAA reservoir project, as reasonably determined by the lessor. The district and the board may include the swapping of land, assignment of leases, and other methods of providing valuable consideration in negotiating the amendments to or termination of such lease agreements.

* * * *

(c) If, after any termination of an EAA lease agreement, ratoon, stubble, or residual crop remaining on the lease premises is harvested or otherwise used by the lessor or any third party, the lessee is entitled to be compensated for any documented, unamortized planting costs, and any unamortized capital costs associated with the lease and incurred before notice.

11. Thus, the intended beneficiaries of section 373.4598, Florida Statutes, are the affected coastal aquatic ecosystems (and members of the public who use and enjoy those ecosystems, live near those ecosystems, and/or depend on those ecosystems being healthy for their livelihoods) and the affected communities (and members of those communities) who are suffering health impacts as a result of the discharges or who are economically harmed by the high-volume polluted discharges the EAA reservoir is being constructed to reduce.

12. As alleged *supra*, petitioners are:

a. The Federation which is a non-profit conservation organization with a substantial number of members who use and enjoy the aquatic ecosystems section which interest section 373.4598, Florida Statutes was enacted to protect. The members' use and enjoyment of these waterbodies is currently being substantially and adversely affected by the harmful high-volume toxin laden discharges which section 373.4598, Florida Statutes was specifically enacted to reduce.

b. Marty Baum, is the Indian Riverkeeper, and lives in Jensen Beach, Florida. He is a citizen and taxpayer of the State of Florida. His health, his use and enjoyment of his real property, and his use and enjoyment of these water bodies for recreational and other purposes is currently being substantially and adversely impacted by affected by the high-volume toxin laden discharges which section 373.4598, Florida Statutes was specifically enacted to reduce.

13. As a result of the District's decision to issue the New Lease, 16,158 acres of EAA reservoir lands will be used for agriculture for the next two years (and for as long as eight years) rather than for the purpose of construction of a reservoir.

14. The purpose of the EAA Reservoir is to store Lake Okeechobee water to prevent it from being discharged into the estuaries where it wreaks havoc on the entire aquatic ecosystems, on people who live on or near these aquatic ecosystems, and on the economic viability of the communities and members of those communities who depend on a healthy aquatic ecosystem for their livelihoods.

15. Persons who use and enjoy the St. Lucie and Caloosahatchee River and Estuaries for recreational purposes, persons who depend upon a healthy aquatic ecosystem for their livelihood, persons whose health is threatened by the toxic algae outbreaks, and persons who live on or near these aquatic ecosystems are directly and immediately substantially affected by the District's decision to issue the New Lease, because any mandated delay in the construction of that reservoir necessarily extends the existing adverse impacts on use and enjoyment of these ecosystems, landowners' use and enjoyment of real property, the losses experienced by businesses who depend on a healthy ecosystem, and threats to the health of users of these ecosystems and those who live on or near these waters.

16. Therefore, both the corporate and the individual petitioners are substantially affected by the District's decision to issue the New Lease and have standing under Chapter 120 to pursue this action.

RECEIPT OF NOTICE

17. The Federation received notice of the agency's decision on November 8, 2018, following the Governing Board meeting at which the Resolution 2018-0110 was approved. The

Federation learned of the agency's decision by word of mouth. Meeting minutes and video of the hearing were posted on the agency's website after the meeting was concluded.

18. Marty Baum received notice of the agency's decision on November 9, 2018 through reports on the decision in news media.

19. This petition is filed within 21 days of the day the agency's decision was made and is therefore timely under 28-106.111(2), Fla. Admin. Code.

BACKGROUND

Legislative Background

20. A set forth *supra*, the Legislature enacted section 373.4598, Florida Statutes for the purpose of prioritizing and facilitating the construction of the EAA reservoir which it determined was necessary to reduce the adverse environmental, economic, and health impacts caused by high-volume discharges of toxic laden water to the East and West Coasts.

21. In 2018, the Legislature enacted Chapter 2018-10, which is an act implementing the 2018-2019 General Appropriations Act. That Act contained proviso language which purports to significantly amend the Legislature's policy concerning leasing of EAA reservoir lands:

Section 72. In order to implement Specific Appropriation 1581 of the 2018-2019 General Appropriations Act, if during the 2018-2019 fiscal year, leases, reservations of possessory estates, or other farming property interests expire on lands owned or controlled by the state or the South Florida Water Management District which have been identified as being necessary for an Everglades Agricultural Area reservoir project, the district shall execute, renegotiate, extend, or amend agreements, including reasonable notice and termination provisions, so that the land does not sit fallow, and provides the maximum public benefit. Any such agreements shall provide that agricultural operators shall be permitted to continue to farm on a field-by-field basis until such time as the agricultural operations are incompatible with site preparation, on-site investigation, or construction for an Everglades Agricultural Area reservoir project, as reasonably determined by the lessor. This section expires July 1, 2019.

§ 72, Laws of Florida 2018-10.

22. The proviso language eliminates “termination” of the EAA Reservoir land leases as a method of achieving the goal of adding water storage necessary to address damaging water releases to the East and West Coast. It also makes agricultural production on these lands the source of “maximum public benefit” rather than protection of the environmental integrity of the Rivers and Estuaries and the economic viability of the affected local communities.

23. The proviso language does not eliminate the requirements of section 373.093, Florida Statutes, which requires a finding that the New Lease is consistent with the purposes for which the land was acquired and published notice of the District’s intention to lease.

24. At the Governing Board Meeting, the District’s General Counsel stated that the proviso language is a “mandate” that requires issuance of the New Lease and creates an exception to the section 373.093(2), Florida Statutes, notice requirements.

25. At the Governing Board Meeting, the District’s General Counsel also stated that the New Lease fell within the exception from notice requirements in lease-back situations set forth in section 373.093(3), Florida Statutes:

(3) It shall not be necessary to publish the notice as provided by subsection (2) where the lease is made to a person in connection with land acquisition by the district and the lease results in a diminution of the cost to the district in the acquisition of the land.

Background on Existing Leases

26. The 16,158 acres of EAA Reservoir lands were purchased by the District in 1999 as part of what is known as the Talisman purchase/exchange agreements. The lands were acquired for the purpose of Everglades Restoration.

27. Okeelanta Corporation participated in the purchase/exchange agreements and was issued a lease to use what are now known as EAA Reservoir lands for sugar cane farming prior to District project implementation of restoration projects. The existing lease expires without a right of renewal on March 31, 1999.

Notice and Hearing on the District's Implementation of the Requirement of Section 373.4598, Florida Statutes

28. The District has been negotiating, in secret, with Sugar Interests, the resolution of section 373.4598, Florida Statutes' lease-related requirements for many months.

29. The "Final Draft" agenda for the November 8, 2018 Governing Board Meeting, included the following item in the Discussion agenda:

25. Constructing the Senate Bill 10 Reservoirs: Opportunities and Challenges in 2019 (Staff contact, Brian J. Accardo, ext. 6232)

Agenda Item Background: In May 2017, Florida Governor Rick Scott signed legislation to increase water storage south of Lake Okeechobee as part of an effort to reduce harmful lake discharges to the Caloosahatchee and St. Lucie estuaries. Senate Bill 10, codified in part at sections 373.4598 and 375.041 of Florida Statutes, directs the District to expedite design and construction of a water storage reservoir in the Everglades Agricultural Area, authorizes the District to evaluate acquisition of Phase II of the C-51 reservoir project in Palm Beach County, and provides annual appropriations for these activities. Section 373.4598 and Chapter 2018-10, Laws of Florida, further direct how the District is to handle land acquisition and lease agreements associated with the reservoirs. Staff will review opportunities and challenges facing the District in 2019 as the agency fulfills its legislative mandates.

30. The "Final" agenda, which was posted on the District's website at approximately 9:00 p.m. on November 7, 2018, the night before the next morning's 9:30 a.m. District

Governing Board meeting on November 8, 2018, added the following Recommended Action:

Recommended Action: Resolution No. 2018 - 1110 Amend an existing lease (Contract C-12547-A01) with Okeelanta Corporation and execute a new lease with New Hope Sugar Company (Contract No. 4600003928) ("Lessees") according to the direction of the Florida Legislature on 16,158 acres, more or less, in Palm Beach County. (Contract Number 4600003928.

31. Numerous attendees, including U.S. Representative Brian Mast on behalf of himself and Governor-Elect Ron DeSantis, requested that the Board not act on the Discussion Item because the lack of notice made it impossible for interested persons to conduct a meaningful legal or factual review of the recommended action or to formulate alternative actions which would meet the objectives of section 373.4598, Florida Statutes. The lack of time to analyze the potential impacts of the action necessarily resulted in a lack of informed public comment on an item of substantial public interest.

32. After taking public comment and a short discussion period, the Board approved the Recommended Action.

33. The Recommended Action: 1) approves Amendment – A01 To Lease Number C-12547, which purports to remove 560 acres of land from Lease Number C-12547, to which the lessee reserves continued access; and 2) approves execution of the New Lease and delegates the authority to determine the market rental rate and to consummate the lease to the Executive Director.

34. The execution of the leases is a ministerial action because the Board's approval of Resolution 2018-1110 approves the terms of the Amended Lease and the New Lease (the New Lease was attached to the Resolution).

35. The Board did not make a specific finding that the Amended Lease or the New Lease were consistent with the purposes for which the EAA Reservoir lands were acquired.

36. The Board did not publish a notice of intention to lease.

The Amended Lease and New Lease

37. By voting to approve Resolution 2018-1110, the District has authorized amendment of the existing lease on the EAA Reservoir Lands to remove 560 acres of land from Lease Number C-12547, to which the lessee reserves continued access (“Amendment”).

38. By voting to approve Resolution 2018-1110, the District also authorized the execution of a New Lease to a new party which allows 16,158 acres of lands, which comprise most of lands within the footprint of the EAA Reservoir project, to be used for agricultural purposes.

39. The New Lease Agreement provides for an 8-year term with a commencement date of April 1, 2019. After the first 20 months, the District may terminate any acreage with 4-months’ notice, on a field by field basis, once the Governing Board approves and the District executes a construction contract for the project.

40. As a result, the New Lease and the Amendment mandate that the EAA Reservoir lands will continue to be used as agricultural lands, and not for construction of the Reservoir.

41. Backup documentation for the agenda item states that the New Lease Agreement and the Amendment will meet the objectives of the Florida Legislature as stated in section 373.4598, Florida Statutes.

STATEMENT OF DISPUTED MATERIAL FACTS

42. Whether the New Lease and the Amendment are “consistent with the purposes for which the lands were acquired.”

43. Whether the lands could be used to implement the EAA Reservoir Project during the two-year period beginning April 1, 2019.

44. Whether the New Lease and the Amendment meet the objectives of the Florida Legislature as stated in section 373.4598, Florida Statutes.

45. Whether the New Lease and the Amendment are made to a person in connection with land acquisition by the district and the lease results in a diminution of the cost to the district in the acquisition of the land, *i.e.*, is this a situation where the District has purchased land and the land is being leased back to the seller.

STATEMENT OF THE ULTIMATE FACTS WHICH WARRANT REVERSAL

46. The District did not publish a notice of intention to lease for the New Lease or the Amendment as required by section 373.093(1), Florida Statutes.

47. The EAA Reservoir lands could be used to implement the EAA Reservoir Project during the two-year period beginning April 1, 2019.

48. The New Lease and the Amendment do not meet the objectives of section 373.4598, Florida Statutes because it delays construction on that project for at least two years.

49. The New Lease and the Amendment are not consistent with the purpose for which the land was required which is Everglades Restoration.

50. The New Lease and the Amendment were not issued in a situation where the District has acquired land and the land is being leased back to the seller.

STATEMENT OF SPECIFIC STATUTES THAT REQUIRE REVERSAL

51. Section 373.093, Florida Statutes requires reversal because the New Lease and the Amendment are not consistent with the purposes for which the land is required which is for Everglades Restoration, not agriculture.

52. Section 373.093(2), Florida Statutes, requires reversal because a notice of intention to lease was not published by the District.

53. Section 373.4598, Florida Statutes, requires reversal because the New Lease is contrary to the objectives set forth in that section. That section authorizes either amendment or

termination of leases on EAA Reservoir lands. The New Lease is neither an amendment of an existing lease or a termination of the existing lease (which terminates by its own terms on March 31, 2019).

54. Article III, section 6 of the Florida Constitution requires that general laws embrace but one subject and matter properly connected therewith, and Article III, section 12 of the Florida Constitution prohibits inclusion in appropriations bills of any subject other than appropriations. This “single subject” requirement is intended to prevent the Legislature from “logrolling.” The proviso language in 2018-10, Laws of Florida, a law implementing the 2018-2019 General Appropriations Act, amends existing substantive law in section 373.4598, Florida Statutes because it eliminates “termination” of the EAA Reservoir land leases as a method of achieving the goal of adding water storage necessary to address damaging water releases to the East and West Coast. It also makes agricultural production on these lands the source of “maximum public benefit” rather than protection of the environmental integrity of the Rivers and Estuaries and the economic viability of the affected local communities.

55. The District lacks the statutory authority to implement legislative policy contained in proviso language that changes or amends existing policy in section 373.4598, Florida Statutes.

56. Section 373.4598, Florida Statutes requires reversal because that statute does not exempt the New Lease from section 373.093, Florida Statutes, requirements, nor does the proviso language which purports to amend the existing statute, and the District has failed to comply with requirements of 373.093, Florida Statutes.

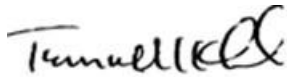
STATEMENT OF RELIEF SOUGHT

57. Petitioners seek reversal of District’s decision to approve Resolution 2018-1110 and thereby approve issuance of an Amended Lease and a New Lease on EAA Reservoir lands.

58. Petitioners seek proper notice of the District's pursuant to section 373.4598, Florida Statutes, prior to the District's approval of issuance of any new, modified, amended, extended or terminated lease on EAA Reservoir Land.

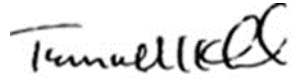
59. Petitioners request that his court make factual findings on the constitutional claim that the proviso language in section 72 of 2018-10, Laws of Florida changes or amends existing substantive law in section 373.4598 and constitutes a single subject violation.

Respectfully submitted this 28th day of November, 2018.



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A courtesy copy of this petition has been provided via Electronic Mail to the following listed person this 28th day of November 2018.



Terrell K. Arline

Copies furnished:

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