



# FLORIDA DEPARTMENT OF Environmental Protection

Northwest District  
160 W. Government Street, Suite 308  
Pensacola, FL 32502

**Ron DeSantis**  
Governor

**Jeanette Nuñez**  
Lt. Governor

**Shawn Hamilton**  
Secretary

February 28, 2023

WCI Communities, LLC  
c/o Scott Keiling  
Vice President  
9440 Phillips Hwy, Suite 7  
Jacksonville, FL 32256  
[Scott.Keiling@Lennar.com](mailto:Scott.Keiling@Lennar.com)

Re: Executed Consent Order  
WCI Communities, LLC  
Lost Key Marina BOT# 170023351  
Escambia County

Dear Mr. Keiling:

Please find attached the Executed Consent Order, State of Florida Department of Environmental Protection and The Board of Trustees of the Internal Improvement Trust Fund v. WCI Communities, LLC (OGC File No: 20-1187), that addresses the resolution of petroleum storage tank and submerged land lease violations at the Lost Key Marina located at 10045 Sinton Drive, Pensacola, in Escambia County.

The attached Consent Order was executed and clerked on October 25<sup>th</sup> 2022. On November 16<sup>th</sup> 2022, a petition to the Consent Order was filed and subsequently dismissed on January 26<sup>th</sup> 2023. No amended petition was filed. In the interests of fairness and efficiency, the effective date and timelines of the attached Consent Order are to be determined to be **final and effective as of the date of this letter: February 28<sup>th</sup> 2023.**

Please review the document and note the agreed upon timeframes for completing the corrective actions and notifying the Department of completion.

We appreciate your cooperation in resolving this matter. If you have any questions, please contact Cliff Richardson at [Cliff.J.Richardson@FloridaDEP.gov](mailto:Cliff.J.Richardson@FloridaDEP.gov) for tanks or Kenneth Dickey at [Kenneth.Dickey@FloridaDEP.gov](mailto:Kenneth.Dickey@FloridaDEP.gov) for submerged lands lease.

Sincerely,

A handwritten signature in blue ink that reads "Elizabeth Mullins Orr". The signature is written in a cursive, flowing style.

Elizabeth Mullins Orr  
Director  
Northwest District

EMO/cr

Enclosures: Executed Consent Order  
Lost Key Order Dismissing wLTA

Cc: Herschel Vinyard, Special Counsel, [Herschel.Vinyard@arlaw.com](mailto:Herschel.Vinyard@arlaw.com)



# FLORIDA DEPARTMENT OF Environmental Protection

Northwest District  
160 W. Government Street, Suite 308  
Pensacola, FL 32502

**Ron DeSantis**  
Governor

**Jeanette Nuñez**  
Lt. Governor

**Shawn Hamilton**  
Secretary

October 25, 2022

WCI Communities, LLC  
c/o Scott Keiling  
Vice President  
9440 Phillips Hwy, Suite 7  
Jacksonville, FL 32256  
[Scott.Keiling@Lennar.com](mailto:Scott.Keiling@Lennar.com)

Re: Executed Consent Order  
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Escambia County


Dear Mr. Keiling:

Please find enclosed the Executed Consent Order, State of Florida Department of Environmental Protection and The Board of Trustees of the Internal Improvement Trust Fund v. WCI Communities, LLC (OGC File No: 20-1187), that addresses the resolution of petroleum storage tank and submerged land lease violations at the Lost Key Marina located at 10045 Sinton Drive, Pensacola, in Escambia County.

Please review the document and note the agreed upon timeframes for completing the corrective actions, paying the civil penalty, and notifying the Department of completion.

We appreciate your cooperation in resolving this matter. If you have any questions, please contact Cliff Richardson at [Cliff.J.Richardson@FloridaDEP.gov](mailto:Cliff.J.Richardson@FloridaDEP.gov) for tanks or Kenneth Dickey at [Kenneth.Dickey@FloridaDEP.gov](mailto:Kenneth.Dickey@FloridaDEP.gov) for submerged lands lease.

Sincerely,

 On behalf of  
Elizabeth Mullins Orr  
Director  
Northwest District

EMO/cr

Enclosures: Executed Consent Order  
WCI Communities LLC Certificate of Incumbency

Cc: Herschel Vinyard, Special Counsel, [Herschel.Vinyard@arlaw.com](mailto:Herschel.Vinyard@arlaw.com)

BEFORE THE STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,  
and THE BOARD OF TRUSTEES OF THE  
INTERNAL IMPROVEMENT TRUST FUND,

IN THE OFFICE OF THE  
NORTHWEST DISTRICT

Complainants,

OGC FILE NO. 20-1187

vs.

WCI COMMUNITIES, LLC,

Respondent.

---

**CONSENT ORDER**

This Consent Order ("Order") is entered into between the State of Florida Department of Environmental Protection ("Department"), and The Board of Trustees of the Internal Improvement Trust Fund ("Board"), and WCI Communities, LLC ("Respondent"), pursuant to section 120.57(4), Florida Statutes, to reach settlement of certain matters at issue between the Department, the Board, and Respondent.

The Department and the Board find, and Respondent admits, the following:

1. The Department is the administrative agency of the State of Florida having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of Chapters 253, 373, 376, and 403, Florida Statutes ("F.S."), and the rules promulgated and authorized in Chapter 18-21 and Title 62, Florida Administrative Code ("F.A.C."). The Department has jurisdiction over the matters addressed in this Order. The Board is responsible for overseeing state owned lands and ensuring they are managed in trust for the citizens of the State of Florida pursuant to Chapter 253, Florida Statutes, and the rules promulgated and authorized thereunder, Florida Administrative Code Title 18. The Department

has the duty to perform all staff duties and functions related to the administration of state lands as provided in Section 253.002, Florida Statutes.

2. Respondent is a foreign limited liability company and is a “person” within the meaning of Sections 253.04, 373.019(15), and 403.031(5), F.S.

3. Lost Key Marina & Yacht Club Master Association, Inc. (“Lost Key”), a Florida homeowners association formed pursuant to Florida Statutes, Chapter 720, governs all or a portion of certain non-residential property containing an underground storage tank system (“Property”). The Property is located at 10045 Sinton Drive, Pensacola, in Escambia County, Florida, parcel number 243S311102002007. The Department has assigned Facility Identification Number 17-8944519 to the Property.

4. Respondent is the owner and operator of an underground storage tank system (“System”) located at the Property.

5. The System consists of an underground storage tank and its associated piping and dispenser. Since on or about December 30, 2014, Respondent has owned and operated the System. The storage tank at the Property is an enclosed stationary container with a volume in excess of 110 gallons in size that contains or contained vehicular fuel. The tank, which is constructed of double-walled, fiberglass-clad steel, was installed at the Property on or about January 1, 2008.

6. The Property and the underground System constitute a “Facility” within the meaning of Section 376.301(19), F.S.

7. On August 28, 2020, the Department issued a Notice of Violation, Orders for Corrective Action and Administrative Penalty Assessment (“Notice of Violation”) to Lost Key, for violations discovered on August 5, 2019 and December 9, 2019 during routine compliance and installation inspections.

8. On August 31, 2020, Lost Key received the Notice of Violation.

9. On November 12, 2020, the Department issued a Final Order to Lost Key. Lost Key failed to timely appeal the Final Order.

10. On January 6, 2021, at the request of Lost Key, the Department met with their representatives by videoconference to discuss the case. At that time, Lost Key provided information indicating that (1) financial responsibility had been maintained, but that the Storage Tank Certificate of Insurance Form 62-761.900(3) Part D, and the Storage Tank Certification of Financial Responsibility Form 62-761.900(3) Part P, had not been provided, (2) visual release detection might not have been documented from May 2017 to August 2019 and from December 2020 to March 2021, (3) a Class A Operator and a Class B Operator had been identified and designated on February 4, 2020 and, a Class C Operator had been identified and designated on January 8, 2021, and (4) Lost Key had not notified the Escambia County Department of Environmental Health 48 and 72 hours prior to installation of the diesel spill bucket.

11. At the time of the January 6, 2021 videoconference, the Department agreed to enter into a consent order to resolve the case, provided that Lost Key submit information sufficient to verify compliance.

12. Respondent owns parcel number 243S311102005007 of the Property, and is the Lessee of a Sovereign Submerged Land Lease ("Lease"), Lease File Number 170023351, that is effective from January 1, 2019 through January 1, 2024.

13. On January 24, 2022 the Department issued a Warning Letter to Respondent for violations observed during a routine inspection related to homeowner complaints due to lack of repair of docking structures.

14. The Department finds that the following violations occurred:

a) Respondent has failed to submit a Storage Tank Certificate of Insurance Form 62-761.900(3) Part D, and the Storage Tank Certification of Financial Responsibility Form 62-761.900(3) Part P from January 1, 2018 to the present.

b) Respondent has failed to submit documentation of visual release detection for the System from May 2017 to August 2019 and from December 2020 to March 2021.

c) Respondent did not designate a Class A Operator and a Class B Operator for the Facility until February 4, 2020, and a Class C Operator until January 8, 2021.

d) Respondent did not notify the Escambia County Department of Environmental Health 48 and 72 hours prior to installation of the diesel spill bucket.

e) Respondent has failed to repair or remove the docking structures, which is a violation of paragraph 15 of the Sovereign Submerged Land Lease, which states: *"The Lessee shall maintain the leased premises in good condition, keeping the structures and equipment located thereon in a good state of repair in the interests of public health, safety and welfare. The leased premise shall be subject to inspection by the Lessor or its designated agent at any reasonable time."*

Having reached a resolution of the matter, Respondent and the Department and the Board mutually agree and it is

**ORDERED:**

15. Respondent shall comply with the following corrective actions within the stated time periods:

a) Provide a completed Storage Tank Certificate of Insurance Form 62-761.900(3) Part D, and the Storage Tank Certification of Financial Responsibility Form 62-761.900(3) Part P within 30 days of the effective date of this Order.

b) Provide records of visual release detection of the System for the periods of May 2017 to August 2019 and from December 2020 to March 2021 within 30 days of the effective date of this Order. In the event such records cannot be produced, then within 30 days of the effective date of this Order, Respondent is to provide a complete System visual release detection records retention plan document detailing the method(s) by which it will ensure future System visual release detection records are accurately maintained in accordance with Rule 62-761.710(1), F.A.C.

c) Inform the Department of the decision to remove or repair all structures within 90 days of the effective date of this Order.

d) Finalize and accept bid(s) for removal or repairs of the docking structures within 120 days of the effective date of this Order.

e) Begin removal or repairs of the docking structures as outlined in the Lease within 365 days of the effective date of this Order.



f) Complete removal or repairs of the docking structures as outlined in the Lease within 20 months of the effective date of this Order.

g) Submit written updates to the Department by the 10<sup>th</sup> day of every quarter defined by the Florida Fiscal Calendar until all conditions of this Order have been met.

16. Within 30 days of the effective date of this Order, Respondent shall pay the Department \$ 5,000.00 in settlement of the matters addressed in this Order. This amount includes \$ 4,500.00 for civil penalties and \$ 500.00 for costs and expenses incurred by the Department during the investigation of this matter and the preparation and tracking of this Order. The civil penalties are apportioned as follows: \$ 750.00 for failure to submit a completed Storage Tank Certification of Financial Responsibility Form 62-761.900(3) Part P, and a Certificate of Insurance Form 62-761.900(3) Part D, in violation of Rule 62-761.710(1), F.A.C. and section 403.121(4)(f), F.S.; \$ 750.00 for failure to submit visual release detection records for the periods of May 2017 to August 2019 and from December 2020 to March 2021 in violation of Rule 62-761.710(1), F.A.C. and section 403.121(4)(f), F.S.; \$ 1,500.00 for failure to designate a Class A Operator, Class B Operator, and a C Operators by October 13, 2018 in violation of Rule 62-761.350(1), F.A.C. and section 403.121(4)(e), F.S.; and \$ 1,500.00 for failure to notify the Escambia County Department of Environmental Health 48 and 72 hours prior to the installation of the diesel spill bucket in violation of Rule 62-761.405(2)(b), F.A.C. and section 403.1212(4)(e), F.S.

17. Respondent agrees to pay the Department stipulated penalties in the amount of \$100.00 per day for each and every day Respondent fails to timely comply with any of the requirements of paragraph 15 of this Order. A separate stipulated penalty shall be assessed for each violation of this Order. The Department may demand stipulated penalties at any time after violations occur. Respondent shall pay stipulated penalties owed within 30 days of the Department's issuance of written demand for payment and shall do so as further described in paragraph 18, below. Nothing in this paragraph shall prevent the Department from filing suit to specifically enforce any terms of this Order. Any stipulated penalties assessed under this paragraph shall be in addition to the civil penalties agreed to in paragraph 16 of this Order. If the Department is required to file a lawsuit to recover stipulated penalties under this paragraph,

the Department will not be foreclosed from seeking civil penalties for violations of this Consent Order in an amount greater than the stipulated penalties due under this paragraph.

18. Respondent shall make all payments required by this Order by cashier's check, money order or on-line payment. Cashier's check or money order shall be made payable to the "Department of Environmental Protection" and shall include both the OGC number assigned to this Order (20-1187), and the notation "Water Quality Assurance Trust Fund." Online payments by e-check can be made by going to the DEP Business Portal at: <http://www.fldepportal.com/go/pay/>. It will take a number of days after this Order becomes final, effective and filed with the Clerk of the Department before ability to make online payment is available.

19. Except as otherwise provided, all submittals and payments required by this Order to be submitted to the Department shall be sent to Florida Department of Environmental Protection, Northwest District, 160 West Government Street, Suite 308, Pensacola, Florida 32502.

20. Respondent shall allow all authorized representatives of the Department access to the Facility and the Property at reasonable times for the purpose of determining compliance with the terms of this Order and the rules and statutes administered by the Department.

21. If any event, including administrative or judicial challenges by third parties unrelated to the Respondent, occurs which causes delay or the reasonable likelihood of delay, in complying with the requirements of this Consent Order, Respondent shall have the burden of proving the delay was or will be caused by circumstances beyond the reasonable control of the Respondent and could not have been or cannot be overcome by Respondent's due diligence. Economic circumstances shall not be considered circumstances beyond the control of Respondent, nor shall the failure of a contractor, subcontractor, materialman or other agent (collectively referred to as "contractor") to whom responsibility for performance is delegated to meet contractually imposed deadlines be a cause beyond the control of Respondent, unless the cause of the contractor's late performance was also beyond the contractor's control. Upon occurrence of an event causing delay, or upon becoming aware of a potential for delay, Respondent shall notify the Department orally within 72 hours and shall, within seven calendar

days of oral notification to the Department, notify the Department in writing of the anticipated length and cause of the delay, the measures taken or to be taken to prevent or minimize the delay and the timetable by which Respondent intends to implement these measures. If the parties can agree that the delay or anticipated delay has been or will be caused by circumstances beyond the reasonable control of Respondent, the time for performance hereunder shall be extended for a period equal to the agreed delay resulting from such circumstances. Such agreement shall adopt all reasonable measures necessary to avoid or minimize delay. Failure of Respondent to comply with the notice requirements of this Paragraph in a timely manner shall constitute a waiver of Respondent's right to request an extension of time for compliance with the requirements of this Consent Order.

22. The Department, for and in consideration of the complete and timely performance by Respondent of all the obligations agreed to in this Order, hereby conditionally waives its right to seek judicial imposition of damages or civil penalties for alleged violations addressed in this Order. This waiver is conditioned upon Respondent's complete compliance with all of the terms of this Order.

23. In the event of a sale or conveyance of the property, if all of the requirements of this Consent Order have not been fully satisfied, Respondent shall, at least 30 days prior to the sale or conveyance of the property, (1) notify the Department of such sale or conveyance and (2) provide a copy of this Consent Order with all attachments to the new owner. The sale or conveyance of the property shall not relieve the Respondent of the obligations imposed in this Consent Order.

24. The Department hereby expressly reserves the right to initiate appropriate legal action to prevent or prohibit any violations of applicable statutes, or the rules promulgated thereunder that are not specifically addressed by the terms of this Order.

25. Respondent is fully aware that a violation of the terms of this Order may subject Respondent to judicial imposition of damages, civil penalties of up to \$15,000 per day per violation, administrative fines of up to \$10,000 per day per violation, and criminal penalties.

26. Respondent acknowledges and waives its right to an administrative hearing pursuant to Sections 120.569 and 120.57, F.S., on the terms of this Order. Respondent acknowledges its right to appeal the terms of this Order pursuant to Section 120.68, F.S., and waives that right upon signing this Consent Order.

27. Electronic signatures or other versions of the parties' signatures, such as .pdf or facsimile, shall be valid and have the same force and effect as originals. No modifications of the terms of this Order will be effective until reduced to writing, executed by Respondent and the Department, and filed with the clerk of the Department.

28. The terms and conditions set forth in this Consent Order may be enforced in a court of competent jurisdiction pursuant to Sections 120.69, 253.04, and 373.129, F.S. Failure to comply with the terms of this Consent Order shall constitute a violation of Sections 253.04 and 373.430, F.S.

29. Persons who are not parties to this Consent Order but whose substantial interests are affected by this Consent Order have a right, pursuant to Sections 120.569 and 120.57, Florida Statutes, to petition for an administrative hearing on it. The Petition must contain the information set forth below and must be filed (received) at the Department's Office of General Counsel, 3900 Commonwealth Boulevard, MS-35, Tallahassee, Florida 32399-3000, or received via electronic correspondence at [Agency\\_Clerk@floridadep.gov](mailto:Agency_Clerk@floridadep.gov), within 21 days of receipt of this notice. A copy of the Petition must also be mailed at the time of filing to the District Office named above at the address indicated. Failure to file a petition within the 21 days constitutes a waiver of any right such person has to an administrative hearing pursuant to Sections 120.569 and 120.57, Florida Statutes.

The petition shall 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, any e-mail address, any facsimile number, and telephone number of the petitioner, if the petitioner is not represented by an attorney or a qualified representative; 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 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 the petitioner contends warrant reversal or modification of the agency's proposed action;
- f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
- g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

If a petition is filed, the administrative hearing process is designed to formulate agency action. Accordingly, the Department's final action may be different from the position taken by it in this Notice. Persons whose substantial interests will be affected by any decision of the Department with regard to the subject Consent Order have the right to petition to become a party to the proceeding. The petition must conform to the requirements specified above and be filed (received) within 21 days of receipt of this notice in the Office of General Counsel at the above address of the Department. Failure to petition within the allowed time frame constitutes a waiver of any right such person has to request a hearing under Sections 120.569 and 120.57, Florida Statutes, and to participate as a party to this proceeding. Any subsequent intervention will only be at the approval of the presiding officer upon motion filed pursuant to Rule 28-106.205, Florida Administrative Code.

A person whose substantial interests are affected by the Consent Order may file a timely petition for an administrative hearing under Sections 120.569 and 120.57, Florida Statutes, or may choose to pursue mediation as an alternative remedy under Section 120.573, Florida Statutes, before the deadline for filing a petition. Choosing mediation will not adversely affect

the right to a hearing if mediation does not result in a settlement. The procedures for pursuing mediation are set forth below.

Mediation may only take place if the Department and all the parties to the proceeding agree that mediation is appropriate. A person may pursue mediation by reaching a mediation agreement with all parties to the proceeding (which include the Respondent, the Department, and any person who has filed a timely and sufficient petition for a hearing) and by showing how the substantial interests of each mediating party are affected by the Consent Order. The agreement must be filed in (received by) the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, or received via electronic correspondence at [Agency\\_Clerk@floridadep.gov](mailto:Agency_Clerk@floridadep.gov), within 10 days after the deadline as set forth above for the filing of a petition.

The agreement to mediate must include the following:

- (a) The names, addresses, and telephone numbers of any persons who may attend the mediation;
- (b) The name, address, and telephone number of the mediator selected by the parties, or a provision for selecting a mediator within a specified time;
- (c) The agreed allocation of the costs and fees associated with the mediation;
- (d) The agreement of the parties on the confidentiality of discussions and documents introduced during mediation;
- (e) The date, time, and place of the first mediation session, or a deadline for holding the first session, if no mediator has yet been chosen;
- (f) The name of each party's representative who shall have authority to settle or recommend settlement; and
- (g) Either an explanation of how the substantial interests of each mediating party will be affected by the action or proposed action addressed in this notice of intent or a statement clearly identifying the petition for hearing that each party has already filed, and incorporating it by reference.
- (h) The signatures of all parties or their authorized representatives.

As provided in Section 120.573, Florida Statutes, the timely agreement of all parties to mediate will toll the time limitations imposed by Sections 120.569 and 120.57, Florida Statutes, for requesting and holding an administrative hearing. Unless otherwise agreed by the parties, the mediation must be concluded within sixty days of the execution of the agreement. If mediation results in settlement of the administrative dispute, the Department must enter a final order incorporating the agreement of the parties. Persons whose substantial interests will be affected by such a modified final decision of the Department have a right to petition for a hearing only in accordance with the requirements for such petitions set forth above, and must therefore file their petitions within 21 days of receipt of this notice. If mediation terminates without settlement of the dispute, the Department shall notify all parties in writing that the administrative hearing processes under Sections 120.569 and 120.57, Florida Statutes, remain available for disposition of the dispute, and the notice will specify the deadlines that then will apply for challenging the agency action and electing remedies under those two statutes.

30. This Consent Order is a settlement of the Department's civil and administrative authority arising under Florida law to resolve the matters addressed herein. This Consent Order is not a settlement of any criminal liabilities which may arise under Florida law, nor is it a settlement of any violation which may be prosecuted criminally or civilly under federal law. Entry of this Consent Order does not relieve Respondent of the need to comply with applicable federal, state or local laws, regulations or ordinances.

31. This Consent Order is a final order of the Department pursuant to Section 120.52(7), F.S., and it is final and effective on the date filed with the Clerk of the Department unless a Petition for Administrative Hearing is filed in accordance with Chapter 120, F.S. Upon the timely filing of a petition this Consent Order will not be effective until further order of the Department.

32. The undersigned certifies that as Vice President of Respondent, he or she is authorized and empowered to negotiate, enter into and execute, in the name and on behalf of the Respondent, any agreements, documents, instruments, certificates, including and without

limitation, this Consent Order entered into between Respondent and the State of Florida Department of Environmental Protection.

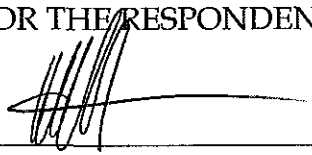
33. Rules referenced in this Order are available at:

<http://www.dep.state.fl.us/legal/Rules/rulelist.htm>.

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FOR THE RESPONDENT:



X Scott Keiling  
X Vice President

10/20/22  
Date


DONE AND ORDERED this 25th day of October, 2022, in  
Orange County, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

*Chin Lasnake* On behalf of

Elizabeth Mullins Orr  
District Director  
Northwest District

Filed, on this date, pursuant to section 120.52, F.S., with the designated Department Clerk,  
receipt of which is hereby acknowledged.



Clerk

October 25, 2022

Date

Copies furnished to:

Lea Crandall, Agency Clerk, MS 35

# WCI COMMUNITIES, LLC

## CERTIFICATE OF INCUMBENCY

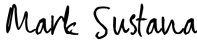
OCTOBER 21, 2022

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The undersigned, Mark Sustana, as the duly elected, qualified and acting Secretary of WCI Communities, LLC, a Delaware limited liability company (the "Company"), hereby certifies that:

**Scott Keiling** is a duly elected, qualified and acting Vice President of the Company, serving continuously in such capacity since his election on February 10, 2017. He is incumbent in such office as of the date hereof and is authorized to execute and deliver all documents in connection with the business of the Company.

IN WITNESS WHEREOF, the undersigned has executed this Certificate of Incumbency on behalf of the Company effective as of the date first written above.

DocuSigned by:  
  
\_\_\_\_\_  
147E737ED065476...  
Mark Sustana

**STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**LOST KEY MARINA DRY STORAGE  
CONDOMINIUM ASSOCIATION, INC.,**

**Petitioner,**

v.

**OGC CASE NO. 20-1187**

**WCI COMMUNITIES, LLC and  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION,**

**Respondents.**

\_\_\_\_\_ /

**ORDER DISMISSING PETITION WITH LEAVE TO AMEND**

On November 16, 2022, the Department of Environmental Protection (Department) received a Non-Party Petition for Administrative Hearing from “Lost Key and Marina Dry Storage Condominium Association, Inc.” That document appeared to misname the Petitioner. On November 28, 2022, “Lost Key Marina Dry Storage Condominium Association, Inc.” (Petitioner) filed a document correcting the misnomer and adding more specific allegations. The two documents, collectively, will be referred to as the “Petition.” The Petition challenges the Department’s decision to enter into a Consent Order with WCI Communities, LLC (WCI). It appears the Petitioner has insufficiently plead standing, and the Petition is both untimely and legally insufficient. For the following reasons, the Petition must be dismissed with leave to amend.

The agency action, a proposed consent order, addresses admitted violations of rules and statutes regarding two separate programs within the Department’s jurisdiction. First, as WCI admitted in the Consent Order, it violated rules in chapter 62-761, Florida Administrative Code

by failing to submit certain documents, by failing to designate an operator for the relevant facility, and by failing to notify a local county office when it installed a diesel spill bucket. Second, WCI violated a sovereign submerged land lease, file # 170023351 (the SSL Lease), with the Board of Trustees of the Internal Improvement Trust Fund. Specifically, WCI failed to repair or remove certain docking structures as the Lease required.

Petitioner does not appear to contest any matters related to the violation of chapter 62-671, or any other matters regarding the underground storage tanks. Instead, Petitioner appears to address those parts of the Consent Order that address the SSL Lease. Likewise, Petitioner does not allege that the Consent Order would authorize WCI to remain out of compliance with the SSL Lease.

The Department has previously explained its consideration of petitions for administrative hearing to challenge consent orders, when the petition is filed by a third party (i.e., someone other than the person entering into the consent order with the Department.)

A consent order is a consensual administrative order authorized under § 120.57(4), Florida Statutes, that is agreed to by the Department and one or more respondents. DEP consent orders are of two classes. The first is a license or permit substitute that serves ‘as authorization for a permissible type of activity that has not yet been conducted or is ongoing.’ The second is a resolution of environmental violations that is designed to bring a violator back into compliance with the law. . . . When a substantially affected third party challenges an enforcement consent order, the appropriate standard of review is whether the Department has the burden of proving the consent order is a reasonable exercise of that discretion.

. . . .

. . . The abuse of discretion standard does not turn on whether the consent order embodies the best possible settlement or even whether a better settlement could have been reached, but rather, whether the settlement that was reached was reasonable under the circumstances. It merely needs to be appropriate given all of the factors that must be considered by the agency in reaching an agreement. [T]he same reasoning applies to all enforcement consent orders: while a petitioner's substantial interests are affected by the adequacy of the corrective actions, if the

corrective actions require the respondent to comply with the Department's permits, leases, orders, rules, or statutes and does not authorize the respondent to remain out of compliance with those requirements, then the consent order is per se reasonable.

*Arlington Ridge Community Association, Inc. v. GI Shavings, LLC*, DOAH No. 18-5297 (Fla. DEP September 13, 2019) (citations omitted; emphasis provided). The Consent Order at issue is the second type described above. It does not serve as an authorization. Notably, it does not appear to authorize WCI to remain out of compliance of the relevant sovereign submerged lands lease.

The Department has observed the following in another, previous final order:

[T]he same reasoning applies to all enforcement consent orders: while a petitioner's substantial interests are affected by the adequacy of the corrective actions, if the corrective actions require the respondent to comply with the Department's permits, leases, orders, rules, or statutes and does not authorize the respondent to remain out of compliance with those requirements, then the consent order is per se reasonable. In a consent order that is per se reasonable, the penalties will not affect the petitioner's substantial interests. Only when the consent order authorizes actions that are not in compliance with the law, such as allowing an unpermissible structure to remain in place, can the amount of the penalty be challenged.

*M.A.B.E. Properties, Inc. v. Dep't of Env't'l Prot.*, DEP/OGC No. 08-1823 (Fla. DEP January 31, 2011) (Final Order No. DEP11-0075), *adopting as modified* No. 10-2334 (Recommended Order November 4, 2010) (Emphasis Provided).

### **Lack of Standing**

Rule 28-106.201(2)(b), Florida Administrative Code, requires petitions for administrative hearings to explain how the petitioner's substantial environmental interests are affected by the challenged agency action. Chapter 120 of the Florida Statutes does not actually employ the word "standing," but the test used is substantially its equivalent. *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009); *see also Vill. of*

*Key Biscayne v. Dep't of Env'tl. Prot.*, 206 So. 3d 788, 792 (Fla. 3d DCA 2016) (“Our research reveals that state agencies routinely dismiss petitions for administrative hearing for failure to plead a sufficient basis for the petitioner’s standing to bring the petition.”) In order to be “substantially affected” a petitioner must demonstrate that he or she (1) will suffer injury in fact which is of sufficient immediacy to entitle him or her to a hearing under Sections 120.569 and 120.57, Florida Statutes, and Florida Administrative Code Rule 28-106.201; and (2) the injury is of a type or nature which the administrative proceeding is designed to protect. *See Agrico Chem. Co. v. Dep't of Env'tl. Reg.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). Based on the allegations of the Petition and the standards for consent orders discussed above, Petitioner lacks standing to challenge the Consent Order.

In light of general principles regarding standing in administrative proceedings, Petitioner cannot satisfy the first prong of the *Agrico* test. Standing as a general proposition requires redressability, as well as a causal connection between the alleged injury and the conduct complained of. *DeSantis v. Florida Educ. Ass'n*, 306 So. 3d 1202, 1214 (Fla. 1st DCA 2020). The alleged injury may not be remote or speculative. *Int'l Jai-Alai Players Ass'n v. Florida Pari-Mutuel Com'n*, 561 So. 2d 1224, 1226 (Fla. 3d DCA 1990). Applying these considerations, the Petition falls short under the first prong of *Agrico*.

The net effect of the Consent Order is to resolve a dispute between the Department and WCI concerning the SSL Lease. A consent order presupposes the consent of WCI; thus, if a third party successfully challenges a consent order, the Department cannot unilaterally change the requirements of a consent order. Therefore, if the Petitioner were to prevail in its challenge, the resulting final order would only set aside the Consent Order and return the Department and WCI to their original position. The Petitioner does not allege that if the Department were to set aside

the Consent Order, the Petitioner would reap any benefit; conversely, Petitioner does not allege that it will suffer any injury if the Department does not set aside the Consent Order. Accepting the allegations of the Amended Petition as true, the Petitioner has failed to show a redressable injury or otherwise meet the first prong of the *Agrico* test. The Amended Petition must be dismissed for lack of standing.

### **Failure to Comply with Rule Requirements for Petitions**

The Department has a statutory duty to review petitions carefully for substantial compliance with rule 28-106.201(2), Florida Administrative Code. § 120.569(2)(c), Fla. Stat. Rule 28-106.201(2) sets forth what must be included in a petition for a formal administrative hearing. The Amended Petition lacks some of the items required by the rule. Specifically, the Petition does not include any of the following items:

- . . . (f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and

For these reasons, the Amended Petition under consideration in this order must be dismissed as required by section 120.569(2)(c) of the Florida Statutes. *See Brookwood Extended Care Center of Homestead, LLP v. Agency for Healthcare Admin.*, 870 So. 2d 834, 841 (Fla. 3d DCA 2003). The Petition alleges, without further elaboration, that the execution of the Consent Order would deprive it of rights to due process under the Florida Constitution or the United States Constitution.

The Department lacks the authority to consider or determine constitutional issues. *Florida Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 849 (Fla. 1st DCA 2002). The Petition does not cite or refer to any rule or statute that would require reversal or modification of the Consent Order. Indeed, the Petition suggests no factual or legal basis to suggest that the

Department should set aside the Consent Order. *See Arlington Ridge Community Association, Inc. v. GI Shavings, LLC, supra; M.A.B.E. Properties, Inc. v. Dep't of Env't'l Prot, supra.* The Department must dismiss the Petition, with leave to amend, because it does not apply with the rule quoted above.

### **Timeliness**

The Petitioner states that it received notice of the Department's action on October 25, 2022. Florida Administrative Code Rule 62-110.106(3) and the notice provided to the Petitioner requires that persons whose substantial interests are affected by the agency's decision must file a petition for an administrative hearing in the Department's Office of General Counsel within 21 days of publication of notice or receipt of notice, whichever occurs first. *See Fla. Admin. Code R. 62-110.106; City of LaBelle v. Bio-Med Servs., Inc.*, 598 So. 2d 207, 208 (Fla. 2d DCA 1992).

Florida Administrative Code Rule 62-110.106(3)(b) provides that the failure to file a petition within the applicable time period constitutes a waiver of any right to request an administrative hearing under Chapter 120, Florida Statutes. The Petitioner received notice on October 25, 2022. The Petitioner had until November 15, 2022 to file a petition. The Petition was received on November 16, 2022; therefore, it is untimely. The Petitioner's failure to timely file the Petition in this proceeding constitutes such a waiver of its right to request an administrative proceeding under Chapter 120, Florida Statutes. *See Fla. Admin. Code R. 62-110.106(3)(b); Env'tl. Resource Assoc. of Fla., Inc. v. Dep't of General Servs.*, 624 So. 2d 330, 331 (Fla. 1st DCA 1993) (reflecting that appellant waived its right to a hearing when it failed to avail itself of the opportunity provided by agency's notice). Nevertheless, under section 120.569(2)(c), Florida Statutes, it appears appropriate to provide an opportunity to cure the



defect before the Department conclusively denies the request as untimely. Petitioner may attempt to cure the defect in an amended petition.

IT IS THEREFORE ORDERED:

A. The Petition is DISMISSED, without prejudice, and the Petitioners are granted leave to file an amended petition providing the additional information listed above. Any amended petition must comply with all the requirements of Florida Administrative Code Rule 28-106.201(2).

B. Any amended petition must be filed with the Agency Clerk, [Agency\\_Clerk@dep.state.fl.us](mailto:Agency_Clerk@dep.state.fl.us), Department of Environmental Protection, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, by 5 p.m. EST, within fifteen (15) days after the date set forth in the certificate of service on the last page of this order.

C. This order constitutes final agency action of the Department, unless a timely amended petition is filed in compliance with this order.

Any party to this proceeding has the right to seek judicial review of this order under Section 120.68, Florida Statutes, by filing a notice of appeal under Rules 9.110 and 9.190, 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 fee with the appropriate district court of appeal. The notice of appeal must be filed within thirty days after the date this order is filed with the clerk of the Department.

DONE AND ORDERED this 26th day of January 2023, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



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CHADWICK R. STEVENS  
Acting General Counsel

3900 Commonwealth Boulevard  
Mail Station 35  
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52,  
FLORIDA STATUTES, WITH THE DESIGNATED  
DEPARTMENT CLERK, RECEIPT OF WHICH IS  
HEREBY ACKNOWLEDGED.

Syndie Kinsey Digitally signed  
by Syndie Kinsey  
Date: 2023.01.26  
11:15:48 -05'00'

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CLERK

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DATE

**CERTIFICATE OF SERVICE**

I CERTIFY that a true copy of the foregoing was emailed to William Butterworth at [wb4@me.com](mailto:wb4@me.com), to Herschel Vinyard at [Herschel.Vinyard@arlaw.com](mailto:Herschel.Vinyard@arlaw.com) and to Scott Keiling at [Scott.Keiling@Lennar.com](mailto:Scott.Keiling@Lennar.com), on this 26th day of January 2023.

*/s/ Jeffrey Brown*

\_\_\_\_\_  
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