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LAW OFFICE OF
DAVID A. LUDDER
A Professional Limited Liability Company

April 16, 2016

Delivered Via Certified Mail
Return Receipt Requested
No. 7008 1300 0001 2360 3473

Hon. Marni Sawicki, Mayor
City of Cape Coral
1015 Cultural Park Boulevard
Cape Coral, FL 33990

Re: **Notice of Intent to File Suit for Violations of Permit No. FLS000035-003**

Dear Mayor Sawicki:

Pursuant to the Clean Water Act § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. Part 135, Subpart A, you are hereby notified that after the expiration of sixty (60) days following service of this notice, the Florida Clean Water Network, Inc. (hereinafter, "FCWN") may file suit against the City of Cape Coral for violations of several terms and conditions of National Pollutant Discharge Elimination System (hereinafter, "NPDES") Permit No. FLS000035-003.

I. Background

Over the course of many years, development-related landscape changes in the City of Cape Coral have increased the volume of stormwater runoff flowing from the City's Municipal Separate Storm Sewer System (hereinafter, "MS4") into the Matlacha Pass Aquatic Preserve (hereinafter, "MPAP") via the North Spreader Waterway. To mitigate the ever-increasing adverse impacts on MPAP from the increased stormwater runoff, the Florida Department of Environmental Protection (hereinafter, "FDEP") included specific conditions in the City's MS4 discharge permit for the control of strormwater discharges into the North Spreader Waterway.

II. Alleged Violations NPDES Permit No. FLS000035-003

The City of Cape Coral operates a MS4 which discharges stormwater into the North Spreader Waterway, a water of the United States. The City was issued NPDES Permit No. FLS000035-003 by FDEP on September 21, 2011 under the NPDES permit program approved

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by the U.S. Environmental Protection Agency under Clean Water Act § 402, 33 U.S.C. § 1342, and administered by FDEP under Fla. Stat. § 403.0885. NPDES Permit No. FLS000035-003 authorizes the discharge of stormwater from the MS4 into the North Spreader Waterway subject to certain terms and conditions.

FCWN alleges that the City of Cape Coral violated NPDES Permit No. FLS000035-003 as follows:

A. Failure to submit map showing drainage areas for stormwater outfalls to North Spreader Waterway

Part III, A., 1. of NPDES Permit No. FLS000035-003 requires that the City of Cape Coral submit to FDEP with the Year 1 Annual Report (Sep 21, 2011 - Sep 30, 2012) a map to redefine areas that formerly were part of the MS4 and that are now directly connected to waters of the United States in the seven mile long North Spreader Waterway (generally west of Burnt Store Road and north of Pine Island Road). The revised map shall clearly delineate those areas that are to remain as part of the MS4 and those areas that formerly were part of the MS4 and are now waters of the United States. All outfalls shall be shown on the map *along with their corresponding contributing drainage areas and direction of flow*.

The City of Cape Coral completed and submitted to FDEP with the Year 1 Annual Report a new inventory and map showing outfalls. However, FCWN alleges that the City failed to show on the map the "corresponding contributing drainage areas and direction of flow" for each outfall. FCWN alleges that such failure is a violation of Part III, A., 1. of NPDES Permit No. FLS000035-003. FCWN further alleges that this violation commenced on October 1, 2012 and has continued each and every day thereafter.

B. Failure to develop and adopt a stormwater retrofitting plan which evaluates alternatives for directing stormwater flows into the existing MS4, where possible.

Part III, A., 1. of NPDES Permit No. FLS000035-003 requires that the City of Cape Coral shall, during Year 1 through Year 3 (Sep 21, 2011 through Sep 30, 2014), develop a stormwater

retrofitting plan which shall evaluate alternatives for directing stormwater flows into the existing MS4, where possible.

The City of Cape Coral has developed one "plan" that addresses stormwater flows into the North Spreader Waterway, *i.e.*, City of Cape Coral Stormwater Master Plan, Northwest Quadrant - Phase I (September 2012). Only the executive summary of the Plan was submitted to FDEP's NPDES Stormwater Section. The Plan does not contain an evaluation of "alternatives for directing stormwater flows into the existing MS4, where possible."

In a letter from Connie Jarvis, Environmental Resources Manager for the City of Cape Coral, to Borja Crane-Amores and Kenneth Kuhl, NPDES Stormwater Permitting Program, FDEP, dated March 25, 2016, Ms. Jarvis writes:

> In reference to the feasibility of redirecting stormwater from areas west of Burnt Store Road (now considered Waters of the United States) back east over our weirs to our current MS4, our engineering staff examined possible ways to implement this alternative as stated in the permit. However, between building new stormwater collection systems, installing and perpetually maintaining pumping equipment, and acquiring land for both upstream storage and siting of equipment, this was not deemed feasible.

Whatever possible alternatives might have been examined by City engineering staff are not disclosed. The City did not present to FDEP an evaluation of the alternatives examined by engineering staff. Moreover, Ms. Jarvis indicates that the alternatives examined by engineering staff were rejected, not because they are not possible, but because the City deemed them not to be "feasible" because of other financial priorities.

Accordingly, FCWN alleges that the City of Cape Coral violated Part III, A., 1. of NPDES Permit No. FLS000035-003 by failing to develop and adopt a stormwater retrofitting plan during Year 1 through Year 3 (Sep 21, 2011 through Sep 30, 2014) which evaluates alternatives for directing stormwater flows into the existing MS4, where possible. FCWN further alleges that this violation commenced on October 1, 2014 and has continued each and every day thereafter.

C. Failure to allow FDEP to review and approve all documents associated with the development and adoption of the City's stormwater retrofit plan.

Part III, A., 1. of NPDES Permit No. FLS000035-003 requires that the City of Cape Coral include FDEP's NPDES Stormwater Section in each step of the process allowing FDEP to review and approve all documents associated with the stormwater retrofitting plan's development and adoption. In addition, Part III, A., 1. of NPDES Permit No. FLS000035-003 requires that each annual report submitted to FDEP by the City shall include a list of all documents submitted to FDEP for review and approval.

In the City's Year 1 Annual Report dated March 20, 2013, the City reported that it had "completed a Stormwater Master Plan for the Northwest Section of the City, for which the executive summary is attached." That plan is known as the City of Cape Coral Stormwater Master Plan, Northwest Quadrant - Phase I (September 2012). Only the executive summary of that plan was submitted to FDEP's NPDES Stormwater Section. The executive summary of the City of Cape Coral Stormwater Master Plan, Northwest Quadrant - Phase I (September 2012) mentions "three (3) major impoundment filter marsh projects" that *may* be employed to reduce the discharge of pollutants into the North Spreader Waterway. (In a letter from Connie Jarvis, Environmental Resources Manager for the City of Cape Coral, to Borja Crane-Amores and Kenneth Kuhl, NPDES Stormwater Permitting Program, FDEP, dated March 25, 2016, Ms. Jarvis explains that the proposed filter marsh projects have been abandoned or deferred indefinitely for financial reasons). All other projects mentioned in the executive summary of the plan (including nine capital improvement projects; fertilizer ordinance; street sweeping; living shorelines; and utility expansion project), are not "stormwater retrofit projects." *See* Annual Report Forms for Individual NPDES Permits for Municipal Separate Storm Sewer Systems for City of Cape Coral, Section VII at Part III.A.4 (Reporting Year 1 through Year 3) (FDEP clarifies that "[a] 'stormwater retrofit project' is one implemented primarily to provide stormwater treatment for areas currently without treatment."). The executive summary was not adopted by the City Council and was not approved by FDEP. In the complete City of Cape Coral Stormwater Master Plan, Northwest Quadrant - Phase I, the City also mentions that "specially designed catch basins with internal filtration" *may* be employed to reduce the discharge of pollutants into the North Spreader Waterway. The complete Plan was not submitted to the FDEP's NPDES Stormwater Section for review and approval. The complete Plan was not adopted by the City Council and was not reviewed or approved by FDEP.

Accordingly, FCWN alleges that the City of Cape Coral violated Part III, A., 1. of NPDES Permit No. FLS000035-003 by failing to allow FDEP to review and approve all documents associated with the development and adoption of the City's stormwater retrofit plan. FCWN further alleges that this violation commenced on or about October 1, 2012 and has continued each and every day thereafter.

D. Failure to include a detailed schedule for the completion of all projects and activities included in the stormwater retrofitting plan.

Part III, A., 1. of Permit No. FLS000035-003 requires that the stormwater retrofitting plan shall include a detailed schedule for the completion of all projects and activities included within it. The plan shall begin to be implemented no later than Year 4 of the permit and shall be completed in accordance with the detailed schedule in the final FDEP-approved stormwater retrofitting plan.

The City of Cape Coral Stormwater Master Plan, Northwest Quadrant - Phase I (September 2012) does not include a detailed schedule for the completion of all stormwater retrofit projects and activities included within the Plan.

Accordingly, FCWN alleges that the City of Cape Coral violated Part III, A., 1. of Permit No. FLS000035-003 by failing to include a detailed schedule for the completion of all stormwater retrofit projects and activities in the stormwater retrofitting plan. FCWN further alleges that this violation commenced on October 1, 2014 and has continued each and every day thereafter.

III. Sanctions for violations

The Clean Water Act authorizes injunctive relief and civil penalties up to $37,500 per day per violation. In addition, the Act authorizes the award of costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines that such an award is appropriate.

Suit may be avoided if these violations have been permanently abated before the expiration of sixty (60) days following the date of this notice. Please advise the undersigned of

any measures that you may undertake which you contend have permanently abated these violations before suit is filed.

Sincerely,

David A. Ludder
Attorney for
Florida Clean Water Network, Inc.

cc: Hon. Gina McCarthy, Administrator
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