

**IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA**

SAVE OUR CREEKS, INC. AND
THE ENVIRONMENTAL CONFEDERATION
OF SOUTHWEST FLORIDA, INC.

Conservationists,

Case No. 2012-

v.

THE FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Defendant.

_____ /

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Save Our Creeks, Inc. (“SOC”) and the Environmental Confederation of Southwest Florida, Inc. (“ECOSWF”) (collectively, “Conservationists”) file this Complaint for Declaratory and Injunctive Relief against the Florida Fish and Wildlife Conservation Commission (“FWCC”). Conservationists allege FWCC violated the Government in the Sunshine Act (“Sunshine Act”), section 286.011, *et seq.*, Florida Statutes, by convening secret technical advisory committee meetings for the purpose of developing, evaluating, and deciding among options for remediating the hydrological effects of a navigation channel restoration project on Fisheating Creek in Glades County, Florida. Instead of actually remediating the hydrological effects of the Fisheating Creek restoration, the secret advisory committee decided to obliterate the restoration project by building a road across the marsh and backfilling the navigation channel with 50 million pounds of sand.

INTRODUCTION

1. This case arises out of a long dispute over the protection of public access to, and the navigability of, Fisheating Creek, one of Florida's last remaining wild and scenic waterways. In 1997, a Glades County jury returned a verdict finding that the entirety of Fisheating Creek in Glades County, including an area known as Cowbone Marsh, is a navigable stream accessible to the public for boating, fishing, and camping. The subsequent settlement agreement between Conservationists and the Board of Trustees of the Internal Improvement Trust Fund, requires the Florida Game and Freshwater Fish Commission (now "FWCC") to, *inter alia*, maintain and enhance in perpetuity the navigability of the entirety of Fisheating Creek, including the area known as Cowbone Marsh.

2. Bowing to pressure from the adjacent landowner, Lykes Bros. Corp. ("Lykes"), who was a party to the original lawsuit and settlement, FWCC has for the last ten years resisted acting on its obligation under the settlement agreement to maintain and enhance the navigation channel. As a result of FWCC's neglect, the Cowbone Marsh navigation channel became overgrown with a thick floating mat of invasive vegetation called "tussock."

3. In 2008, Conservationists threatened to sue FWCC to enforce the agency's obligation under the settlement agreement to maintain and protect the Cowbone Marsh navigation channel. In response, FWCC finally developed plans to restore the channel's navigability using an "Agitator," which is a flat-bottom boat fitted with a large, rotating blade that is used by state and federal agencies in Florida to shred vegetation and restore navigation channels.

4. Despite the 1997 jury verdict conclusively establishing the existence of a navigation channel throughout Fisheating Creek and FWCC's obligation to maintain and

improve channel navigability under the settlement agreement, certain FWCC agency personnel continued to resist restoration of the Cowbone Marsh navigation channel.

5. In the meantime, however, a contractor for FWCC proceeded with the plan to remove invasive vegetation in the Cowbone Marsh navigation channel. From mid-April through May 2010, the FWCC contractor used the Agitator to shred much of the invasive vegetation in the original Cowbone Marsh navigation channel. The particular Agitator that was used on Cowbone Marsh was the same one that has been used to maintain and improve navigation on Lake Miccosukee in Leon County.

6. State and federal agencies have used similar Agitators to remove tussocks to restore and maintain navigation channels throughout Florida for at least a decade. Although the Florida Department of Environmental Protection (“FDEP”) has never required a dredge and fill permit to remove invasive vegetation on navigable waters, Lykes Bros. Inc. complained about the use of the Agitator to the U.S. Corps of Engineers (“the Corps”) and FDEP. The Corps subsequently issued an order finding that the restoration of the Cowbone Marsh navigation channel constituted unpermitted dredging, and referred the matter to the U.S. Environmental Protection Agency (“EPA”). EPA then determined that FWCC’s removal of vegetation created a preferential flow pattern, which was adversely affecting the marsh by drawing down the water table in the surrounding area and reducing its water storage capacity. Accordingly, EPA and FDEP directed FWCC to formulate a remedial action plan.

7. In response, FWCC initially developed and implemented a hydrologic remediation plan that involved installing a series of small low impact earthen check dams made of sand bags and wood running boards, which FWCC concluded was the most practical way to minimize adverse flow patterns while also restoring and maintaining the historical navigation

channel. Shortly thereafter, however, FWCC convened a “technical advisory group” charged with developing, evaluating, and recommending different remedial plans.

8. FWCC did not provide public notice of the advisory group’s meetings, and the meetings were closed to the public. Despite Conservationists’ rights as parties to the settlement agreement and their interest in maintaining navigation through Cowbone Marsh, the technical advisory group excluded Conservationists from the closed meetings.

9. During the course of its closed-door meetings, the technical advisory group initially considered a variety of potential remedial measures, including maintaining and improving the low impact check dams that allow continued navigation in the restored channel. Other options included reversing the channel restoration and backfilling the navigation channel with sand.

10. By the end of its private deliberations, the technical advisory group had narrowed the alternatives for returning the Cowbone Marsh navigation channel to its previous occluded condition to four discrete options. Each of the four options involved completely reversing the original navigation channel restoration project and filling the navigation channel with sediment. The technical advisory group’s final four options included: (1) building roads over more than two miles of the Marsh along with constructing staging areas to allow heavy equipment and dump trucks to drive across the marsh and backfill the navigation channel with sandy soils; (2) using hydraulic pumping to backfill the navigation channel; (3) using a combination of backfilling and hydraulic pumping; and (4) backfilling the navigation channel using helicopters to transport fill material. In its final recommendation, the technical advisory group eliminated all of the remedial options that would have allowed for the restoration and maintenance of the

historic navigation channel, such as maintaining and improving the existing check dams or installing weirs to control the flow of water.

11. The technical advisory group then evaluated each of its final four options against several factors, including cost and technical feasibility.

12. Finally, the technical advisory group decided upon a “recommended” alternative, which involved building roads and staging areas across the marsh and backfilling the navigation channel with 50 million pounds of sand to completely reverse the navigation restoration project. The technical advisory group’s final recommendation did not include any discussion of the previously-eliminated options, such as maintaining and improving the existing check dams or installing weirs to control flow.

JURISDICTION

13. This Court has jurisdiction pursuant to sections 26.012(2)(a), (c), and (3), Florida Statutes, and section 286.011(2), Florida Statutes.

VENUE

14. Venue in Leon County is proper pursuant to section 47.011, Florida Statutes.

THE PARTIES

15. Plaintiff Save Our Creeks (“SOC”) is a not-for-profit Florida corporation made up of interested citizens and groups devoted to the conservation of natural resources, especially creeks and small waterways, in Southwest Florida and throughout the State. SOC was organized in 1989 to preserve public access to Fisheating Creek.

16. SOC’s registered address is 33 Mockingbird Rd., Lake Placid, Florida 33852.

17. The Environmental Confederation of Southwest Florida (“ECOSWF”) is a Florida 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 purposes are 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.

18. ECOSWF's offices are located at: 421 Verna Rd., Sarasota, Florida 34240.

19. Each of the named Conservationists was a party to the 1997 litigation and subsequent settlement agreement, which explicitly required FWCC to maintain and enhance navigation throughout the Cowbone Marsh navigation channel in perpetuity. That settlement agreement granted Conservationists the right to enforce its provisions. Conservationists' rights under the settlement agreement are adversely affected by the technical advisory group's closed-door decision to recommend backfilling the navigation channel. Conservationists' rights under the settlement agreement will be thwarted by implementation of the decided-upon backfilling project.

20. The Florida Fish and Wildlife Conservation Commission ("FWCC") is an agency of the State of Florida whose management of the Fisheating Creek navigation channel through Cowbone Marsh is pursuant to its obligations under a lease from the Trustees of the Internal Improvement Board and under the terms of the settlement agreement with SOC, ECOSWF, and Lykes..

21. FWCC's offices are located at 620 South Meridian Street, Tallahassee, Florida 32399.

THE FIGHT OVER PUBLIC ACCESS TO FISHEATING CREEK AND COWBONE MARSH

22. The dispute over maintaining navigability in Cowbone Marsh has been ongoing for nearly two decades. In 1989, Lykes blocked public access and navigation on a portion of

Fisheating Creek adjacent to the Lykes' property in Glades County. Fisheating Creek is a western tributary of Lake Okeechobee that has traditionally been used for boating, canoeing, and other recreational activities.

23. The Trustees of the Internal Improvement Fund ("the Trustees"), SOC, and ECOSWF filed suit against the Lykes to establish the navigability of Fisheating Creek throughout Glades County, including the area through Cowbone Marsh. *See Board of Trustees of the Internal Improvement Trust Fund, Save Our Creeks, Inc. and Environmental Confederation of Southwest Florida v. Lykes Bros., Inc.*, No. CA 93-136 (Fla. 20th Cir. Ct.).

24. A central issue in that case was whether a historical navigation channel existed beneath a layer of floating vegetation that covers Cowbone Marsh. In 1997, a jury returned a verdict finding that the stream is navigable throughout its entire course from Highlands County down to Lake Okeechobee, which includes the channel that flows through Cowbone Marsh.

25. Shortly thereafter, the parties to that litigation entered a settlement agreement, in which Lykes agreed to abandon its claims and sold the Trustees conservation easements and fee simple lands to large upland tracts connected to the stream bed.

26. As part of the settlement agreement, and pursuant to the terms of a subsequent lease from the Trustees, Florida Game and Freshwater Fish Commission (now "FWCC") assumed responsibility for management of those lands.

27. As part of the settlement agreement, FWCC explicitly agreed to maintain and protect navigation throughout Fisheating Creek, including Cowbone Marsh.

28. Conservationists are parties to the settlement agreement and therefore, have a right to enforce its provisions.

29. Despite repeated complaints from Conservationists, FWCC did not fulfill its obligations under the settlement agreement to maintain and protect navigation throughout Fisheating Creek, which includes Cowbone Marsh.

30. For over a decade, FWCC has declined to take the actions necessary to maintain or protect navigation in Fisheating Creek, allowing the tussock overlying the channel to become heavily overgrown with a thicket of invasive vegetation. During the last decade, periods of drought and increased pollution runoff from Lykes' surrounding lands have exacerbated vegetative growth and resulted in thickening and multiple layers of tussock in the Cowbone Marsh navigation channel.

31. Despite annual appropriations specifically designated to control nuisance vegetation, FWCC continued to neglect its duty to maintain the historic navigation channel. Based on FWCC's continued failure to fulfill its obligations under the settlement agreement, Conservationists threatened suit to enforce the terms of the agreement in 2008. As a result of that potential litigation, in 2010, FWCC finally agreed to restore navigation throughout the channel.

32. FWCC planned to restore navigation to Cowbone Marsh using an "Agitator," which is a flat-bottom boat fitted with a large, mechanical rotating blade that cuts through vegetation on the surface of the water and casts the cut vegetation aside. Agitators are commonly used in other state and federal projects, including in the Loxahatchee National Wildlife Refuge, to restore and maintain navigation channels.

33. Despite the 1997 jury verdict establishing the existence of a navigation channel throughout Cowbone Marsh and FWCC's obligation to maintain the channel's navigability under

the settlement agreement, certain FWCC agency personnel continued to resist restoration of the Cowbone Marsh navigation channel.

34. In April 2010, however, a FWCC contractor began the process of removing invasive vegetation from the Cowbone Marsh navigation channel using the Agitator. Over a period of several weeks, the contractor removed invasive vegetation throughout most of the historic navigation channel. Although FWCC initially planned to restore navigability throughout the Cowbone Marsh navigation channel, the agency never finished the restoration project.

35. For at least a decade, Agitators have been used by both federal and state agencies to remove aquatic vegetation on navigable waters. Although dredge permits have never been required for such activity, Lykes complained to the Corps and FDEP that use of the agitators constituted dredging. Both agencies then issued orders finding that the restoration of the Cowbone Marsh navigation channel constituted dredging. The Corps also determined that FWCC's removal of vegetation created a preferential flow pattern, which was draining the marsh by drawing down the water table in the surrounding area and reducing its water storage capacity. Accordingly, the Corps referred the matter to EPA for enforcement and remedial action.

36. In response to EPA's enforcement action, FWCC initially developed and implemented a hydrologic remediation plan involving the installation of low impact, earthen check dams made of sand bags and wood running boards, which serve to maintain the navigation channel while also minimizing any adverse hydrological flow patterns. FWCC employees have acknowledged that the check dams are effectively preventing adverse hydrological flow patterns.

37. Even though the check dams provided satisfactory protection against adverse flow patterns, FWCC convened a "technical advisory group," which was responsible for developing, evaluating, and recommending a remediation plan.

38. FWCC did not provide public notice of the meetings.

39. The meetings were not open to the public.

40. In particular, the meetings were not opened to Conservationists or their representatives, who were parties to the settlement agreement and have an interest in enforcing FWCC's obligation under the agreement to maintain a navigable channel through Cowbone Marsh. When Conservationists' representative attempted to attend one of the technical advisory group's meetings, the group informed her that the meetings were private and directed her to leave. Conservationists' expert hydrologist also attended part of one meeting and offered to provide expert opinion regarding potential remediation options, but the technical advisory group did not notify him of any subsequent meetings.

41. During the course of its closed-door meetings, the technical advisory group initially considered a variety of potential remedial measures, including maintaining and improving the previously installed check dams and/or installing weirs to return flow patterns to their previous condition.

42. By the end of the private deliberations, however, the technical advisory group had narrowed the remediation alternatives to four discrete options: (1) building over two miles of roads across Cowbone March, building staging areas to allow heavy equipment and several hundred dump trucks full of sandy soil to enter the marsh, and backfilling the navigation channel with 50 million pounds of sandy soil; (2) building a ten mile pipeline to hydraulic pump slurry backfill into the navigation channel; (3) using a combination of backfilling and hydraulic pumping; and (4) backfilling the navigation channel using helicopters to transport 50 million pounds of fill material.

43. Despite evidence that the check dams are effectively controlling adverse flow conditions and maintaining navigation through the historic navigation channel, the technical advisory group eliminated the maintenance of those check dams as a remedial option. The group also eliminated other less intrusive options, such as installing weirs to control the flow of water. In its final recommendation, the technical advisory group did not explain its decision to eliminate low-impact remedial methods that would both maintain channel navigation and prevent adverse hydrologic flow.

44. The technical advisory group then evaluated each of its top four alternatives, all of which involved completely reversing the navigation channel restoration project and backfilling the navigation channel.

45. Finally, the technical advisory group decided upon a “recommended” method for returning Cowbone Marsh navigation channel to its previous occluded condition. The group recommended that FWCC adopt Option 1: Backfilling. In its final recommendation to FWCC, the technical advisory group advised the agencies that building a two mile road across the marsh to facilitate the passage of several hundred dump trucks full of sand was the most time-efficient and cost-effective alternative.

46. The technical advisory group’s final recommendation did not include any discussion of the previously-eliminated options, such as installing weirs to control flow.

47. On December 19, 2011, Nick Wiley, the Executive Director of FWCC, wrote to the Corps and to the EPA, informing them that he had reviewed the technical advisory group’s recommendations, and that FWCC decided to adopt the technical advisory group’s final recommendation for Option 1 (*i.e.*, road construction and backfilling by truck).

48. FWCC adopted the technical advisory group's recommended plan without considering any other alternatives, and without any further analysis.

COUNT I
THE DECISION OF FWCC TO BACKFILL COWBONE MARSH VIOLATES THE
SUNSHINE ACT

49. Conservationists re-allege and incorporate by reference all of the allegations set forth in paragraphs 1 through 48 above.

50. Section 286.011(1), Florida Statutes, states that “[a]ll meetings of any board or commission of any state agency . . . at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.”

51. FWCC delegated to the technical advisory group decision-making authority for developing, evaluating, and deciding upon a plan to reverse the Cowbone Marsh navigation channel restoration project.

52. Alternatively, even if FWCC did not explicitly delegate authority to make the final decision as to the appropriate remedial plan, the technical advisory group nevertheless made policy decisions, recommendations, and provided advice that informed the agencies' final decision. The group eliminated from consideration certain remedial alternatives, such as the installation of weirs to control water flow, that would both maintain navigation through the channel and minimize adverse flow patterns. After developing a variety of potential remedial measures, the technical advisory group narrowed the list of potential alternatives to four discrete options. The group then analyzed those narrow options and selected a recommended plan to return the Cowbone Marsh navigation channel to its pre-cut condition.

53. FWCC adopted the technical advisory group's recommendation without any further analysis or decision-making.

54. The technical advisory group was a "board" or "commission" within the meaning of the Sunshine Act because it exercised decision-making authority.

55. The technical advisory group's meetings were conducted in private, were not noticed, and were not open to the public. Thus, the decision to backfill Cowbone Marsh was made in violation of the Government in the Sunshine Act.

56. Conservationists' interests in maintaining navigability of Cowbone Marsh and their rights under the settlement agreement have been adversely affected by FWCC's actions.

COUNT II TEMPORARY INJUNCTION

57. Allegations 1 through 57 are re-alleged and incorporated by reference.

58. The *status quo* for almost two years has been a restored, natural and historic channel in Cowbone Marsh.

59. The existing low impact wiers in the navigation channel prevent any adverse environmental or hydrologic effects of the restoration project and actually improve the ecosystem of Cowbone Marsh.

60. No environmental injury will take place if the decision to fill the navigation channel is postponed until FWCC complies with the Sunshine Act.

61. If the FWCC alters the *status quo* by proceeding with its decision to fill the historic navigation channel with sand, Conservationists will be irreparably injured because the proposed backfill project will irrevocably abrogate their right under the settlement agreement to the maintenance of a navigation channel throughout Fisheating Creek, which includes the Cowbone Marsh area.

62. Conservationists have no adequate remedy at law because damages cannot compensate for permanent loss of Plaintiff's unique rights to the maintenance and enhancement of the Cowbone Marsh navigation channel under the settlement agreement.

63. A temporary injunction will not irreparably injure FWCC because Plaintiff's requested relief requires only that the agency comply with the law.

64. A temporary injunction will be in the public interest because the public has an interest in ensuring that state agencies comply with the requirements of the Sunshine Act.

PRAYER FOR RELIEF

WHEREFORE, Conservationists Save Our Creeks and the Environmental Confederation of Southwest Florida respectfully request that this Court set aside the decisions of the Florida Fish and Wildlife Conservation Commission and the technical advisory committee, invalidate the decisions made by the secret committee, issue a temporary injunction enjoining FWCC from acting in any way upon the technical advisory group's recommendation until notice is given and the public is allowed to attend all Advisory Committee meetings concerning remediation plans for the Cowbone Marsh navigation channel, and grant all other appropriate relief.

Dated: February ____, 2012.

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