

Florida Department of Environmental Protection

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Governor

Jennifer Carroll
Lt. Governor

Herschel T. Vinyard Jr.
Secretary

BUREAU OF SUBMERGED LANDS AND ENVIRONMENTAL RESOURCES CONSOLIDATED NOTICE OF DENIAL

APR 20 2012

In the Matter of an Application for Permit/Water Quality Certification and Authorization to Use
Sovereign Submerged Lands by:

APPLICANTS:

Sarasota Sailing Squadron
c/o David E. Jennings, Commodore
1717 Ken Thompson Parkway
Sarasota, FL 34236

PROJECT NAME: Sarasota Sailing Squadron

City of Sarasota
Sarah Warren, Esq.
Fournier and Connolly, P.A.
1 South School Avenue, Suite 700
Sarasota, FL 34237

FILE NO.: 58-0141375-003

BOT NO.: 580343458

COUNTY: Sarasota

CONSOLIDATED NOTICE OF DENIAL

ENVIRONMENTAL RESOURCE PERMIT AND LEASE FOR THE USE SOVEREIGN SUBMERGED LANDS

The Department of Environmental Protection gives consolidated notice of denial of:

(a) an environmental resource permit under Part IV of Chapter 373, Florida Statutes (F.S.), and Title 62, Florida Administrative Code (F.A.C.), which also constitutes denial of certification of compliance with state water quality standards pursuant to section 404 of the Clean Water Act, 33 U.S.C. 1344.

(b) the lease to use sovereign submerged lands for the proposed activity, under Article X, Section 11 of the Florida Constitution, Chapter(s) 253, Title 18, F.A.C., and the policies of the Board of Trustees.

NOTICE OF DENIAL; SARASOTA SAILING SQUADRON/CITY OF SARASOTA

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Where applicable (such as for activities in coastal counties), this consolidated denial of the environmental resource permit and the authorization to use sovereign submerged lands also constitutes a finding of inconsistency with Florida's Coastal Zone Management Program, as required by Section 307 of the Coastal Zone Management Act.

This consolidated notice of denial is based on the reasons stated below.

I. DESCRIPTION OF THE PROPOSED ACTIVITY

The Applicants, Sarasota Sailing Squadron, Inc. (SSS) and the City of Sarasota, applied on February 16, 2011 to the Department of Environmental Protection for an environmental resource permit/water quality certification and requested authorization to use sovereign submerged lands owned by the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees) to reconfigure, operate and maintain an existing private boating facility and 120 slip mooring field within the landward extent of Sarasota Bay, a Class II Outstanding Florida Waterbody. In-water work is limited to the removal of existing 4-foot by 4-foot by 6-inch concrete mooring anchors and the replacement of those anchors with screw in type mooring anchors.

This activity includes consideration of an application for a five-year term fee-waived sovereignty submerged land lease containing 1,332,090 square feet (30.58 acres) more or less, for an existing 120-slip public mooring field and 24-slip docking facility currently used in conjunction with an upland private sailing club. Although the mooring field is an adjunct to a private sailing club (the Sarasota Sailing Squadron), the applicants requested a fee waived lease based upon their proposal to operate the mooring field and docks over sovereign land as "open to the public" in order to qualify for a fee waived lease pursuant to 18-21.011(1)(b)(7), F.A.C.

The activity is located on the east end of City Island, at 1717 Ken Thompson Parkway, Sarasota, Section 23, Township 36 South, Range 17 East, Sarasota County.

II. AUTHORITY FOR REVIEW

The Department has permitting authority under Part IV of Chapter 373, F.S., and Chapters 62-330, 62-341 and 62-343, F.A.C. The activity is not exempt from the requirement to obtain an environmental resource permit (ERP). Pursuant to Operating Agreements executed between the Department and the water management districts, as referenced in Chapter 62-113, F.A.C., the Department is responsible for reviewing this application.

The activity also requires a proprietary authorization, as it is located on sovereign submerged lands owned by the Board of Trustees. The activity is not exempt from the need to obtain a proprietary authorization. Pursuant to Article X, Section 11 of the Florida Constitution, Sections 253.002 and 253.77, F.S., Sections 18-21.0040, 18-21.0051, and 62-343.075, F.A.C., the policies of the Board of Trustees, and the Operating Agreements executed between the Department and the water management districts, as referenced in Chapter 62-113, F.A.C., the Department has the authority to review and take final action on this request for proprietary authorization.

III. REASONS FOR DENIAL

A. Environmental Resource Permit and Sovereign Submerged Lands Authorization

The applicants applied for a fee-waived lease for the existing 120-slip mooring field and docks on sovereign submerged lands, pursuant to 18-21.011(1)(b)(7), F.A.C., which stipulates that; “A waiver from payment of annual lease fees for government, research, education or charitable entities that are either not-for-profit or non-profit shall be granted if the following conditions are met:

- a. Any revenues collected from the activity or use of sovereign submerged lands are used solely for the purposes of operation and maintenance of the structure; and
- b. The activity or use of sovereignty submerged lands is consistent with the public purposes of the applicant organization and is not an adjunct to a commercial endeavor.”

The applicants did not provide sufficient details on how revenues from the rental of slips at the facility would be accounted for or allocated to ensure that they were to be used only for the operation and maintenance of the mooring field and docking structures. In addition, the applicants did not provide sufficient justification that the operation of a mooring field with rental slips in conjunction with a private yacht/sailing club was consistent with the public purpose(s) of the organizations and would not constitute revenue generating activities.

In order to meet the provisions of this Rule, the Applicants proposed to advertise the slips as open to the public, and create a waiting list for slips that open up, so that members of the public would eventually have a chance to rent a slip in the mooring field. However, it was not clear how that waiting list would be managed to ensure that the members of the public had an equitable chance at acquiring a wet slip in the mooring field, and that members of the SSS did not receive preferential treatment in the assignment of slips.

The applicant has provided reasonable assurance that the construction and operation of the activity, considering the direct, secondary and cumulative impacts, will comply with the provisions of Part IV of Chapter 373, F.S., and the rules adopted thereunder. However, pursuant to Sections 18-21.00401 and 62-343.075, F.A.C., an individual or standard general permit under Part IV of Chapter 373, F.S., cannot be issued because the activity does not meet the standards for approval of authorization to use sovereign submerged lands, as described below.

The request for authorization to use sovereign submerged lands is denied because the applicant has not met all applicable requirements for proprietary authorizations to use sovereign submerged lands, pursuant to Article X, Section 11 of the Florida Constitution, Chapter 253 F.S., 18-21 F.A.C., and the policies of the Board of Trustees. Specifically:

- (1) The continued operation of the activity is inconsistent with the management policies, standards and criteria of section(s) 18-21.004, F.A.C. The applicant has not provided reasonable assurance that the leasing of state owned lands will be "not contrary to the public interest" ...; that is, the applicant has not provided reasonable assurance that leasing

of state owned lands without payment of lease fees, for the purpose of a operating and maintaining a mooring field and docking facilities in conjunction with a private yacht and sailing club, will be in the public interest.

- (2) The continued operation of the activity is inconsistent with 18-21.011(1)(b)(7), F.A.C, as they have not shown that; (a) any revenues collected from the activity or use of sovereign submerged lands will be used solely for the purposes of operation and maintenance of the structure; and that (b), the activity or use of sovereignty submerged lands is consistent with the public purposes of the applicant organization and is not an adjunct to a commercial endeavor.”

BACKGROUND:

The applicants requested after-the-fact authorization for an existing public mooring field and docking facility presently used in conjunction with an upland private yacht/sailing club. The existing mooring field, which provides slips for up to 120 sailing vessels, was to be reconfigured to consolidate the moorings and relocate vessels out of shallow seagrass areas. The area of preempted state owned submerged lands was to be reduced from approximately 1,475,712 square feet to 1,332,090 square feet(a 143,622 square foot decrease) as a result of the reconfiguration. The ERP would have covered the operation and the maintenance of the facility and required the replacement of existing 4-foot by 4-foot concrete mooring anchors with screw type anchors according to a fixed schedule. The submerged lands lease would require the Sarasota Sailing Squadron to operate and manage the mooring field pursuant to the ERP and mooring field management plan.

The SSS is a non-profit sailing club that was established in the 1930's and chartered in 1948. The club promotes sailing related activities (e.g., racing, safety, instruction, etc.) for all ages. The SSS has leased the current site, which is owned by the City of Sarasota (“City”), since 1958. The submerged lands immediately adjacent to the site are within Trustees Deed (No: 17540) issued to the City, while the remainder of the docking and mooring areas are on state owned lands.

The Department of Environmental Regulation (DER) issued a permit in 1981 (#58-44765-3E) for the installation of 38 concrete mooring anchors in the current location of the mooring field. In 1995, the Department issued an environmental resource permit (ERP) and letter of consent for the construction and operation of 5 docks with 28 slips (#582244699), most of which were on privately owned bottom lands. In 1999 the Department issued another ERP (58-01413753-001) for the extension of two existing piers and the creation of an additional 23 wet slips. The project was again issued a letter of consent based on the applicant's non-profit status. On August 18, 2004, the City and the SSS applied to the Department for a permit and state lands authorization to expand the mooring field to accommodate 149 vessels. During processing of that application, the Department became aware that an additional 65 anchors had been installed at the facility without authorization from the Department. At the suggestion of Department staff, on October 15, 2007, the applicants withdrew their application for a lease so that the violations could be resolved prior to issuance of the lease.

At that time, Department staff initiated enforcement to resolve the violations at the site. It was agreed that the Department would draft a Consent Order (CO) to address the collection of costs and expenses, and a Temporary Use Agreement (TUA) to collect administrative fines and allow time to process the lease.

On February 29, 2008, the SSS submitted a revised lease application that included much of the information lacking in the previous submittal, and on May 9, 2008, the Department notified the SSS that the application for the TUA was complete and that the CO and TUA were in review and would be forthcoming. During review of the documents, the Department found that in spite of the SSS' status as a non-profit entity, the City would have to be a co-applicant for the facility to qualify for a fee waived lease, pursuant to rules 18-21.011(1)(b)(7)(a) and (b), F.A.C. After deliberations between the Department and the Applicants, the Department executed a CO and TUA with the SSS on October 22, 2010.

The TUA required the SSS to submit an application for the ERP and Lease within 30 days of the execution of the TUA. However, the application was not submitted to the Department until February 16, 2011. The Department sent the SSS a Request for Additional Information (RAI) on March 17, 2011 and received a response on July 5, 2011. A second RAI was sent on July 14, 2011. On October 7, 2011, the SSS requested an extension to the TUA, which was set to expire on October 21, 2011, so that they could have additional time to prepare their response. The extension request was granted by The Department, with the understanding that no additional time would be granted, and that the remaining timeframes would have to be met. To address the time extension, the CO was modified to reflect the new dates for submission and completion of the applications, and a new TUA was issued, which expires on April 21, 2012. Both documents were executed by Department on December 14, 2012. The SSS submitted their response to the RAI on December 15th, 2011, and the project was deemed complete at that point.

B. Coastal Zone Consistency

Based on the above, the Department has determined that the activity is inconsistent with Florida's Coastal Management Program (FCMP), as required by Section 307 of the Coastal Zone Management Act. Pursuant to Section 380.23, F.S., the Department may not issue a permit for an activity found to be inconsistent with the FCMP. The Department has recommended project modifications which would bring the project into compliance with the Department's statutory authority under the FCMP (see below). However, the applicant has not modified the application in accordance with those recommendations.

Pursuant to 15 CFR part 930, subpart H, and within 30 days from receipt of this letter, you may request that the Secretary of Commerce override this objection. In order to grant an override request, the Secretary must find that the activity is consistent with the objectives or purposes of the Coastal Zone Management Act, or is necessary in the interest of national security. A copy of the request and supporting information must be sent to the Florida Coastal Management Program and the federal permitting or licensing agency. The Secretary may collect fees from you for administering and processing your request.

IV. PROPOSED CHANGES

The Department has determined that the following changes to the project may enable the Department to grant a consolidated permit and authorization to use sovereign submerged lands:

- 1) Establish a system to notify the general public of the availability of rental slips at the facility and assign them in such a manner to qualify as a “public” facility without preference for or requirement of membership to ensure that the leasing of state owned lands without compensation is not contrary to the public interest.
- 2) Detail how revenues from the rental of slips on sovereign submerged lands will be used only for the operation and maintenance of the mooring field and associated amenities, to the exclusion of the facilities primarily used for the benefit of the members of the SSS.
- 3) Provide clarification on how the operation of a “public” rental mooring field in conjunction with a private membership-only sailing/yacht club is consistent with the public purposes of the applicant organizations (the City of Sarasota and the Sarasota Sailing Squadron)

Modification of the project as specified above may enable the Department to determine that the activity is consistent with Florida’s Coastal Management Plan.

V. RIGHTS OF AFFECTED PARTIES

This denial is final and effective on the date filed with the Clerk of the Department unless a sufficient petition for an administrative hearing is timely filed under sections 120.569 and 120.57 of the Florida Statutes as provided below. If a sufficient petition for an administrative hearing is timely filed, this action automatically becomes only proposed agency action on the application, subject to the result of the administrative review process. Therefore, on the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Department. Because the administrative hearing process is designed to re-determine final agency action on the application, the filing of a petition for an administrative hearing may result in granting the application.

Mediation is not available.

A person whose substantial interests are affected by the Department’s action may petition for an administrative proceeding (hearing) under sections 120.569 and 120.57 of the Florida Statutes. The petition must contain the information set forth below and must be filed (received by the clerk) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000.

Under rule 62-110.106(4) of the Florida Administrative Code, a person whose substantial interests are affected by the Department’s action may also request an extension of time to file a petition for an administrative hearing. The Department may, for good cause shown, grant the request for an extension of time. Requests for extension of time must be filed with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35,

Tallahassee, Florida 32399-3000, before the applicable deadline. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon. If a request is filed late, the Department may still grant it upon a motion by the requesting party showing that the failure to file a request for an extension of time before the deadline was the result of excusable neglect.

The application for a variance or waiver is made by filing a petition with the Department of Environmental Protection, Office of General Counsel, Mail Station 35, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000. The petition must specify the following information:

- (a) The name, address, telephone number, and any facsimile number of the petitioner;
- (b) The name, address, and telephone number, and any facsimile number of the attorney or qualified representative of the petitioner, if any;
- (c) The applicable rule or portion of a rule from which a variance or waiver is requested;
- (d) The citation to the statute underlying (implemented by) the rule identified in (c) above;
- (e) The type of action requested;
- (f) The specific facts that demonstrate a financial hardship or a violation of principles of fairness that would justify a variance or waiver for the petitioner;
- (g) The reason why the variance or waiver would serve the purposes of the underlying statute (implemented by the rule); and
- (h) A statement whether the variance or waiver is permanent or temporary and, if temporary, a statement of the dates showing the duration of the variance or waiver requested.

If a timely and sufficient petition for an administrative hearing is filed, other persons whose substantial interests will be affected by the outcome of the administrative process have the right to petition to intervene in the proceeding. Intervention will be permitted only at the discretion of the presiding officer upon the filing of a motion in compliance with rule 28-106.205 of the Florida Administrative Code.

In accordance with rule 62-110.106(3), Florida Administrative Code, petitions for an administrative hearing by the applicant must be filed within 14 days of receipt of this written notice. Petitions filed by any persons other than the applicant, and other than those entitled to written notice under section 120.60(3) of the Florida Statutes must be filed within 14 days of publication of the notice or within 14 days of receipt of the written notice, whichever occurs first. Under section 120.60(3) of the Florida Statutes, however, any person who has asked the Department for notice of agency action may file a petition within 14 days of receipt of such notice, regardless of the date of publication.

The failure of any person to file a petition for an administrative hearing within the appropriate time period shall constitute a waiver of that right.

A petition that disputes the material facts on which the Department's action is based must contain the following information:

- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests are or will be affected by the agency determination;
- (c) A statement of when and how the petitioner received notice of the agency decision;
- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
- (e) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the agency's proposed action;
- (f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action; and
- (g) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wishes the agency to take with respect to the agency's proposed action.

A petition that does not dispute the material facts on which the Department's action is based shall state that no such facts are in dispute and otherwise shall contain the same information as set forth above, as required by rule 28-106.301.

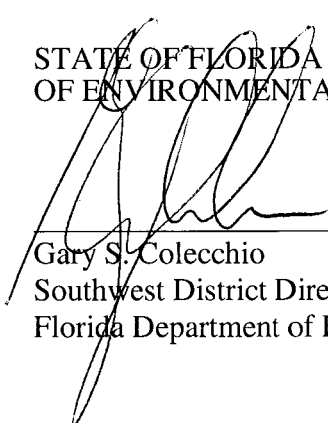
Under sections 120.569(2)(c) and (d) of the Florida Statutes, a petition for administrative hearing must be dismissed by the agency if the petition does not substantially comply with the above requirements or is untimely filed.

This notice of denial constitutes an order of the Department. Subject to the provisions of paragraph 120.68(7)(a) of the Florida Statutes, which may require a remand for an administrative hearing, the applicant has the right to seek judicial review of the order under section 120.68 of the Florida Statutes, by the filing of a notice of appeal under rule 9.110 of the Florida Rules of Appellate Procedure with the Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida, 32399-3000; and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate district court of appeal. The notice of appeal must be filed within 30 days from the date when the final order is filed with the Clerk of the Department. The applicant, or any party within the meaning of section 373.114(1)(a) or 373.4275 of the Florida Statutes, may also seek appellate review of this order before the Land and Water Adjudicatory Commission under section 373.114(1) or 373.4275 of the Florida Statutes. Requests for review before the Land and Water Adjudicatory Commission must be filed with the Secretary of the Commission and served on the Department within 20 days from the date when the order is filed with the Clerk of the Department. The applicant, or any party within the meaning of paragraph 20.255(5)(a) of the Florida Statutes, may also seek appellate review of the order before the Land and Water Adjudicatory Commission under subsection 20.255(5) of the Florida Statutes. Requests for review before the Land and Water Adjudicatory Commission must be filed with the Secretary of the Commission and served on the Department within 20 days from the date when the order is filed with the Clerk of the Department.

Pursuant to 15 CFR 930.64(a), the Department is notifying the United States Army Corps of Engineers, Jacksonville District, and the Director of the National Oceanographic and Atmospheric Administration (NOAA) Office of Ocean and Coastal Resource Management of this consistency objection. This objection may be appealed to the Governor of the State of Florida, pursuant to Section 380.23(3), F.S., or to the Secretary of the United States Department of Commerce on the grounds described in 15 CFR 930, Subpart H.

Executed in Hillsborough County, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Gary S. Colecchio
Southwest District Director
Florida Department of Environmental Protection

GSC/tpg

Copies furnished to:

cc: U.S. Army Corps of Engineers,
Submerged Lands and Environmental Resources File

CERTIFICATE OF SERVICE

The undersigned duly designated deputy clerk hereby certifies that this CONSOLIDATED NOTICE OF PERMIT DENIAL and all copies were mailed before the close of business on 4/20, 2012 to the above listed persons.

FILING AND ACKNOWLEDGMENT

FILED, on this date with the designated Department Clerk, pursuant to 120.52(11), Florida Statutes, receipt of which is hereby acknowledged.

Clerk

E Robinson

Date

4/20/12