

**STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
DIVISION OF ADMINISTRATIVE HEARINGS**

MATLACHA CIVIC ASSOCIATION, INC.,  
SANIBEL-CAPTIVA CONSERVATION FOUNDATION,  
CALUSA WATERKEEPER, DANIEL CARNEY,  
JAMES COLLIER, KEVIN SPARKS,  
and KATHLEEN R. WALSH

Petitioners,

OGC CASE NO. 23-0377

v.

CITY OF CAPE CORAL and  
STATE OF FLORIDA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION

Respondents.

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**PETITION FOR ADMINISTRATIVE HEARING**

Petitioners request an administrative hearing to challenge the Florida Department of Environmental Protection’s (“FDEP” or “Department”) Notice of Intent to Issue an Environmental Resource Permit (“ERP”) to the City of Cape Coral for removal of the Chiquita Boat Lock (“NOI”). The NOI was issued and signed on February 17, 2023, by Jennifer Carpenter, FDEP Director of District Management for the South Florida District.

Petitioners contend that the Application fails to meet any of the standards required under Florida law. Moreover, as preliminary to any hearing, Petitioners contend that the Department engaged in a fatal due process error in issuing the NOI. The City of Cape Coral’s operation of the Chiquita Boat Lock and its South Spreader Canal is governed by the terms of FDEP Consent Order No. 15, and its subsequent amendments. Consent Order No. 15 requires Cape Coral – among other obligations – to maintain the Chiquita Boat Lock in place. The Department cannot issue an NOI for removal of the Lock without first processing and approving an application for

amendment of the Consent Order. In order to remove the Chiquita Boat Lock, the City of Cape Coral and FDEP must first proceed with the Notice and Hearing provisions required by Section 120.57, Florida Statutes. Such Notice and Hearing process would afford all persons and entities substantially affected by an amendment of Consent Order No. 15 to appear to contest such an amendment. Such substantially affected persons would include, for example, the BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA, a Grantee of thousands of acres of mangrove wilderness under the original terms of Consent Order No. 15. We discuss this obstacle further at Paras. 22-33.

## **INTRODUCTION**

1. The Chiquita Boat Lock is a water detention barrier across the South Spreader Waterway in the City of Cape Coral. The purpose of the Chiquita Lock is to separate the canal waters of the southern end of the City from the navigable waters of the United States at the Caloosahatchee River. The Chiquita Lock and the South Spreader Waterway (“SSW”) were constructed over 30 years ago by the early developers of Cape Coral (collectively identified as “GAC”) to remedy a Clean Water Act enforcement action brought in 1977 by the predecessor of FDEP, the Florida Department of Environmental Regulation (“DER”).

2. Consent Order No. 15 (April 19, 1977), which resolved the enforcement action, also required GAC to construct a North Spreader Waterway (“NSW”). The North Spreader Waterway, in turn, included another detention barrier known as the Ceitus Boat Lift Barrier.

3. This history is only partially reported in Attachment C to the Application. Consent Order No. 15 imposed conditions: “to restrict destruction of the mangroves and to provide additional control and treatment of stormwater discharges” and “to be a freshwater system designed to retain and treat the stormwater runoff and then to provide uniform discharge

of the stormwater into the adjacent mangroves.” FDEP and the City of Cape Coral do not dispute that Consent Order No. 15 requires these structures, including the Chiquita Lock and the Ceitus Boat Lift Barrier.

4. Consent Order No. 15 remains in full force and effect today; yet, the City of Cape Coral has applied for an ERP to remove the Chiquita Boat Lock. The City has offered only one reason for the request: to allow boaters to navigate the Spreader Waterway without having to wait for operation of the Lock.

5. There is no environmental purpose whatsoever served by removal of the Chiquita Lock. On the contrary, its removal will cause significant environmental damage. Moreover, the additional elements of Cape Coral’s proposed “Sustainability Program” do not require issuance of an ERP. Those elements, as summarized in Attachment B, are the following: “The program will include two stormwater improvement projects; environmental monitoring for smalltooth sawfish; [and] enhancement to mangrove, upland, and subtidal habitats along the Waterway, . . .” (Attachment B at B-5). Therefore, it is clear that the proposed “Sustainability Program” is an illegitimate vehicle to seek amendment of Consent Order No. 15 without proper notice of any proposed amendment to affected parties.

6. The State of Florida and the City of Cape Coral are bound to maintain the Chiquita Boat Lock by the terms of a Warranty Deed of April 12, 1977, which was executed as a requirement of Consent Order No. 15. The Warranty Deed transferred thousands of acres of mangrove wetlands originally owned by GAC to the BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA in order that the North and South Spreader Waterways be maintained as designed and as constructed by the original developer, GAC. The State of Florida, and hence its Department of Environmental

Protection, and the City of Cape Coral are obligated under the Warranty Deed and Consent Order No. 15 to maintain those lands in their natural state in an environmentally responsible manner. Both have failed to do so, as admitted in Attachment B to the Application. The City states that because it has not maintained the SSW, the Chiquita Lock no longer serves its intended purpose. Rather than remedying that failure, the City asks that the Chiquita Lock be removed so that the pollutants it says enter the Matlacha Aquatic Preserve now can be diverted to the Caloosahatchee River.

### **PETITIONERS AND PARTIES AFFECTED**

7. The agency which issued the NOI is the Florida Department of Environmental Protection, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000. The Department's File No. is 244816-005. Director Jennifer Carpenter recently assumed responsibility for FDEP oversight in the City of Cape Coral. Her predecessor, John Iglehart, held those responsibilities for over thirty years.

8. The applicant for the permit is the City of Cape Coral, 1015 Cultural Park Boulevard, Cape Coral, Florida 33990.

9. Petitioners are the Matlacha Civic Association, Inc., a non-profit association for the residents of the islands of Matlacha, Florida; Sanibel-Captiva Conservation Foundation; Calusa Waterkeeper; Cape Coral City residents Daniel Carney, James Collier, and Kevin Sparks; and Matlacha resident Kathleen R. Walsh. The additional information required by Rule 28-106.201(b), F.A.C., is contained in Exhibit 1, attached to this Petition.

## PETITIONERS' SUBSTANTIAL INTERESTS

10. FDEP has issued its NOI for an ERP to remove the Chiquita Boat Lock in accordance with Part IV of Chapter 373, Florida Statutes. In the NOI, FDEP acknowledges the potential adverse impact of the removal of the Chiquita Boat Lock:

The Department has determined that the proposed activity, because of its size, potential effect on the environment or the public, controversial nature, or location, is likely to have a heightened public concern or likelihood of request for administrative proceedings.

(NOI at 5). Section 373.016 (F.S.) declares the policy of the State, in relevant part, “to minimize degradation of water resources caused by the discharge of stormwater”; “to preserve natural resources, fish, and wildlife”; “to promote recreational development, protect public lands, and assist in maintaining the navigability of rivers and harbors”; and “otherwise to promote the health, safety, and general welfare of the people of this state.” In Section 403.021 (F.S.), the legislature also declares that: “The pollution of the air and waters of this state constitutes a menace to public health and welfare; creates public nuisances; is harmful to wildlife and fish and other aquatic life; and impairs domestic, agricultural, industrial, recreational, and other beneficial uses of air and water.”

11. Thus, the intended beneficiaries of Chapter 373, Part IV, are the affected coastal aquatic ecosystems and members of the public who use and enjoy those ecosystems, live near those ecosystems, and/or depend on those ecosystems being healthy for their enjoyment and livelihoods, and the affected communities and members of those communities who are suffering health impacts as a result of the pollutants in the water and air.

12. All Petitioners will suffer injury in fact of sufficient immediacy to entitle them to a hearing, and Petitioners’ substantial injury is of a type and nature a hearing is intended to protect. Petitioners will suffer direct, immediate, and irreparable harm if the Chiquita Boat Lock

is removed. The Chiquita Lock was originally constructed in the late 1970's and early 80's as part of the Spreader Waterway System in mitigation of a Clean Water Act Section 404 violation. The Waterway System was designed to maintain natural flows of water which preexisted the canals. The removal of the Lock will alter the natural flow of water and allow direct flow of polluted canal waters into protected natural resource areas utilized by Petitioners, thus directly affecting their use and enjoyment of the water and natural resources of the area including Matlacha Pass Aquatic Preserve, San Carlos Bay, and the waters of Sanibel, Captiva, and Pine Islands. Petitioners allege that removal of the Chiquita Lock will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state, including manatees and the habitat of the smalltooth sawfish.

13. In connection with the remediation of the Clean Water Act violations in the late 70s, the FDEP and the City of Cape Coral are obligated by the Warranty Deed and Consent Order No. 15 to maintain the Spreader Waterways and the Chiquita Lock. Petitioners are direct beneficiaries of Consent Order No. 15 and the Warranty Deed, which Petitioners maintain prevents the removal of the Chiquita Boat Lock.

14. The Matlacha Civic Association is a Florida not-for-profit corporation, tax exempt as an IRS Section 501(c)(3) organization, located in Matlacha, Florida, in unincorporated Lee County. The principal purpose of the Association is to "Provide a unified voice on civic problems so that the best interests of Matlacha can be effectively presented to our County Commissioners, State Legislatures, other elected officials and the general public." The Association has over 130 members, residents of tiny islands with approximately 600 registered voters, almost all of whom live on canals. The waters surrounding Matlacha are impaired from nutrients, silt and other CWA-classed pollutants emanating from the Cape Coral Spreader

Waterways. If the Chiquita Lock is removed, the impairment of the waterways will increase, and the mangrove wetlands on the eastern edge of the Matlacha Aquatic Preserve, an Outstanding Florida Water (Rule 62.302.700(9)(h), F.A.C.), will die.

15. Sanibel-Captiva Conservation Foundation (SCCF) is a non-profit organization, tax exempt as an IRS Section 501(c)(3) organization, located in Sanibel Florida, situated in Lee County. The mission of the organization is to “Protect and care for Southwest Florida’s coastal ecosystems.” The organization was founded in 1967 and has over 6,600 members who utilize the coastal habitats and wetlands of Sanibel, Captiva, the Caloosahatchee and the greater Southwest Florida area. The organization owns more than 2,000 acres of land in Southwest Florida, including approximately 44 acres of mangrove Wetlands south of the Chiquita Lock. The waters of the Caloosahatchee are impaired for nutrients. If the Chiquita Lock is removed, the impairment of the Caloosahatchee estuary will increase, and the mangrove wetlands that are part of the larger mangrove ecosystem situated partly on SCCF lands may be impacted.

16. Calusa Waterkeeper is a not-for-profit organization with a mission to protect and restore the Caloosahatchee River from Lake Okeechobee to the coastal waters. The organization averages approximately 400 active members and donors each year, who are primarily located in Lee County, including Cape Coral, Fort Myers, Matlacha, Sanibel & Pine Islands, and engage in a variety of recreational activities in our waterways. Calusa Waterkeeper's primary concerns regarding the proposed removal of Chiquita Lock and other state-mandated control structures in Cape Coral, are that the lack of detainment of city storm water will increase total nitrogen and other pollutant loading to the Caloosahatchee River and Matlacha Pass, and that the lower water levels in the spreader system will negatively impact the health of mangroves in the area, among

other potential impacts. The organization, its members and volunteers, contend that the removal of the Chiquita Boat Lock will impair the health of the adjacent waterbodies and ecosystems.

17. Daniel Carney is a resident of Cape Coral. He is an officer with the Reel Anglers Fishing Club based in Cape Coral, the Tidal Zone Ranger Leader for the Calusa Waterkeeper, a member of the Coastal Conservation Association, a member of The Captains for Clean Water and Secretary for the Gold Coast Estates Association. As a dedicated fisherman and someone in tune with the decline in water quality in Southwest Florida, Mr. Carney strongly opposes the removal of the Chiquita Lock. The removal of the lock will negatively impact the water quality of the water downstream from the lock, reduce the water levels in the canals above the lock and create a saline environment that can become a breeding ground for harmful algae blooms. The downstream habitat is also critical habitat for the endangered smalltooth sawfish. This habitat would be changed forever with the permanent removal of the Chiquita Lock. As a boater and waterman, Mr. Carney believes the justification for removal of the lock is far outweighed by the risk of damages to the environment. Cape Coral already fails to meet the BMAP standards. With continued growth, the nitrogen and phosphate loads will continue to increase.

18. James Collier is a resident of Cape Coral, living there since 2006. He is an active member of multiple fishing clubs, Captains for Clean Water, the Caloosa Waterkeeper, Vote Water, and the Coastal Conservation Association. Mr. Collier is seriously involved in the fishing and boating community in the SW Florida region, with broad on-the-water experience from Charlotte Harbor to Everglades National Park. He is also very involved in efforts to protect and conserve wildlife in Cape Coral and the surrounding area. Mr. Collier contends the removal of the Chiquita Lock would result in significant degradation of the marine environment surrounding the site. Mr. Collier has been at Serenia Vista Park (the location of the now-removed Ceitus boat



lift) on a regular basis for several years and observed the degradation in that area first hand. The area drained by the canal system above the Chiquita Lock is quite large and the Lock should be left in place (improved by repair or replacement) to preserve the mangrove habitat. Hurricane Ian seriously damaged mangroves all around the Lock and in Lee County in general. These trees are a big part of hurricane protection and we needed all the protection we had from Ian. The Lock being maintained will help reduce the die-off of seagrass and oysters in the Caloosahatchee and Pine Island Sound. The entire area, including the habitat for smalltooth sawfish and other species, would be harmed by the removal of the Lock. Mr. Collier has seen first-hand the sad results in the North Spreader Canal after the removal of the boat lift. Removal of the Lock will see those results repeated in the South Spreader. Still further, Mr. Collier the Lock serves as an important safety moderator of traffic in the area of the Lock. As a resident, boater and avid outdoorsman, removal of the Lock will adversely impact his enjoyment of the water and ecosystem.

19. Kevin Sparks lives in Southwest Cape Coral. He and his wife and became permanent residents of Cape Coral in 2009. They came to the Cape for the fishing and boating. Since then the water quality and quality of life in general, especially for fishers and boaters, has declined. He is concerned, based on the evidence he has reviewed, that the removal of the Chiquita lock will exacerbate the already declining water quality in and around Cape Coral. Mr. Sparks has traversed through the lock many times at all times of the day and while it can be frustrating at times, in his view, and again based on the evidence he has seen, this is a small price to pay for the risk of further damage to our water environment. Mr. Sparks will be deprived of his enjoyment of the waters in his ecosystem by removal of the Lock.

20. Kathleen R. Walsh is a resident of Matlacha, living on the waters of the Matlacha Aquatic Preserve. She is a boater, fisherman, and kayaker enjoying the waterways which will be adversely affected by removal of the Chiquita Boat Lock.

### **RECEIPT OF NOTICE**

21. Petitioners received notice of the NOI when it was published by the City of Cape Coral on March 3, 2023. Petitioners were granted an extension of time by the Department to file a petition to and including April 18, 2023. On April 11, 2023, Petitioners requested a second extension of time to May 5, 2023. The Department denied the request on April 12, 2023. The one-day pendency of the second request for an extension tolled the time to file a petition to April 19, 2023. Consequently, this Petition is timely filed.

### **STATEMENT OF ULTIMATE FACTS AND ARGUMENT AS TO HOW THE FACTS, RULES, STATUTES AND LAW REQUIRE REVERSAL OF THE DEPARTMENT'S NOTICE OF INTENT TO ISSUE PERMIT**

- A. The NOI Violates Consent Order No. 15 and the Obligations of the Warranty Deed of 1977; Hence, FDEP and Cape Coral Must Proceed through Section 120.57, Florida Statutes, with Notice and Hearing to Amend the Consent Order.**

22. In the mid-1970's, the Co-Trustees of Gulf American Corporation, GAC Properties Credit, Inc., and GAC Properties, Inc. (collectively referred to herein as "GAC") filed original permit applications, after work commenced, for a dredge and fill work project that created the canal system in Cape Coral with the FDEP's predecessor agency, the Department of Environmental Regulation ("DER"). Today, Cape Coral has over 400 miles of canals, the largest municipal canal system in the world. Under today's federal and state water quality standards, such a canal system would never be permitted.

23. In 1976, DER notified GAC that it intended to deny the permit applications because the project would result, in part, "in long term degradation of water quality of the coast

ecosystem"; "alter the existing watershed by eliminating the natural drainage pattern"; "accumulation of sediment, debris, nutrients, and toxic substances"; "creation of stagnant areas of water"; "interference with the conservation of fish, marine life, and wildlife, and other natural Resources"; and, "destruction of natural marine habitats, grass flats suitable as nursery or feeding grounds for marine life . . . ." DER also charged that "Major discharges at the beginning of the wet season or during a major storm will deliver a massive slug of pollutants directly into the coastal waters." Removal of the Chiquita Boat Lock will cause all of the same environmental hazards which first caused DER to take action against GAC in 1976.

24. Accordingly, in 1977, DER entered into Consent Order No. 15 with GAC to create the Spreader Waterway System and detention control systems, including locks and barriers. The terms of Consent Order No. 15 resolved numerous violations of Chapters 253 and 403, Florida Statutes, and the Clean Water Act, Public Law 92-500, and allowed the development of the City of Cape Coral. (Consent Order No. 15, April 19, 1977, attached as Exhibit 2).

25. In order to resolve these water resource violations, Consent Order No. 15 more specifically required GAC to construct a water detention system consisting of a "spreader waterway to serve as a water distribution system for intercepting and releasing discharges of waters from certain areas of the Cape Coral development" in order to "buffer, treat, and improve water quality before it reaches the Matlacha Pass [on the north] and the Caloosahatchee River [on the south]." (Consent Order No. 15 at 1, Exhibit 2).

26. In addition – due to water quality problems within the interior canal system and in order to prevent direct canal connections to the waters of the State – Consent Order 15 also required GAC to install three barriers and boat lifts, including what is now the Chiquita Lock,

along the spreader waterways to retain pollutants while providing for navigable access to Cape Coral canals.

27. This Spreader Waterway System was designed by Charles H. King, Jr., M., ASCE, and Gerald M. Ward, M.E. Their design was a ground-breaking step in the protection of mangrove environments. The engineering and environmental objectives of the Spreader Waterway System designed by Messrs. King and Ward were the following:

- (a) to negate the transportation and deposition of colloidal material on the shallow bay bottom flora and fauna in the Matlacha Estuary;
- (b) to keep the canal water table at a high level to prevent subsurface salt water intrusion;
- (c) to provide an environmentally acceptable manner of controlling nutrient laden runoff into the Matlacha Estuary in compliance with the newly enacted federal Clean Water Act;
- (d) to reestablish the predevelopment sheetflow of water through the mangrove and grasses to the west; and,
- (e) to assimilate the pollutants from the uplands in the spreader waterways and in the mangrove zones so that good quality water enters the Matlacha Estuary.

*See, generally,* King and Ward, “The Perimeter Canal: a New Approach to Discharge Urban Water Into a Coastal Mangrove Area,” at 99, Selected Papers. Sponsored by Irrigation and Drainage Division and Colorado Section, American Society of Civil Engineers,” (1973). More specifically, Messrs. King and Ward wrote:

Matlacha Pass and Charlotte Harbor are shallow water ecosystems which would be significantly damaged if upland runoff was allowed to flow directly into the estuarine areas via excavated channels. The developer will combine urban development, recreation, and preservation of sensitive ecological areas through the use of the perimeter waterway.

This waterway will perform important environmental functions in collecting and allowing restricted, biologically screened discharge of the upland runoff. By collecting and restricting the upland runoff until deleterious components can be assimilated by natural vegetation, the perimeter waterway conceivably may improve water quality. The waterway will also act as a physical buffer between the developed and undeveloped areas in addition to being a

functioning part of the ecosystem. Through design the west edge of the waterway will maintain simulated sheet flow through the mangroves and grasses. Based on present observations, the mangroves will flourish in the nutrients and sediments deposited by the runoff, and the net productivity in the life chain cycle is expected to increase.

(*Id.* at 114-15). They described the Matlacha Estuary as “the most valuable marine habitat in the State.” (*Id.* at 108).

28. Consent Order No. 15 notably required GAC to relinquish to the State of Florida the mangrove wilderness lands it had purchased or threatened which lay west of the North and South Spreader Canals to the shores of the Matlacha Estuary. DER required GAC to divest the precious mangrove wetlands, “Because of the water quality benefits to be derived from the tidal wetlands surrounding Cape Coral and the treatment these natural areas provide for any indirect discharges from the Cape Coral area . . . .” (Consent Order No. 15 at 3, Exhibit 2).

29. Subsequently, GAC vested all its holdings and responsibilities in the City of Cape Coral. As a result, the City of Cape Coral and FDEP are now the responsible parties under Consent Order No. 15 and its amendments.

30. The State of Florida, and hence its Department of Environmental Protection, is obligated under the Warranty Deed to maintain those lands in their natural state:

At no time shall [the State of Florida] allow a use to be made of the premises which shall be inconsistent with preservation of same in accordance with acceptable principles of environmental conservation and shall retain the property’s natural character and quality.

(Warranty Deed, April 12, 1977, at 3, attached as Exhibit 3).

31. In furtherance of this goal, the Warranty Deed further provides as follows with respect to the Spreader Waterway:

Such waterway, in the collection of said runoff waters, is designed to allow for disposal of the excess waters so collected over and across the most westerly or southerly banks thereof onto the lands herein conveyed which lie waterward of

such water. The construction of all the foregoing waterway is authorized by the Department of Environmental Regulation and other regulatory agencies, *and the operation thereof in the collection and disposal of such waters requires that same be allowed to flow toward navigable waters and across the lands herein conveyed*  
.....

(*Id.* at 3)(emphasis supplied).

32. The provisions of the Consent Order were included in the City's MS4 application for compliance with the National Pollutant Discharge Elimination System's ("NPDES") requirements to reduce the generation of stormwater pollutants to waters of the state. The intent of Consent Order No. 15 and subsequent MS4 permits for Cape Coral was to isolate the stormwater runoff from Cape Coral for detention and treatment of pollutants in the Spreader Waterway System. FDEP is currently reviewing the Lee County MS4 permit renewal application that includes Cape Coral as a co-permittee. Removal of the Chiquita Lock in the South Spreader will violate the NPDES provisions for the Cape Coral MS4 by conjoining these waters with waters of the United States without the isolation and treatment legally required. This NPDES permit cannot be reissued without reasonable assurance that discharges from the MS4 system will not cause or contribute to the impairment of a downstream waterbody. In this case the downstream waterbody is the Caloosahatchee Estuary that is impaired for nutrients (total nitrogen).

33. In April of 2008, due to vandalism and storm damage around the Ceitus Boat Lift Barrier on the North Spreader Waterway, the City requested authorization from FDEP to pursue an Ecosystem Management Agreement (EMA) pursuant to Section 403.0752, Florida, Statutes, in an effort to pursue a resolution among stakeholders regarding how to deal with the Ceitus Boat Lift Barrier. In order to do so, FDEP issued Notice pursuant to Section 120.57, Florida Statutes, of the intent to modify the Consent Order to allow for the mediation. The Amended Order, dated

May 20, 2008 in the files of FDEP, provided that if stakeholders did not agree on how to proceed with the restoration or removal of the Ceitus Boat Lift Barrier, the City of Cape Coral was required to submit an ERP Application to rebuild the Ceitus Boat Lift Barrier. (See Second Amended Consent Order, attached as Exhibit 4). Although the parties failed to achieve agreement, the City of Cape Coral refused to submit an ERP Application to rebuild the Ceitus Boat Lift Barrier. Nonetheless, according to its own terms the provisions of Consent Order No. 15 remain in full force and effect. Therefore, the Department erred in issuing the NOI in this matter rather than noticing its intent to amend, yet again, Consent Order No. 15. Without first proceeding through that process, the Department erred.

**B. Removal of the Chiquita Boat Lock will Increase the Level of Pollutants Delivered into the Waters of the United States and Violate the Existing MS 4 Permit.**

34. The litany of “reasonable assurances” in the Application are unsupported by fact. However, there is an existing model demonstrating without doubt that removal of the Chiquita Lock will increase pollutants delivered to the Caloosahatchee. As noted above, the City of Cape Coral refused to rebuild the Ceitus Boat Lift Barrier on the North Spreader Waterway. As a comparative example, nitrogen concentrations in the North Spreader Waterway (the Cape Coral MS4 discharge) have exhibited an increasing trend since removal of the Ceitus Boat Lift Barrier in 2008. Consequently, the EPA has declared the Matlacha Pass Aquatic Preserve impaired, adding it to the section 303(d) list in August of 2015.

35. The City of Cape Coral admits, in fact, that when the Ceitus Barrier on the North Spreader Waterway was removed in 2008, “The blowout rapidly moved many mangrove trees, sand, silt, muck, and rocks into the canal below the barrier and then out into open waters of Matlacha Pass, where seagrasses and other benthic habitats were buried beneath the sediment.”

(ERP Application Attachment B at B-50). The true history of the NSW demonstrates that what the City now calls a “blowout” was actually the result of Cape Coral’s failure to maintain the NSW pursuant to requirements of Consent Order No. 15, and its refusal to comply with the Second Amended Consent Order attached as Exhibit 4. The 2008 event is a *per se* violation of the Clean Water Act and persists to this day. The result of removing the Chiquita Lock will have a similar effect on the Caloosahatchee Estuary as compared to removal of the Ceitus Boat Lift Barrier. In this case, the Caloosahatchee Estuary is already verified impaired with a TMDL for TN. Removing the Chiquita Lock will eliminate the intended MS4 detention and treatment function of 797 acres (estimated at 3000 – 5000 acre feet) of the South Spreader system from the MS4 treatment area. As described by the Applicant in response to an FDEP RAI during processing of the first NOI to remove the Chiquita Lock, removing the lock will allow tidal influence and exchange to overwhelm or substantially change the hydraulic dynamics of the South Spreader treatment area. In effect, removing the lock will reduce the intended hydraulic functioning of the system. The intended function of the South Spreader System can only be maintained by isolating the treatment area and increasing the hydraulic residency time with the lock in place, currently required as part of the MS4 permit. This system can no longer be considered as a treatment area without the lock in place resulting in the necessary hydraulic residence time or detention needed to effectively sequester nitrogen and other pollutants from Cape Coral’s stormwater runoff.

36. Removing such an extensive volume of water from the current NPDES stormwater active treatment system eliminates reasonable assurance that the NPDES system will not contribute pollutants to a downstream waterbody already impaired for nutrient pollution. Furthermore, removing the Chiquita Lock will reduce the function of the treatment system



related to its water level enabling redistribution of Cape Coral stormwater from the spreader canals into the mangrove fringe before impacting waters of the state. All of these outcomes also violate the terms of Consent Order No. 15.

37. In regard to the continuing discharge of sediment from the Spreader Waterway System, one must note that the NOI is not the product of any legal review by either the FDEP or the City of Cape Coral. A prudent legal review would disclose that discharge of sediment – which is occurring regularly from the NSW now that the Ceitus Barrier has been removed – is a violation of the Clean Water Act. This form of sediment – which has overwhelmed the seagrass beds of the Matlacha Aquatic Preserve adjacent to the North Spreader Waterway – stays intact over time and thus continues to have roughly the same net polluting effect years or even decades after the time of their deposit. This condition is an ongoing violation of the Clean Water Act. *See, e.g., Sasser v. Administrator, U.S. E.P.A.*, 990 F.2d 127, 129 (4th Cir.1993); *Informed Citizens United, Inc. v. USX Corp.*, 36 F.Supp.2d 375, 377 (S.D.Tex.1999); *United States v. Reaves*, 923 F.Supp. 1530, 1534 (M.D.Fla.1996).

38. Violations are deemed “continuing” when the violator (1) illegally dumps fill material in wetlands or other federal waters; and (2) is in a position to remove the pollutants but fails to do so. *See, e.g., Sasser v. Administrator, U.S. E.P.A.*, 990 F.2d at 129; *Informed Citizens United, Inc. v. USX Corp.*, 36 F.Supp.2d at 377-78 (holding the “in violation” requirement satisfied by the continued presence of fill in wetlands); *United States v. Reaves*, 923 F.Supp. at 1534 (“Defendant's unpermitted discharge of dredged or fill materials into wetlands on the site is a continuing violation for as long as the fill remains.”); *United States v. Cumberland Farms*, 647 F.Supp. 1166, 1183-84 (D.Mass.1986), *aff'd* 826 F.2d 1151 (1st Cir.1987) (holding that the defendant violated the CWA not only for each day that it used a bulldozer or backhoe in

the wetlands but for each day that it allowed the illegal fill material to remain there); *Ctr. for Biological Diversity v. Marina Point Dev. Associates*, 434 F. Supp. 2d 789, 798 (C.D. Cal. 2006).

39. The most recent data on pollution of the Caloosahatchee Watershed is evidence that FDEP and its constituents are failing to protect our waters. Estimates of pollutant loading have increased dramatically from Cape Coral major outfalls during the past five years, as reported in the Cape Coral MS4 reports comparing 2014/2015 to 2019/2020. Total nitrogen, the parameter FDEP attributed to verified nutrient impairment in the Caloosahatchee estuary, San Carlos Bay, Pine Island Sound, and Matlacha Pass State Aquatic Preserve, increased from 251,148 pounds per year in the 2014/2015 to 927,703 pounds per year in 2019/2020, a 267 percent increase. The Caloosahatchee estuary has a TMDL adopted in 2009 for total nitrogen requiring a 22.8% non-point load reduction relative to the contribution to the overall anthropogenic load (F.A.C. 62-304.800). Total phosphorus loading increased 98 percent, BOD increased 108 percent, and TSS increased 137 percent when comparing the two time periods as reported by Cape Coral through its MS4 NPDES reporting. The recent 2022 Caloosahatchee River FDEP BMAP 5-Year review indicated that total nitrogen loading has significantly increased since the BMAP was adopted in 2012 and that nitrogen load reduction allocations to stakeholders will need to be increased by 1,938,241 pounds per year for TMDL attainment. Cape Coral is one of the BMAP stakeholders required to reduce TN loading. Concentrations for TN, TP, BOD and TSS estimated by Cape Coral from mean event concentration methodology for the 2019/2020 MS4 period were erroneously reported in the Cape Coral MS4 Year 4 Cycle 4 report as exactly the same as the 2014/2015 period. The reported mean event concentration for total phosphorus in the Cape Coral 2021 MS4 report was 0.159 ppm which is a 300 percent increase compared to the Estuary-

Specific Numeric Interpretations of the Narrative Nutrient Criterion of 0.040 ppm for the lower Caloosahatchee estuary (F.A.C. 62-302.532). Cape Coral has not reported MS4 total phosphorus mean event concentrations less than 0.118 going back to 2002.

**C. The City of Cape Coral Fails to Establish that Removal of the Chiquita Lock is Not Contrary to the Public Interest.**

40. Whether a proposed activity is in the public interest is governed by Section 373.414 (F.S.) which provides in pertinent part as follows:

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s.373.421(1), and is regulated under this part, is not contrary to the public interest or *is clearly in the public interest*, the governing board or the department *shall consider and balance* the following criteria:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
5. Whether the activity will be of a temporary or permanent nature;
6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and
7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

(Emphasis supplied).

41. The burden to demonstrate entitlement to an ERP permit is on the applicant, the City of Cape Coral. The Brown and Caldwell Engineering Report that accompanies the NOI says removal of the Chiquita Boat Lock is necessary “to improve navigability and boater safety.”

(ERP Application Attachment B at B-57). Although the United States Coast Guard monitors boater accidents in the tidal waters of the United States, Cape Coral has cited no evidence of any boating accidents at the Chiquita Boat Lock. This is so even though the terms of the FDEP Permit allowing the Lock to remain open on incoming tides required monitoring of boat safety.

42. Nor is there any indication of the magnitude of boater use of the Chiquita Boat Lock. In 2003, Cape Coral commissioned the design of a dual high speed lock for the Chiquita Boat Lock. In the report on the dual boat lock, it was stated that in 2001-2002, boater transport at the Chiquita Lock averaged 200 passages a month, or less than 7 a day. The report noted 30-45 minute waits on weekends. However, the report noted that the dual lock would have increased boat passage by 250% over the existing lock. The report also recommended that both the dual lock and the single lock remain in place to accommodate maintenance. No similar data has been produced for the current time period. In addition, upon information and belief the City of Cape Coral continues to investigate replacement of the Chiquita Boat Lock with a high-speed lock, apparently at a proposed cost of \$40 million. Charlotte County is currently in the process of building a parallel lock at its lock located at Cattle Dock Point. Cape Coral has ample assets, as it is reported as the fastest growing city in Florida, if not in the entire United States.

43. Nor has Cape Coral produced any data as to how many boat owners are located adjacent to the South Spreader Waterway. In contrast, Cape Coral in 2015 operated 5 boat launch ramps. During that year, there were a total of 15,042 paid boat launches among all five ramps. By far the majority occurred in the waters served by the North Spreader Waterway. Cape Coral has not explored creation of additional boat launching facilities south of the Chiquita Boat Lock, nor has it offered any information as to whether the boat launching facilities on the Caloosahatchee are overwhelmed with boaters.

44 More particularly, the NOI and the Brown and Caldwell Engineering Report say nothing about installation of a high speed dual lock as an alternative to creating an open system that admittedly will further pollute the Estuary.

45. The NOI also does not take into account the adverse impact of falling canal levels. In the 2018, during low canal levels, seawalls of Cape Coral residents fell into the canals. Cape Coral required these residents to rebuild their seawalls at an average expense of \$30,000. In addition, Cape Coral entered into a million dollar contract with a northern neighbor to release millions of gallons of fresh water south into the Cape Coral canals. While the folly of this purchase is self-evident from the fact that these waters simply flow out the open North Spreader canal, the purchase would be entirely unnecessary with both the Chiquita Lock and Ceitus Boat Lift Barrier in place. In addition, Cape Coral regularly declares emergency water restrictions on its residents because of low water levels in the canals. These water restrictions are necessary for two reasons: (1) the canal water provides approximately 50% of the irrigation water for lawns; and (2) Cape Coral requires residential properties to have lawns. Moreover, the NOI takes no account of the impact of falling canal levels on the very boaters it intends to benefit. Boats of even average draft will not be able to negotiate canals with depths of 2-3 feet. The larger boats which dock in Cape Harbour Marina will be left sitting on their expensive props, and their owners will depart Cape Coral as a mooring option.

46. There is no actual balancing of the seven criteria set forth in Section 373.414(a) (F.S.) in the Application. FDEP admits in the NOI that removal of the Chiquita Boat Lock will have an adverse impact on the wetlands and the waters of the United States. Rather than weighing that impact against calming the nerves of an unknown number of weekend boaters, the ERP proclaims that Cape Coral should receive credit for other projects and promised projects.

The problem with this observation is two-fold: (1) federal law requires proof that an activity adversely affecting federal waters is “unavoidable” before a permittee can be given credit for mitigation measures; and, (2) the mitigation measures offered by Cape Coral have no impact on ameliorating the adverse impact of removing the Chiquita Boat Lock. The City of Cape Coral must meet this standard before it has complied with federal laws. The clearance from ACOE upon which Cape Coral relies for its Application was issued in 2016.

47. In conducting the balancing test required by Section 373.414(a) (F.S.), DOAH also must take into consideration the behavior of FDEP and the City of Cape Coral since the turn of the century. Quite simply, both have Unclean Hands, as they have not acted as good stewards of the waterways.

48. On March 11, 2020, the Department issued a Final Order denying Cape Coral’s first ERP Application to Remove the Chiquita Lock. Under elements of *res judicata*, issue preclusion, and collateral estoppel, the following facts and rulings are binding in this adjudication (reference is to the numbered paragraphs of the adopted order of Judge Ffolkes; with emphasis added in italics:

33. The City's expert, Anthony Janicki, Ph.D., testified that nitrogen concentrations in the Caloosahatchee River were higher than in the South Spreader Waterway in the years 2017 and 2018. Thus, he opined that if the Lock is removed, water from the South Spreader Waterway would not negatively impact the Caloosahatchee River. *However, the City's application was supported by an analysis, with more than a decade of monitoring data, which showed nitrogen concentration values were comparable inside the South Spreader Waterway and in the Caloosahatchee River.*

34. Dr. Janicki also used the Department's Hydrologic Simulation Program – FORTTRAN (HSPF) watershed model to estimate the Total Nitrogen (TN) loading that would enter the Caloosahatchee River through the Chiquita Lock. Dr. Janicki estimated that *TN loading to the Caloosahatchee River, after removal of the Chiquita Lock, would amount to 30,746 pounds per year.* The Caloosahatchee River is listed as impaired for nutrients and has a TN Total Maximum Daily Load (TMDL) that was set by the Department in 2009.

35. Dr. Janicki opined that removing the Lock would not result in adverse impacts to the surrounding environment. But the Petitioners obtained his concession that *his opinion was dependent on the City's completion of additional water quality enhancement projects in the future as part of its obligations under the Caloosahatchee Estuary Basin Management Action Plan (BMAP) for achieving the TN TMDL.*

38. The Petitioners proved by a preponderance of the competent and substantial evidence that *the City relied on future projects* to provide reasonable assurance that the removal of the Lock would not cause or contribute to violations of water quality standards in the Caloosahatchee River and the Matlacha Pass Aquatic Preserve.

40. The engineering report that supports the City's application stated that when the Lock is removed, the South Spreader Waterway behind the Lock will become tidally influenced. With the Lock removed, *the volume of daily water fluxes for the South Spreader Waterway would increase from zero cubic meters per day to 63,645 cubic meters per day. At the location of Breach 20, with the Lock removed, the volume of daily water fluxes would drastically decrease from 49,644 cubic meters per day to eight cubic meters per day.*

42. Mr. Erwin testified that Breach 20 was not a "breach." He described it as the location of a perpendicular intersection of the South Spreader Waterway with a small tidal creek, which connected to a tidal pond further back in the mangroves. Mr. Erwin testified that an "engineered sandbag concrete structure" was built at the shallow opening to limit the amount of flow into and out of this tidal creek system. But it was also designed to make sure that the tidal creek system "continued to get some amount of water." As found above, *Lock removal would drastically reduce the volume of daily water fluxes into and out of Breach 20's tidal creek system.*

43. *Mr. Erwin also testified that any issues with velocities or erosion would be exemplified by bed lowering, siltation, and stressed mangroves.* He persuasively testified, however, that there was no such evidence of erosion and there were "a lot of real healthy mangroves."

44. Mr. Erwin opined that *removal of the Lock would cause the South Spreader Waterway to go from a closed, mostly fresh water system, to a tidal saline system. He described the current salinity level in the South Spreader Waterway to be low enough to support low salinity vegetation and not high enough to support marine organisms like barnacles and oysters.*

45. The City's application actually supports this opinion. Using the Environmental Fluid Dynamics Code (EFDC) model developed by Dr. Janicki for this Lock removal project, comparisons were made describing the salinity distribution within the South Spreader Waterway. The model was run with and without the Lock, for both a wet and dry year.

46. Dr. Janicki testified, and the model showed, *that removal of the Lock would result in increased salinity above the Lock and decreased salinity downstream of the Lock*. However, he generally opined that the distribution of salinities was well within the normal ranges seen in this area. The City's application also concluded that the resultant salinities did not fall outside the preferred salinity ranges for seagrasses, oysters, and a wide variety of fish taxa. However, *Dr. Janicki did not address specific changes in vegetation and encroachment of marine organisms that would occur with the increase in salinity within the South Spreader Waterway*.

48. In addition, the City's application stated that removing the Lock would result in a drop in the water level of one to one and a half feet within the South Spreader Waterway. *Mr. Erwin credibly and persuasively testified that a drop in water level of only a few inches would have negative effects on the health of mangroves, and that a drop of a foot could result in substantial mangrove die-off*.

50. Mr. Erwin's credible and persuasive testimony was contrary to the City's contention that Lock removal would not result in adverse impacts to the mangrove wetlands adjacent to the South Spreader Waterway.

51. The City and the Department failed to provide reasonable assurances that removing the Lock would not have *adverse secondary impacts to the health of the mangrove wetlands community adjacent to the South Spreader Waterway*.

57. The City's literature review included a regional assessment by FWC's Fish and Wildlife Research Institute (FWRI) from 2006. Overall, the FWRI report concluded that the mouth of the Caloosahatchee River, at San Carlos Bay, was a "hot spot" for boat traffic coinciding with the shift and dispersal of manatees from winter refuge. The result was a "high risk of manatee motorboat collisions." In addition, testimony adduced at the hearing from an 18-year employee of Cape Harbour Marina, Mr. Frank Muto, was that *Lock removal would result in novice boaters increasing their speed, ignoring the no-wake and slow-speed zones, and presenting "a bigger hazard than the [L]ock ever has."*

79. . . . . The Petitioners proved by a preponderance of the competent and substantial evidence that *the City relied on future projects to provide reasonable assurance* that the removal of the Lock would not cause or contribute to violations of water quality standards in the Caloosahatchee River and Matlacha Pass Aquatic Preserve.

80. Such *reliance on future projects does not satisfy the required upfront demonstration that there is a substantial likelihood of compliance with standards, or "a substantial likelihood that the project will be successfully implemented."* See Metro. Dade Cnty. v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Those future projects were part of the BMAP process under Section 403.067, Florida Statutes, which the Department had recognized and incorporated into its original intent to issue and draft permit. See Joint Exhibit 1 at pp. 329 and 330. The March 1, 2019, second amendment eliminated the Department's previous finding that the City demonstrated



mitigation of adverse water quality impacts through its achievement of future project credits in the BMAP process.

89. The preponderance of the competent substantial evidence demonstrated that *the volume of flow through Breach 20, an adjacent tidal creek connected to Matlacha Pass, will drastically decrease*. Mr. Erwin testified that Breach 20 was designed to maintain water flow to this adjacent tidal creek system. He also persuasively testified that there was no evidence of erosion at Breach 20, and there were currently "a lot of real healthy mangroves."

90. Since the City's position was that the decrease in flow volume and in velocity at Breach 20 would cure a perceived "erosion" problem, any potential adverse impacts to the tidal creek system and mangrove wetlands were not addressed. *The undersigned's reasonable inferences from the record evidence are that the flow in the adjacent tidal creek system will be adversely impacted, and those "healthy mangroves" will also be adversely impacted. See Heifetz v. Dep't of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985)*("It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence."); *Berry v. Dep't of Env'tl. Reg., 530 So. 2d 1019, 1022 (Fla. 4<sup>th</sup> DCA 1988)*("[T]he agency may reject the findings of the hearing officer only when there is no competent substantial evidence from which the finding could reasonably be inferred." (citations omitted)).

95. Mr. Erwin's credible and persuasive testimony regarding adverse secondary impacts to the ecological health of the mangrove ecosystem adjacent to the South Spreader Waterway was in stark contrast to the City's contention that Lock removal was not expected to result in impacts to those mangrove wetlands.

96. The credible and persuasive evidence demonstrated *that Lock removal would adversely affect the smalltooth sawfish and its nursery habitat*. The credible and persuasive evidence also demonstrated that *Lock removal would increase the already high risk of manatee-motorboat collisions by inviting manatees into the South Spreader Waterway, a non-main-stem refuge, where novice boaters would present "a bigger hazard than the [L]ock ever has."*

97. The preponderance of the competent substantial evidence demonstrated that the City failed to provide reasonable assurances that the Project will not impact the values of *wetland and other surface water functions*.

102. The preponderance of the evidence supports a finding that the City's claims of navigational public safety concerns have less to do with navigational hazards, and *more to do with inexperienced and impatient boaters*. Even so, the direct impact of Lock removal will be to increase navigational access from the Caloosahatchee River to the South Spreader Waterway.

103. In addition, the preponderance of the evidence also supports a finding under factor one that *there will be adverse secondary impacts to the property of Cape Harbour Marina.*

104. Based on the above findings and conclusions, the Project will adversely affect the public interest factors associated with wetlands, fish and wildlife, and their habitat (factors two, four, and seven). Because the Project will be of a permanent nature, factor five of the public interest test falls on the negative side of the balancing test. Factor six is neutral.

105. The adverse secondary impacts that fall under factors one, two, four, five, and seven outweigh any perceived benefits under factors one and three. Therefore, after balancing the public interest factors, it is concluded that the Project fails the public interest balancing test and should not be approved. Under either review, the Project is contrary to the public interest, and is not clearly in the public interest.

#### **STATEMENT OF DISPUTED ISSUES OF MATERIAL FACT**

49. Removal of the Chiquita Lock will result in increased delivery of pollutants into the waters of the United States and damage to the mangrove wetlands.

50. The load reduction requirements of the BMAP utilized by FDEP are antiquated and do not represent current nitrogen loading.

51. Cape Coral's rapid and further anticipated growth will increase nutrient laden runoff into the Spreader Canal which is not accounted for in the NOI. Very recently, Cape Coral annexed hundreds of acres of mostly commercial properties which are unaccounted for in the ERP and current loading models.

52. The *2022 5-Year Review of the Caloosahatchee River and Estuary Basin Management Action Plan* reports that Cape Coral has only 1 project for nutrient improvement in process and 1 project in the planning stage. The reported 5-year average of TN load is actually 5,177,800 lbs./yr., which is an increase of 1,218,239 lbs./yr. over the predicted starting load. Current projects will not meet the 20-year milestone currently projected for the BMAP. Moreover, due to the uptrend in TN load, the practice of providing credits for such things as fertilizer ordinances should be re-evaluated for use in future BMAPS. Cape Coral relies in part on its own fertilizer ordinance to

proclaim its adherence to clean water. Nikki Morgan from FDEP reported at the Caloosahatchee River and Estuary and Everglades West Coast Basin Management Action Plans (BMAPs) Annual Meeting that the Department does not know why measured loading of TN is higher than what was modeled. In other words, the modeling on which the BMAP system is predicated bears no relation to quantitative analysis. To the extent the City of Cape Coral relies on its “compliance” with the BMAP process, the argument carries no quantitative weight.

53. The City of Cape Coral also has a history of over-promising when pressed on compliance standards. When constituents challenged the Cape Coral MS4 in 2016, Cape Coral promised it would upgrade its catch basins, but never did so. Similarly, Cape Coral refused to comply with the March 2008 Second Amended Consent Order No. 15 which required Cape Coral to replace the Ceitus Boat Lift Barrier. There is no reason to believe that with increased TN loading coming down the Caloosahatchee River that Cape Coral will meet its TN reduction levels, whenever those levels are determined.

54. The information relied upon by Cape Coral significantly predates Hurricane Ian. There is no information reported as to how much salt water breached the weirs of the Cape Coral canals, and the extent of damage to plant life and level of contamination of the detention ponds in Cape Coral. Yet, Cape Coral claims that removal of the Lock will be beneficial in the face of climate change and rising sea levels. Petitioners contend the opposite is true. Mangrove propagation is the best way to protect against climate change and certainly to protect against damage caused by a hurricane. The results of these benefits are clear after Hurricane Ian. Properly managed, the canals of Cape Coral can be used as a perfect mitigation system to protect fresh water and propagate mangrove systems. To argue that removal of the Lock would be a benefit against these future events is folly, as the upland damages from Hurricane Ian would have been even greater without the Lock in place.

55. FDEP Director Jennifer Carpenter erred in the following ways:
- a. Not requiring Cape Coral to conduct a nutrient budget study to ascertain the adverse impacts of removal of the Chiquita Lock
  - b. By granting 70,000 lbs of TN/yr reduction as a result of septic to sewer conversion. There is no data quantifying TN pollution from septic tanks. In addition, treated wastewater displacing septic would still deliver TN to the canal system and overall nutrient budget.
  - c. Awarding about 27K lbs. TN/yr reduction for using treated wastewater for lawn irrigation. There is no data supporting this assumption, and assumes too much sequestration of TN based on existing soil characteristics.
  - d. Giving Cape Coral credit for nitrogen load reduction for the Spreader Canals and freshwater canals. Those canals do not act as a “sink” for nitrogen assimilation; rather, they are a potential source of nitrogen flowing into waters of the United States. FDEP has granted about 28,000 lbs of TN/yr reduction credit from the detention sequestering of the freshwater canal system that flows into the South Spreader upstream of the lock. The freshwater canals are more likely a source due to their age of over 50 years and accumulated TN as a legacy component. Also, the canals were not designed as a modern wet detention basin on which TN sequestering estimates are based but were designed mostly to convey water off the landscape as flood control with highly variable hydraulic residence times.
  - e. Not recognizing that increased flow from removing the Chiquita Lock would depress salinity in the downstream area that is also a sawfish exclusion zone.
  - f. Failing to ascertain the level of sediment and pollutant dispersal into the Matlacha Aquatic Preserve from removal of the Chiquita Lock, despite ample evidence of the devastating

and continuing delivery of pollutants into the Matlacha Aquatic Preserve when the Ceitus Boat Lift Barrier was removed in 2008.

g. Failing to recognize that removing the Chiquita Lock would violate Cape Coral's MS4 permit. Removal of the lock creates an open and tidally influenced basin. This basin would represent the loss of about 800 acres of brackish treatment area within the existing MS4 jurisdiction and the entire South Spreader basin.

h. Failing to consider alternatives to removal of the Chiquita Lock to achieve the goal of boater safety. First, had FDEP and Cape Coral conducted regular maintenance of the Spreader Waterways, none of the so-called "breaches" on the western berm would currently exist. This maintenance is required by both Consent Order No. 15 and the Warranty Deed of 1977. Second, in 2002, Cape Coral engaged engineers to prepare plans for a dual boat lock system which should have been installed at both the Ceitus Barrier site and the Chiquita Lock site.

i. Failing to account for the fact that algae and aquatic vegetation mask total nutrient loading figures.

j. Concluding that the waters upland of the Chiquita Lock and those below the lock have similar characteristics regarding nutrient levels.

k. Concluding that Cape Coral's proposal complies with Section 401 of the Clean Water Act.

l. Concluding that Cape Coral's proposal is consistent with the Florida's Coastal Zone Management Program, as required by Section 307 of the Coastal Zone Management Act, 16 U.S.C. § 1456.

m. Concluding that Cape Coral's proposal conforms with State and federal environmental laws because she did not consider any evidence outside the FDEP file.

56. The removal of the Chiquita Lock will require dredging of the Spreader Waterway in order to maintain safe passage of vessels. No permit for such dredging is included in the NOI.

#### **RULES AND STATUTES WHICH REQUIRE DENIAL OF THE NOI**

57. Florida Statutes 373.016, Declaration of Policy. In Paras. 34-36 and 39, the Petition explains how the ERP would violate this important legislative statement of policy.

58. Florida Statutes 373.414, Public Interest Test. Violation of the Public Interest Test is described in Paras. 40-47.

59. Title 16 U.S.C. Section 1456, Coordination and Cooperation in Coastal Waters. The federal approvals relied upon by Cape Coral are out of date, and predicated upon inaccurate information provided by Cape Coral.

60. Title 16 U.S.C. Sections 1531, *et seq.*, Preservation of Fish, Wildlife, and Plants. In Para. 48, the Petitioners recount the findings of the Administrative Law Judge in the previous denial of removal of the Lock which demonstrate the failure to protect fish, wildlife, and the mangroves.

61. Title 33 U.S.C. Section 1311, Unlawful Discharge of Pollutants. Section A describes the unlawful discharge of pollutants by GAC, which would be replicated by removal of the Chiquita Lock. See also Para. 39.

62. Title 33 U.S.C. Section 1313, Implementation of Water Quality Standards. See Para. 39.

63. Title 33 U.S.C. Section 1341, Certification for Discharge into Waters of the United States. Cape Coral has not reported its discharge into waters of the United States.

64. Title 33 U.S.C. Section 1342, National Pollutant Discharge Elimination System. See Paras. 32, 36, and 39.

65. Title 33 U.S.C. Section 1344, Discharge of Dredge or Fill Materials into Waters of the United States. Paras. 34-39 describe how the granting the Application will adversely affect waters of the United States.

66. Title 40 C.F.R. Section 130.7, Total Maximum Daily Loads. See Paras. 35 and 39.

67. Title 50 C.F.R. Section 17.108, Manatee Sanctuaries. In Para. 48, the Petitioners recount the findings of the Administrative Law Judge in the previous denial of removal of the Lock which demonstrate the failure to protect fish, wildlife, and the mangroves.

68. Title 50 C.F.R. Section 226.218, Critical Habitat for Smalltooth Sawfish. In Para. 48, the Petitioners recount the findings of the Administrative Law Judge in the previous denial of removal of the Lock which demonstrate the failure to protect fish, wildlife, and the mangroves.

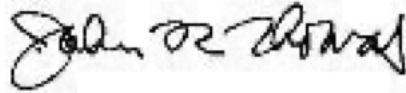
**RELIEF SOUGHT**

Petitioners request that the NOI be denied.

Respectfully submitted,

*s/J. Michael Hannon*

J. Michael Hannon, Qualified  
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Co-counsel for Petitioners

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<sup>1</sup> Pursuant to Rule 28-106.105(a). Petitioners also have filed a Request for Qualified Representative under Rule 28-106(2)(a) along with this Petition.



## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a copy of the foregoing was sent via electronic transmission to the following this 19<sup>th</sup> day of April, 2023:

Justin G. Wolfe  
Jeffrey Brown  
Frederick L. Aschauer, Jr., Esq.  
Kevin Hennessy, Esq.  
Ronald W. Hoenstine, III  
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*s/J. Michael Hannon*  
J. Michael Hannon

# **EXHIBIT 1**

## PETITIONERS

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# **EXHIBIT 2**

BEFORE THE STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL REGULATION

DEPARTMENT OF ENVIRONMENTAL REGULATION,	)	
	)	
vs.	)	Order No. 15
	)	
GAC PROPERTIES, INC., Lee County.	)	
_____	)	

CONSENT ORDER

This is a Consent Order between the State of Florida Department of Environmental Regulation (hereinafter referred to as the "Department") and Frank J. Callahan and Herbert S. Freehling, as Co-Trustees of GAC Corporation, GAC Properties Credit, Inc., and GAC Properties, Inc. (hereinafter referred to as "GAC").

Background: Permit applications were filed with the Department for certain dredge and fill work to be done at the Cape Coral Project of GAC. The Department issued a letter dated June 30, 1976 informing GAC of the Department's intent to deny certain of these permits. In addition, the Department issued Warning Notice No. 7996 dated July 9, 1976 regarding ongoing dredge and fill activities within the Cape Coral Project. On August 26, 1976, the Department set out by letter the modifications of the Cape Coral Project required to allow the completion of the project. Subsequently, the GAC verbally agreed to incorporate and implement the proposed, major modifications, subject to the approval of the Bankruptcy Court. It was also determined after the initial denial that GAC qualified for special consideration. This order represents the best efforts of the Department and GAC to improve an old project, begun prior to this decade. It does not signify water quality standards will be met in the interior canals, but is an attempt to buffer, treat, and improve water quality before it reaches Matlacha Pass or the Caloosahatchee River. This Consent Order resolves the alleged violations and serves as the authorization from the Department to complete the work.

1. GAC agrees that no development work shall be done waterward of the line identified as "A" drawn on Exhibit No. 1. Any work that has been done by GAC waterward of this line shall be restored. Restoration shall include the removal or replacement of all GAC-excavated fill material to natural elevation in the areas designated as "B" on Exhibit No. 1. Restoration shall commence within sixty (60) days of the date of entry of this Consent Order, continue in a continuous manner, and be completed to the satisfaction of the Department's district office within one (1) year of the date of entry of this Consent Order.

2. All work landward of "A" on Exhibit No. 1 will be done as described in Exhibit No. 2. The Department originally indicated its intent to deny the applications for permits because of its concern over water quality in the canal system and discharges from the canal system. GAC agrees to construct a pollution retention system landward of "A" on Exhibit No. 1. This retention system will consist of a perimeter spreader waterway to serve as a water distribution system for intercepting and releasing discharges of waters from certain areas of the Cape Coral development. GAC agrees to construct back-to-front sloping lots, swales and weirs within the inland portion of the undeveloped portion of Cape Coral, so as to retain as much of the runoff from the upland as possible, as well as increase the retention and percolation of freshwater to the aquifer. GAC shall prepare a hydraulic assessment to determine the maximum retention of runoff possible within the swales and canals. All work described in this paragraph of the Consent Order shall be performed as described in Exhibit No. 2.

3. Because of the water quality problems within the interior canal system, the Department cannot allow any direct

connection of Cape Coral waterways to waters of the State, which direct connections do not presently exist. Therefore, GAC shall install boat lifts to provide navigable access to Cape Coral canals which do not presently have access to waters of the state. The locations of the boat lifts are identified on Exhibit No. 1 as C<sub>1</sub>, C<sub>2</sub> and C<sub>3</sub>. Construction of the boat lifts shall be as described in Exhibit No. 2.

4. Because of the water quality benefits to be derived from the tidal wetlands surrounding Cape Coral and the treatment these natural areas provide for any indirect discharges from the Cape Coral area, GAC shall deed to the State, on the date of entry of this Consent Order, the lands owned by GAC as are described in the warranty deeds attached as Exhibits 3(a), 3(b) and 3(c).

5. GAC will deposit to the account of the Department's Pollution Recovery Fund the sum of \$200,000 per year, each year for five (5) consecutive years, the first such deposit to be made within thirty (30) days of the entry of this Consent Order and following payments to be made on or before the annual anniversary date of the date of entry of this Consent Order. All money deposited in the Pollution Recovery Fund to the account of GAC projects shall be identified and all interest earned on the account of GAC projects shall be credited to the Pollution Recovery Fund account of these GAC projects. This money shall be used at the discretion of the Secretary of the Department, which use shall nonetheless be restricted in use to study water quality and quantity problems in the Cape Coral and Golden Gate Estates areas, to propose solutions to the problems identified, and as funds allow, to correct the identified problems in both projects. No more than \$200,000 may be spent in any one fiscal year without the approval of GAC.

6. GAC hereby agrees to withdraw all permit applications pending for the Cape Coral development (File Numbers 36-10-3545, 36-24-3827, 36-10-3546 and 36-20-0274) on the same date as the entry of this Consent Order. The Department agrees

that this Consent Order will provide the necessary authorization to complete the work described in Exhibits 1 and 2. This Consent Order waives certification under PL 92-500, Section 401.

7. This Consent Order is enforceable under Section 120.69, Florida Statutes and can also be enforced under Section 403.161(1)(b), Florida Statutes.

JAMES E. YACOS and JOHN RODGERS CAMP, JR., as Co-Counsel for the Co-Trustees of GAC Corporation, et al.

By:

  
JOHN RODGERS CAMP, JR.

DEPARTMENT OF ENVIRONMENTAL  
REGULATION:

  
TERRY COLE

Deputy General Counsel

Consented to by GAC this \_\_\_\_\_ day of \_\_\_\_\_,


1977.

  
HERBERT S. FREEHLING  
as Co-Trustee

  
FRANK J. CALLAHAN  
as Co-Trustee

DATED AND ENTERED this 19 day of April,

1977.

  
JOSEPH W. LANDERS, JR.  
Secretary

Department of Environmental  
Regulation  
2562 Executive Center Circle, E.  
Montgomery Building  
Tallahassee, Florida 32301



RECEIVED

MAY 04 1979

DEPARTMENT OF ENVIRONMENTAL REGULATION

BEFORE THE STATE OF FLORIDA

DEPARTMENT OF ENVIRONMENTAL REGULATION

DEPARTMENT OF ENVIRONMENTAL )  
REGULATION )

vs. )

GAC PROPERTIES, INC., )

Lee County, Florida. )

MODIFICATION TO CONSENT ORDER


The Department of Environmental Regulation (herein referred to as the "Department") and Frank J. Callahan and Herbert S. Freehling, as Co-Trustees of the GAC Corporation, GAC Properties Credit, Inc., and GAC Properties, Inc. (hereinafter referred to as "GAC") in executing the provisions of Consent Order No. 15 have found that certain modifications need to be made to the above mentioned Consent Order in order to carry out the environmental aims of the order.

Accordingly, the previously executed Consent Order (Order No. 15) is modified as follows:

1. All mosquito control ditches or other water courses in Unit 29 to be intersected by the spreader canal will be plugged east of and adjacent to the spreader canal excavation in a manner previously approved by the Department's district office;
2. All excavated material will be deposited in a location previously approved by the Department's district office;
3. The South Florida District Office of the Department is delegated the authority to approve in writing minor changes in the design of the spreader canal which it finds will enhance the function of the spreader canal or preserve additional wetland areas; and
4. Exhibit 2 of the Consent Order (Order No. 15) is modified by agreement of the parties as shown on the attachment

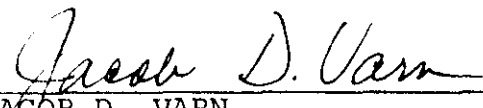
to this Modification to Consent Order and which is marked  
Exhibit 2, plate 3, revised December/1978.

Consented to by GAC this 18<sup>TH</sup> day of April, 1979.

  
HERBERT S. FREEHLING  
as Co-Trustees

  
FRANK J. CALLAHAN  
as Co-Trustee

DATED AND ENTERED this 27<sup>TH</sup> day of April, 1979.

  
JACOB D. VARN  
Secretary

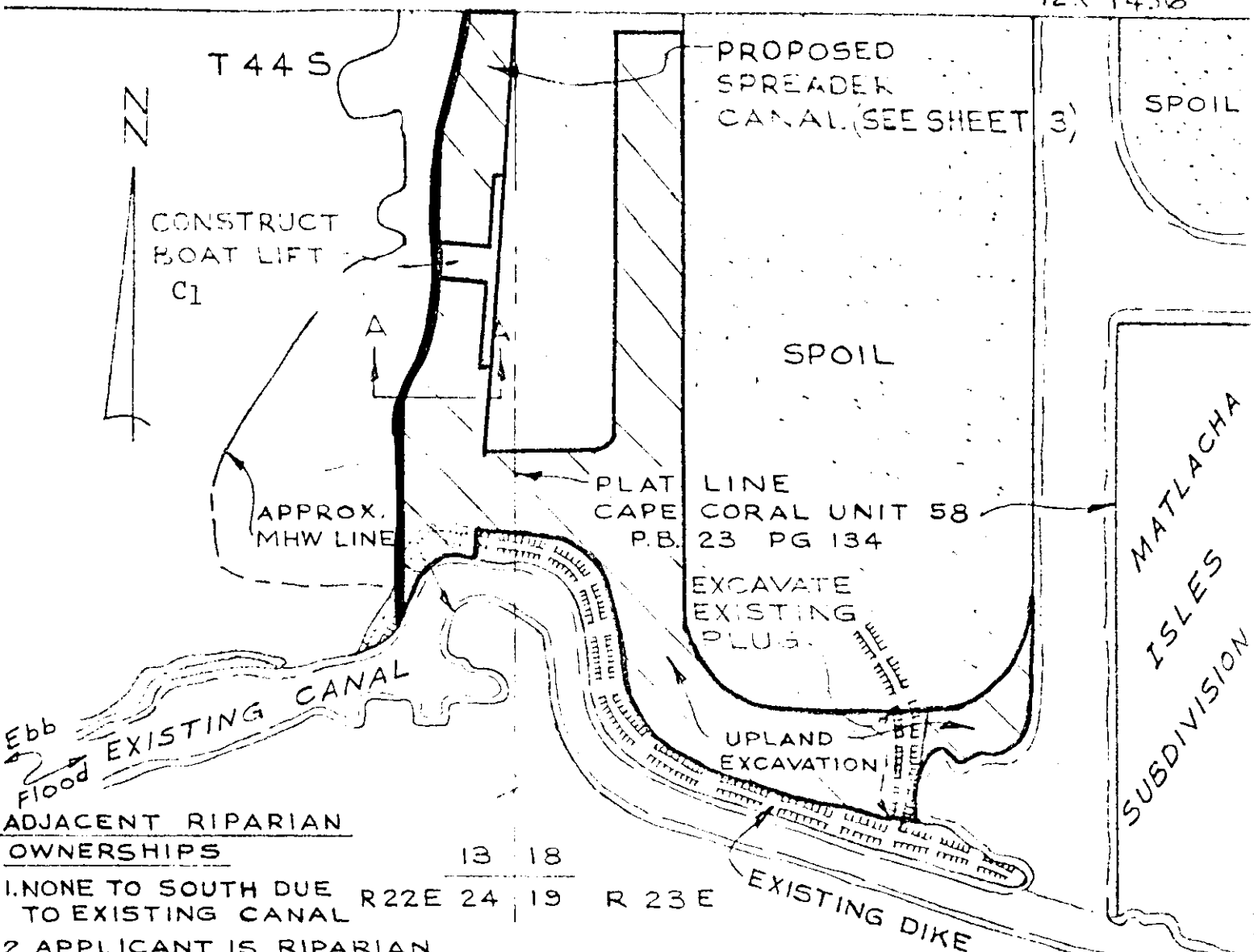
Department of Environmental  
Regulation  
2600 Blair Stone Road  
Twin Towers Office Building  
Tallahassee, Florida 32301



*H. M. Ewald*

C<sub>1</sub>

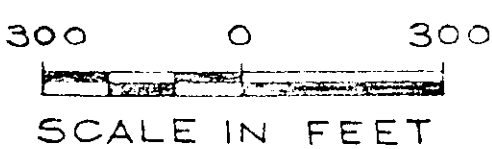
35-20-0274  
72K-1436



ADJACENT RIPARIAN OWNERSHIPS

	13	18
1. NONE TO SOUTH DUE TO EXISTING CANAL	R 22 E 24	R 23 E
2. APPLICANT IS RIPARIAN OWNER FOR 38,000 FT. NORTH.		

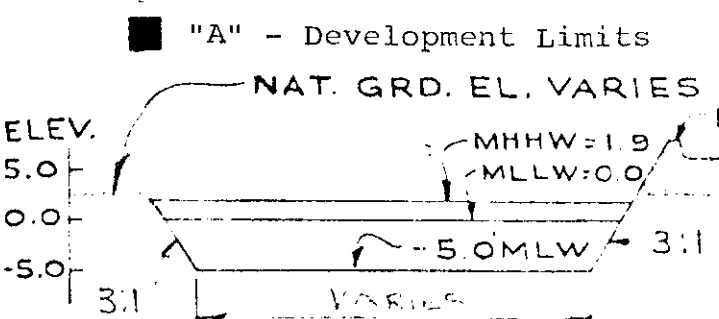
**PLAN**



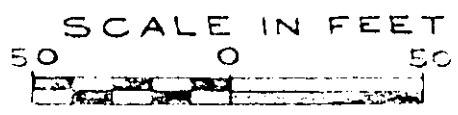
NOTES:

1. ALL ELEVATIONS REFER TO MLLW DATUM.
2. APPROX. 3800 C.Y. OF SAND WITH ORGANIC MATERIAL TO BE DREGGED FROM BELOW MHW LINE AND PLACED ON APPLICANT'S UPLAND PROPERTY BEHIND SUITABLE DIKES.

REV. 11/76 REV. 12/73  
REV. 2/73 REV. 5/73  
REV. 12/72



**SECTION 'A-A'**

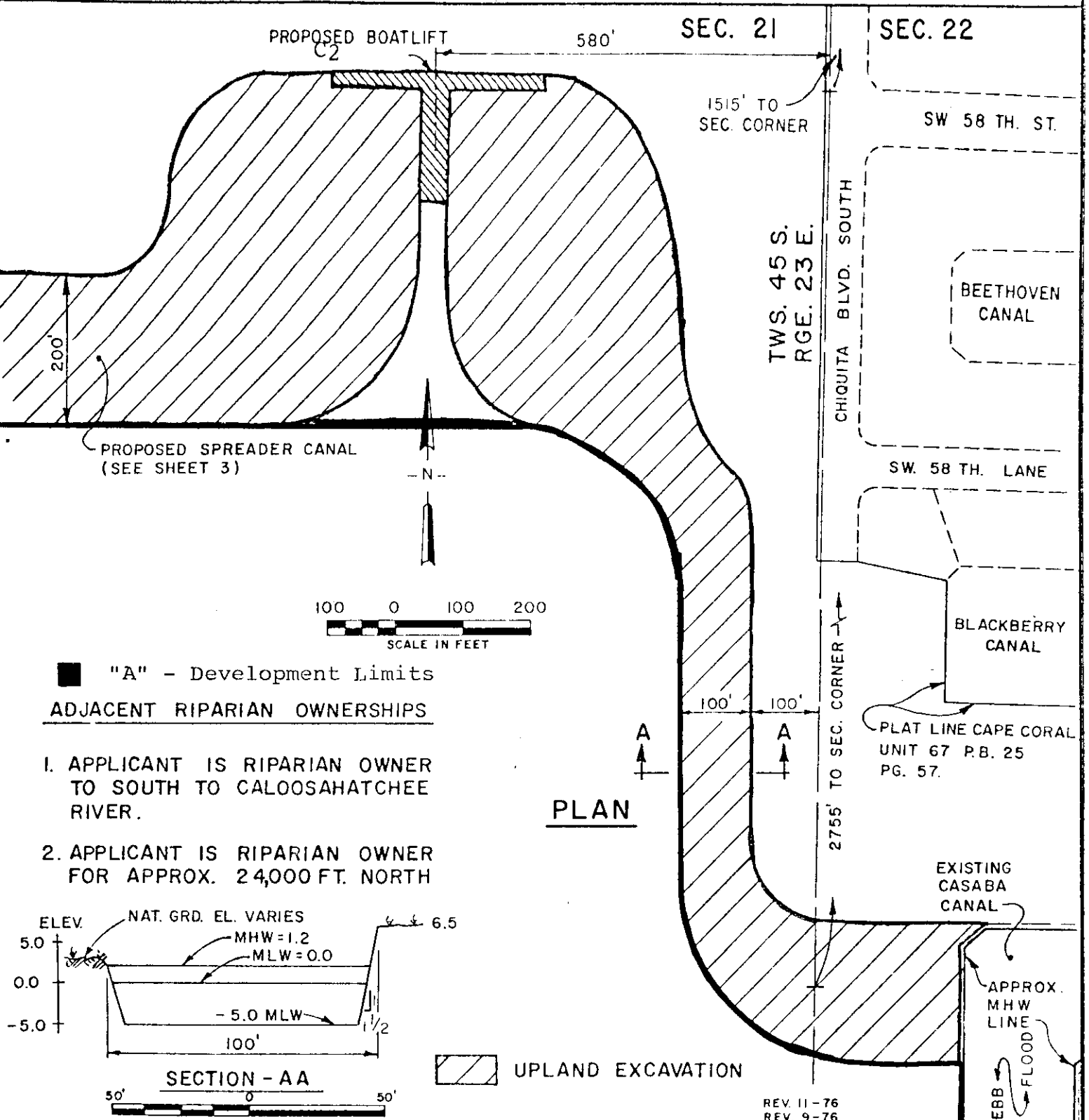


GEE & JENSON CONSULTING ENGINEERS, INC. WEST PALM BEACH, FLORIDA			
CHANNEL EXCAVATION & LIFT CONSTRUCTION MATLACHA PASS CAPE CORAL, LEE COUNTY, FLORIDA APPLICANT - GAC PROPERTIES, INC.			
DESIGNED D. H. D.	DRAWN GB	CHECKED JmW	JOB NO. 71-133
DATE June 72	SCALE	APPROVED J.A.H.	DRAWING NO. FILE NO.
			SHEET 1 OF 3

C<sub>2</sub>

NEW PLAT AREA SOUTHWEST

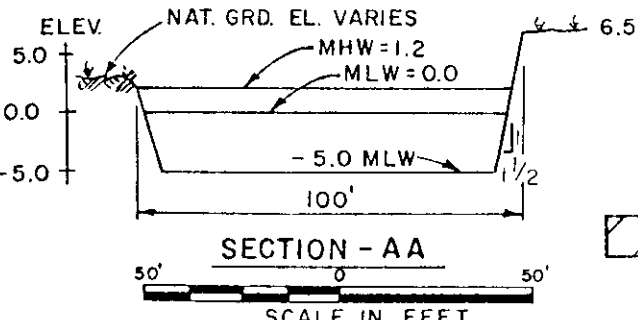
36-10-3546  
75K-1005



PLAN

■ "A" - Development Limits  
ADJACENT RIPARIAN OWNERSHIPS

1. APPLICANT IS RIPARIAN OWNER TO SOUTH TO CALOOSAHATCHEE RIVER.
2. APPLICANT IS RIPARIAN OWNER FOR APPROX. 24,000 FT. NORTH



SECTION - AA

UPLAND EXCAVATION

REV. 11-76  
REV. 9-76

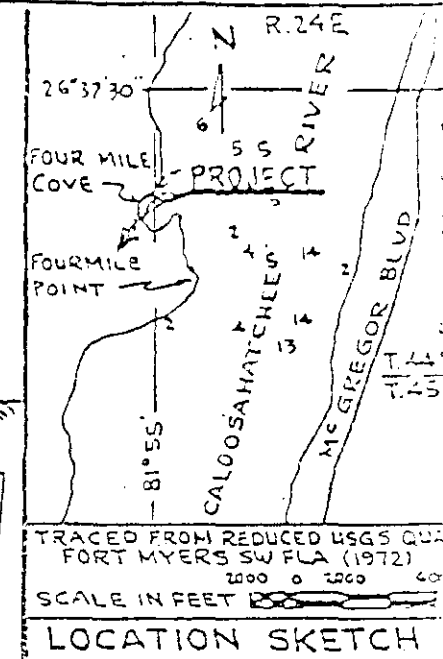
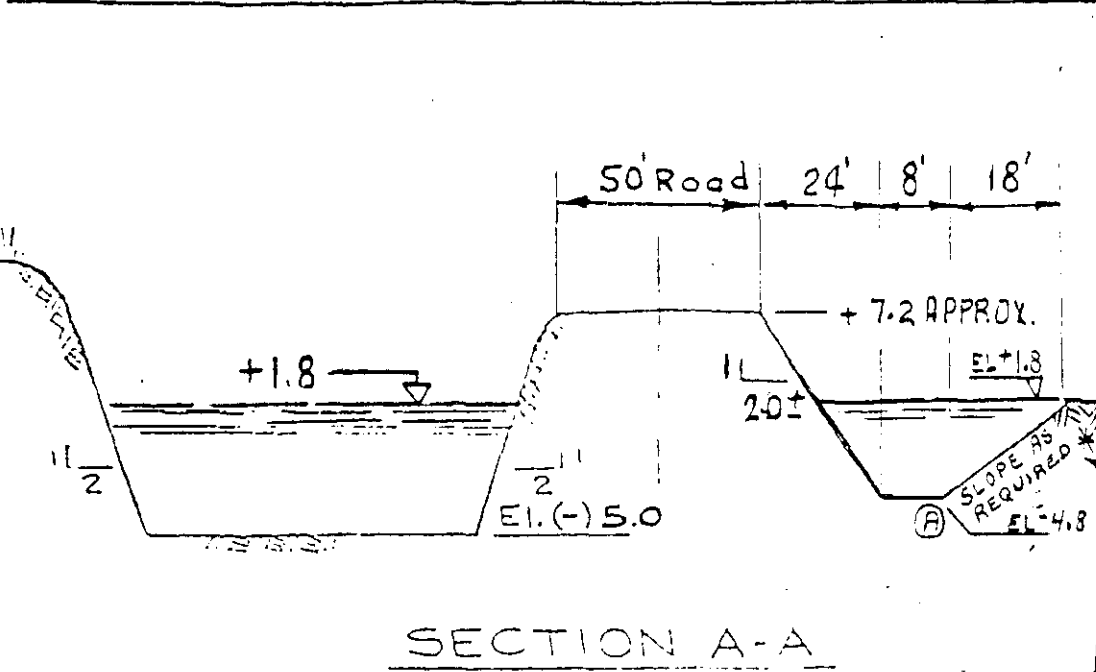
- NOTES
1. ALL ELEVATIONS REFER TO MLW DATUM.
  2. APPROX. 3,200 C.Y. OF SAND WITH ORGANIC MATERIAL TO BE REMOVED FROM BELOW MHW LINE AND PLACED ON APPLICANT'S UPLAND BEHIND SUITABLE DIKES.

CHANNEL EXCAVATION & LIFT CONSTRUCTION  
MATLACHA PASS & CALOOSAHATCHEE RIVER  
CAPE CORAL, LEE COUNTY, FLORIDA  
APPLICANT - GAC PROPERTIES, INC.

DESIGNED P. M.	DRAWN M. M.	CHECKED	JOB NO. 71 - 133	DRAWING NO.
DATE MAY 75	SCALE NOTED	APPROVED	FILE NO.	SHEET 1 OF 3

UNIT 89

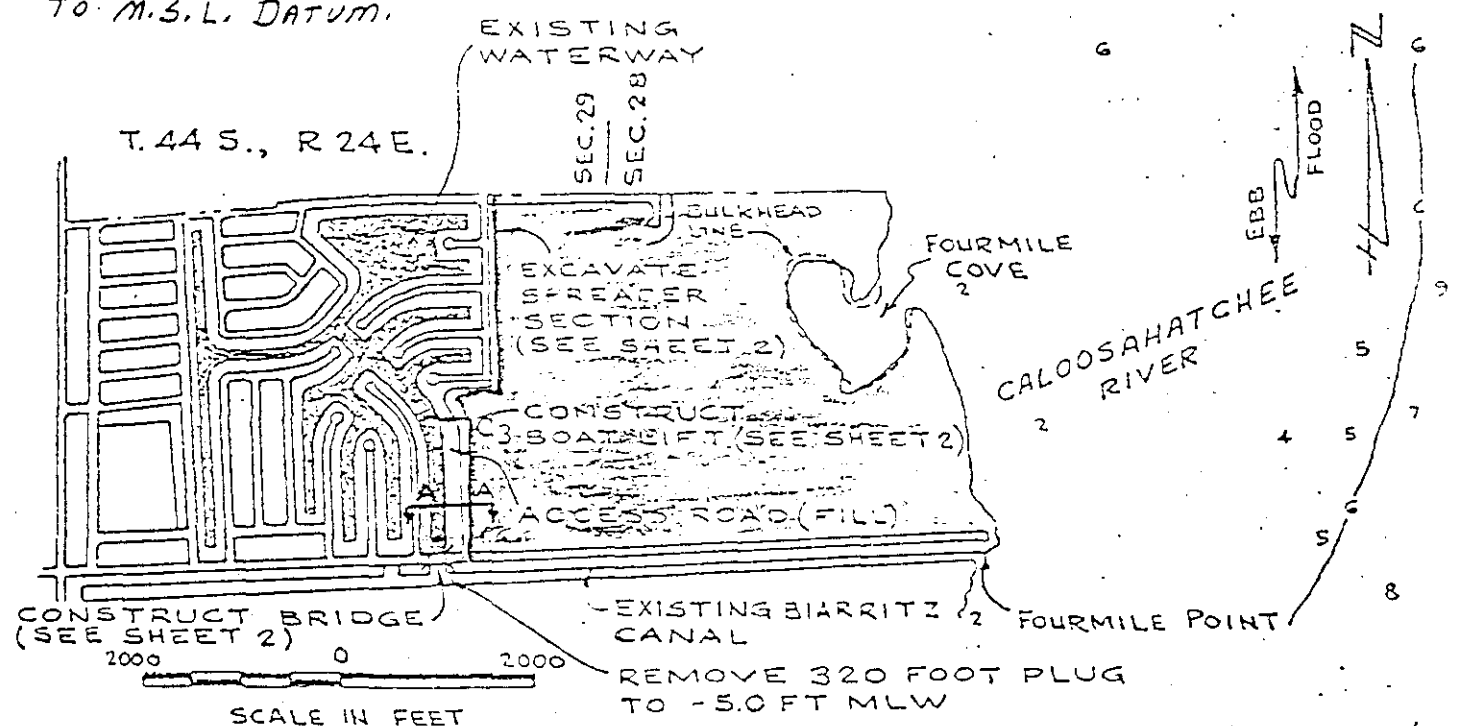
C<sub>3</sub>



- "A" - Development Limits
- Preserve Area

NOTE:  
IF EXISTING GROUND ALONG NON-DEVELOPMENT PLAT LINE OF SPREADER W.W. IS LESS THAN EL. +1.8 M.S.L., FILL TO EL. -2.5 M.S.L. AND CONSTRUCT SIDE SLOPE TO MEET POINT (A)

NOTE: ALL ELEVATIONS REFER TO M.S.L. DATUM.



NOTE  
APPROXIMATELY 600 C.Y. OF SANDY MATERIAL TO BE DREDGED FROM BELOW MHW LINE AND PLACED ON APPLICANTS UPLAND BEHIND SUITABLE DIKES.  
SEE ATTACHED LIST FOR ADJACENT RIPARIAN OWNERS.

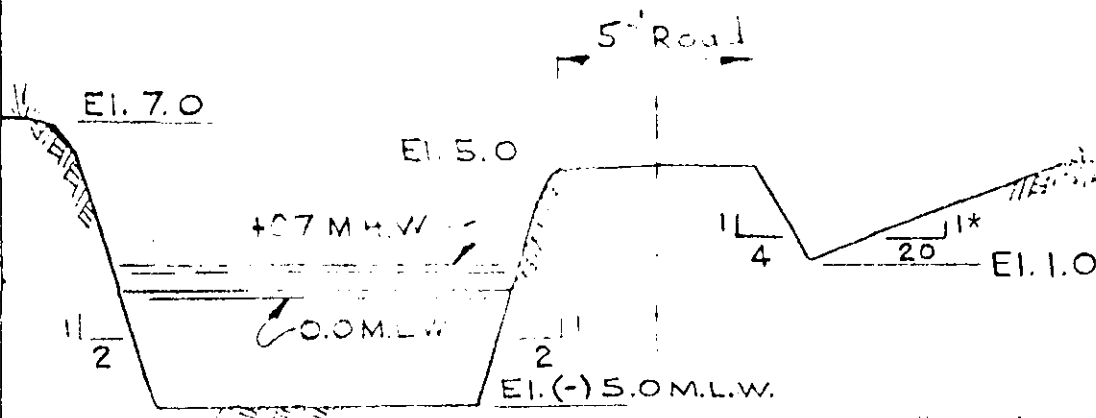
GEE & JENSON CONSULTING ENGINEERS, INC. WEST PALM BEACH FLORIDA				
UNIT 89 DEVELOPMENT B CHANNEL BIARRITZ CANAL LEE COUNTY, FLORIDA APPLICANT: GAC PROPERTIES, INC.				
DESIGNED D.H.D.	DRAWN MGB	CHECKED <i>[Signature]</i>	JOB NO. 72-45	DRAWING NO.
DATE MAY 75	SCALE NOTED	APPROVED <i>[Signature]</i>	FILE NO.	SHEET 1 OF 2

REV. 9/78

C<sub>3</sub>

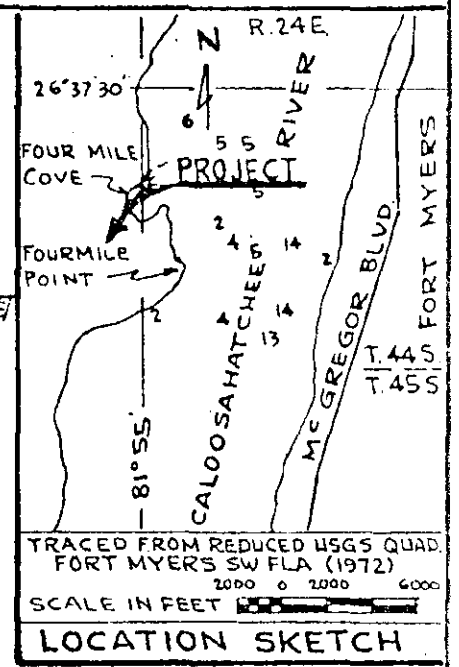
UNIT 89

36-10-3545  
75K-1006



SCALE: HORIZ. 1" = 50'  
VERT. 1" = 10'

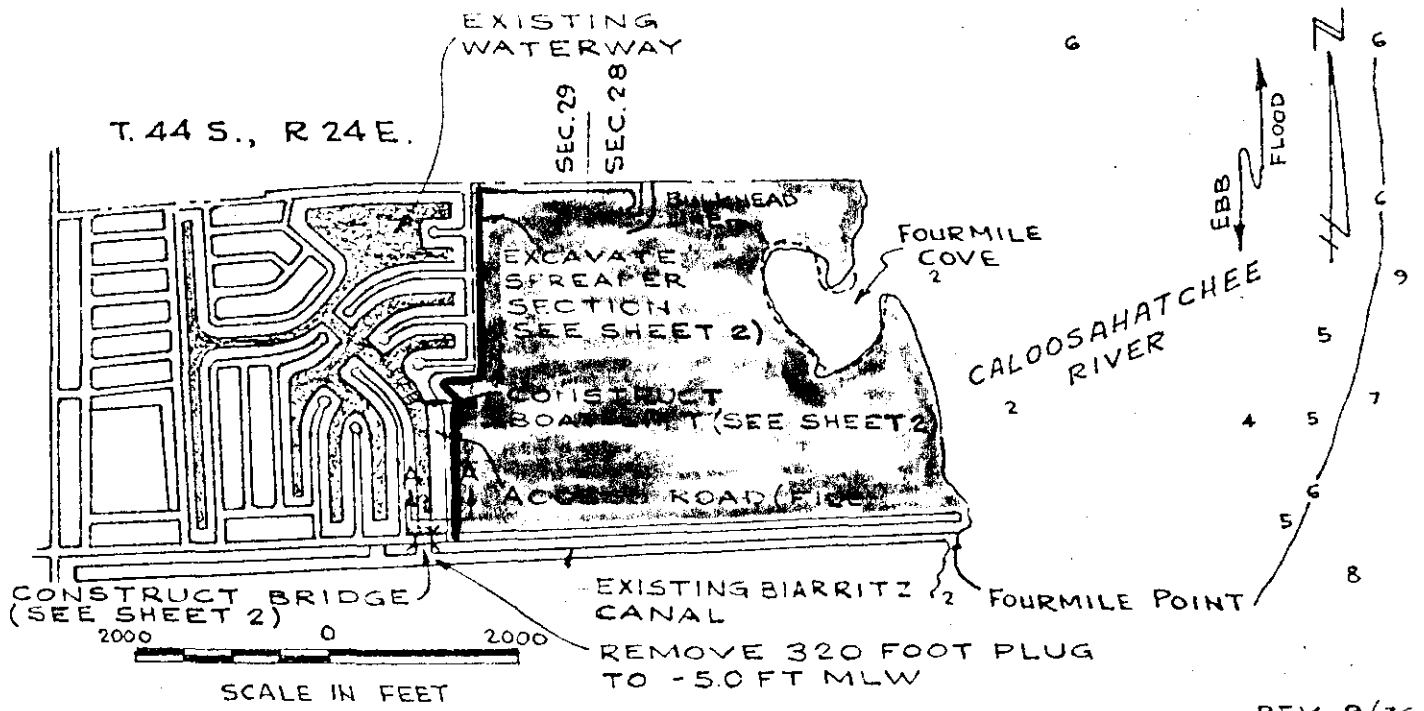
SECTION A-A



- "A" - Development Limits
- ▣ Preserve Area

\*1:20 or the landward edge of wetland vegetation.

NOTE: ALL ELEVATIONS REFER TO M.L.W. DATUM.

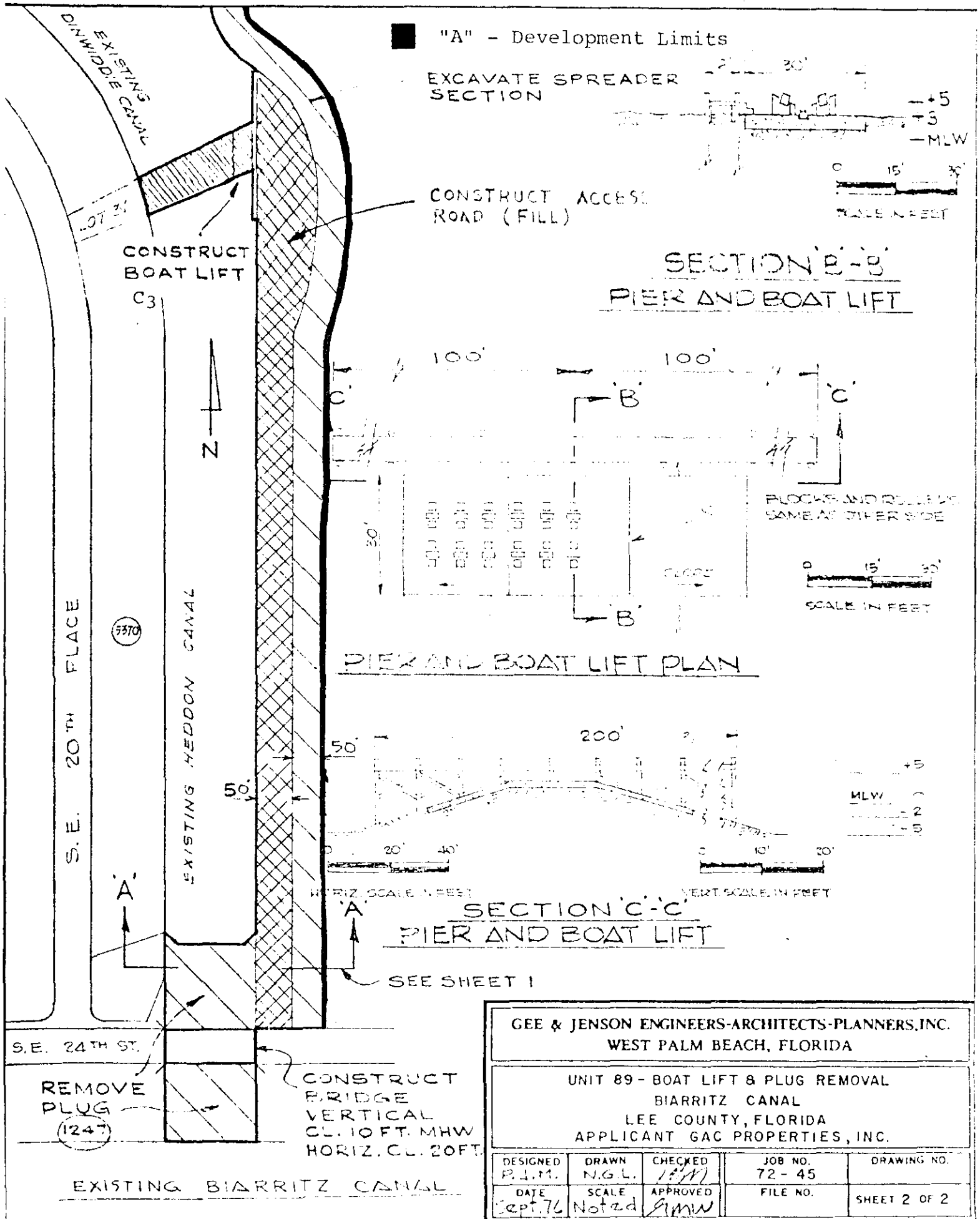


NOTE  
APPROXIMATELY 600 C.Y. OF SANDY MATERIAL TO BE DREDGED FROM BELOW MHW LINE AND PLACED ON APPLICANTS UPLAND BEHIND SUITABLE DIKES.  
SEE ATTACHED LIST FOR ADJACENT RIPARIAN OWNERS.

REV. 9/72

<b>GEE &amp; JENSON CONSULTING ENGINEERS, INC.</b> WEST PALM BEACH FLORIDA				
UNIT 89 DEVELOPMENT & CHANNEL BIARRITZ CANAL LEE COUNTY, FLORIDA APPLICANT: GAC PROPERTIES, INC.				
DESIGNED D.H.D.	DRAWN MGB	CHECKED <i>[Signature]</i>	JOB NO. 72-45	DRAWING NO.
DATE MAY 75	SCALE NOTED	APPROVED <i>[Signature]</i>	FILE NO.	SHEET 1 OF 2

C<sub>3</sub>



GEE & JENSON ENGINEERS-ARCHITECTS-PLANNERS, INC. WEST PALM BEACH, FLORIDA				
UNIT 89 - BOAT LIFT & PLUG REMOVAL BIARRITZ CANAL LEE COUNTY, FLORIDA APPLICANT GAC PROPERTIES, INC.				
DESIGNED P.J.M.	DRAWN N.G.L.	CHECKED 12/77	JOB NO. 72-45	DRAWING NO.
DATE Sept. 76	SCALE Noted	APPROVED JMW	FILE NO.	SHEET 2 OF 2



Exhibit 2      Plate 5

Construction of the boat lifts shall be to the following criteria:

- 1 - No transfer of water between the spreader waterway and state waters will be allowed.
- 2 - No part of the boat lifts will encroach beyond line A of Exhibit #1.
- 3 - The lift locations may be moved upstream from Locations C1, C2 and C3 up to 100 feet as long as such relocation does not open additional interior canals to state waters. The location of the boat lift may be moved downstream.
- 4 - The height, width and length of the earthen dam will be determined after establishing the seaward elevation of the spreader waterway and completing the hydraulic analysis.
- 5 - The type of mechanical transfer equipment will be at the discretion of GAC and its design engineer.

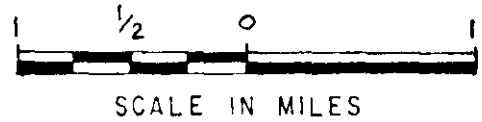
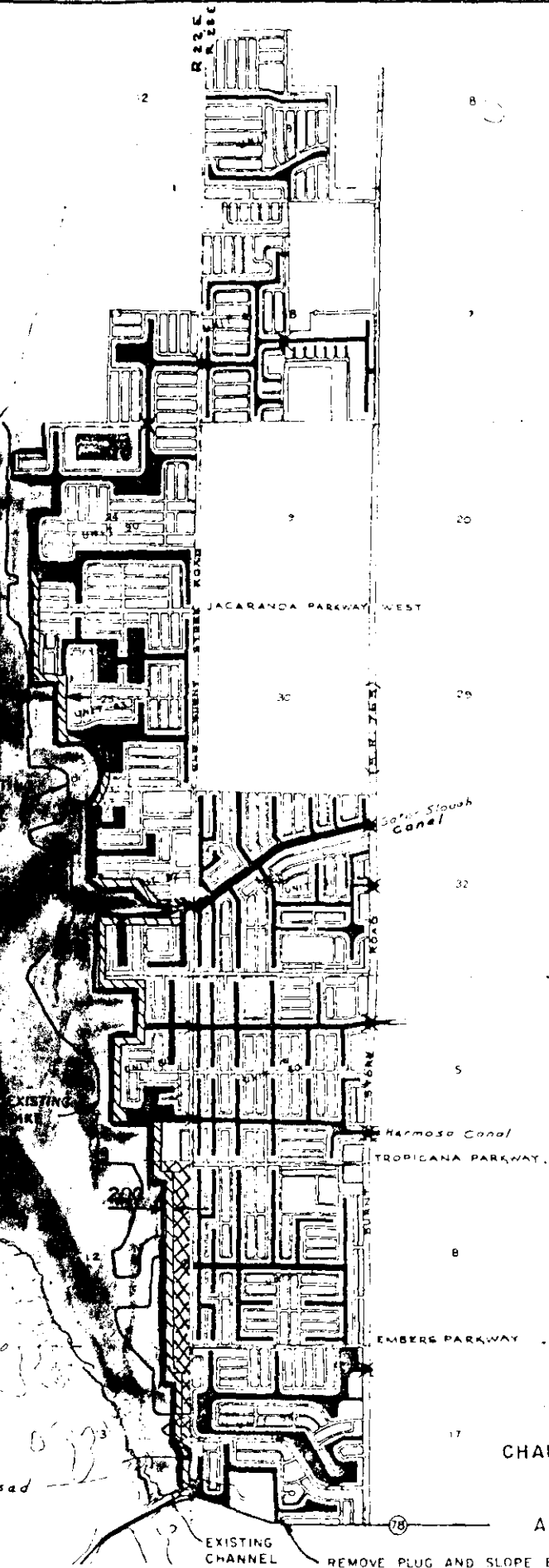
SPREADER WATERWAYS

Exhibit 2 Plate 6




36-20-0274  
72-143G

CHARLOTTE HARBOR

MATLACHA PASS





LEGEND

- ▲ WEIR
- ✕ BRIDGE
-  SPREADER CANAL
-  PLATTED WATERWAYS  
CAPE CORAL UNITS 58,  
59, 60, 61, 81, 82, 83, 90,  
91 & 97- FILL FOR DEV.
-  FILL FOR DEVELOPMENT

REMOVE EXISTING DIKE TO NATURAL GRADE EXISTING PRIOR TO DIKE CONSTRUCTION.

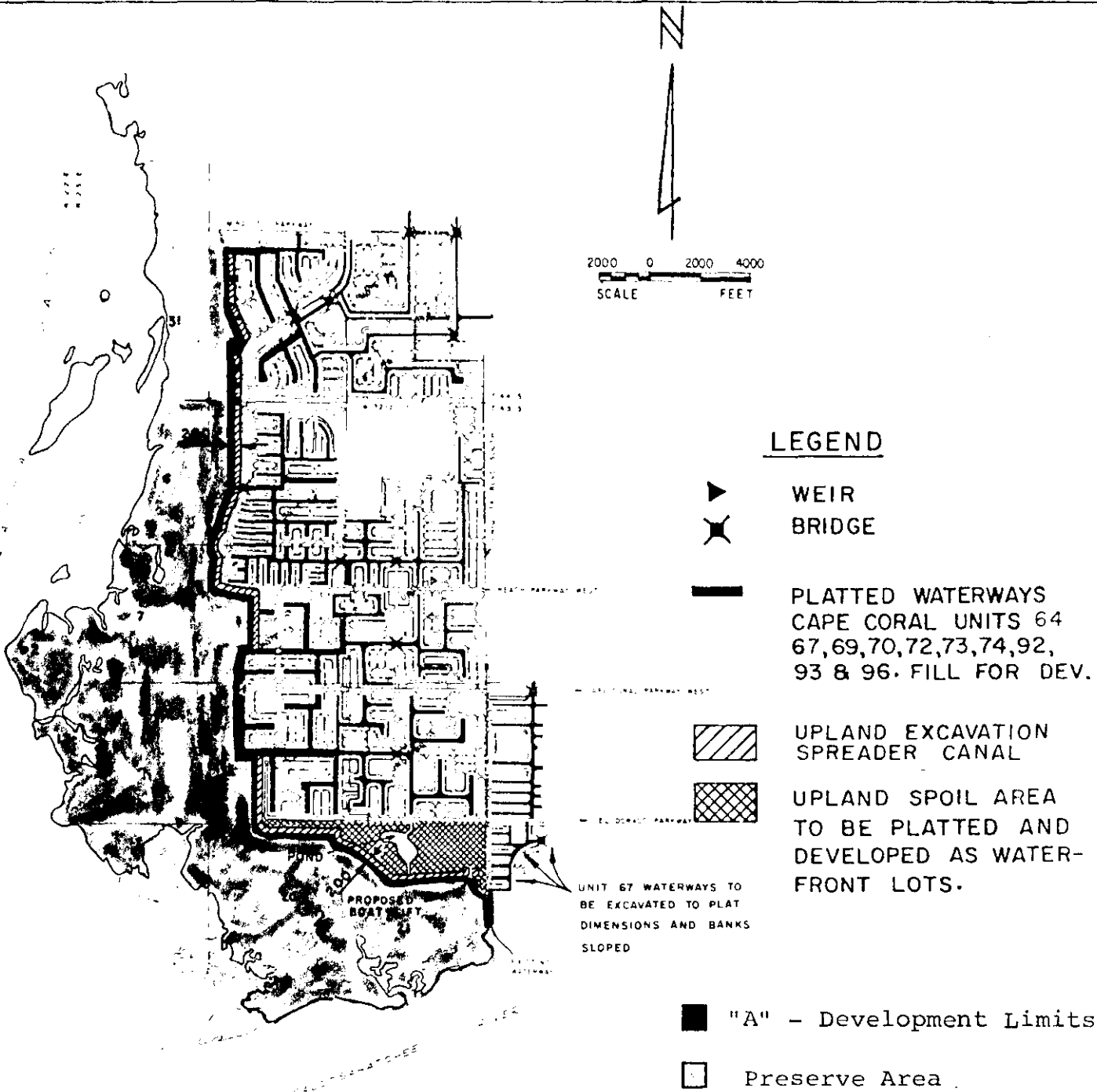
REMOVE ANY EXISTING FILL WEST OF SPREADER CANAL.

-  "A" - Development Limits
-  Preserve Area

CHANNEL EXCAVATION & LIFT CONSTRUCTION  
MATLACHA PASS  
CAPE CORAL, LEE COUNTY, FLORIDA  
APPLICANT - GAC PROPERTIES, INC.

REMOVE PLUG AND SLOPE BANKS TO OBTAIN UNIT 58 PLAT DIMENSIONS

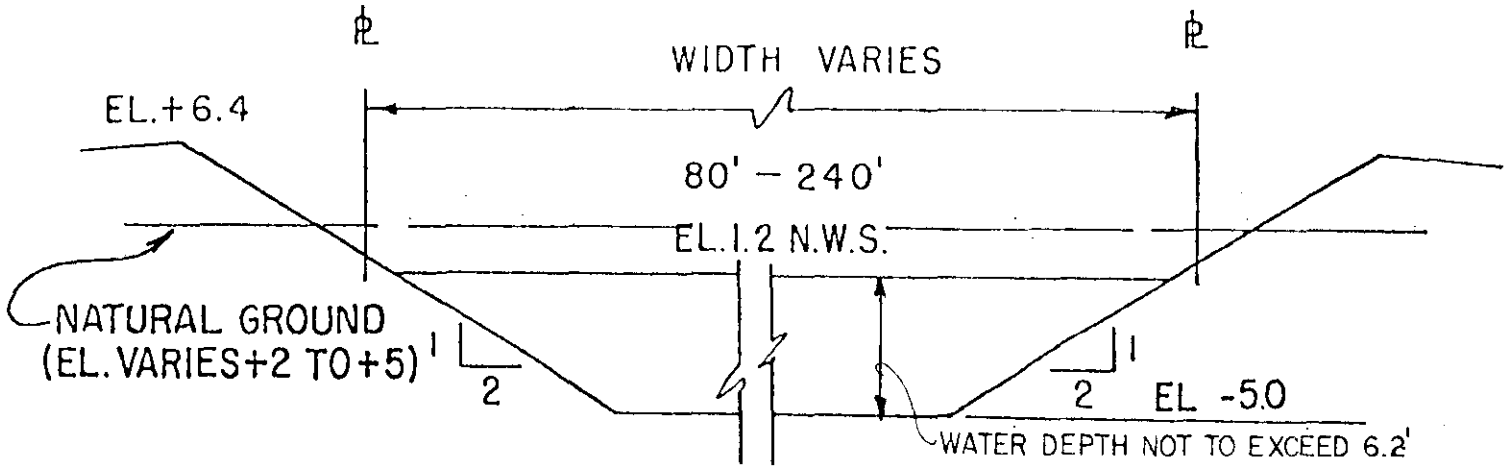
11/76  
10/76 SHEET 3 OF 3  
9/76



CHANNEL EXCAVATION & LIFT CONSTRUCTION  
MATLACHA PASS & CALOOSAHATCHEE RIVER  
CAPE CORAL, LEE COUNTY, FLORIDA  
APPLICANT- GAC PROPERTIES, INC.

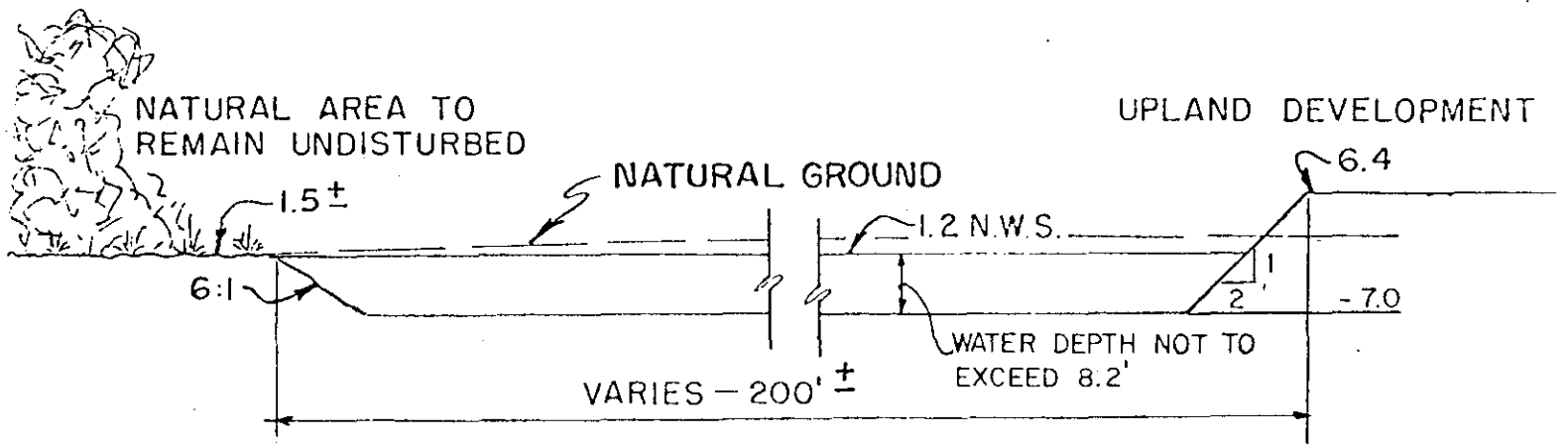
CROSS SECTIONS  
INTERIOR CANALS AND SPREADER WATERWAY

36-20-021  
72K-1436



TYPICAL CANAL SECTION

SCALE



TYPICAL SECTION

SPREADER WATERWAY EXCAVATION

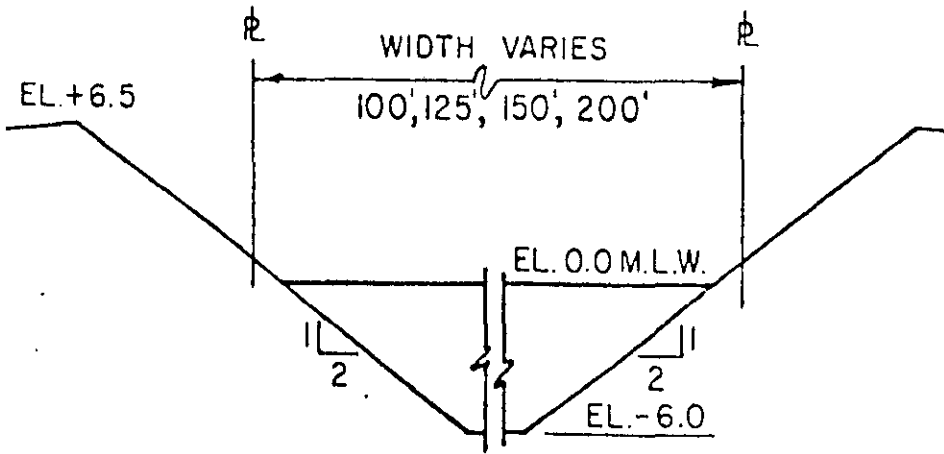
HORIZ. SCALE 0 40 FEET

VERT. SCALE 0 20 FEET

NOTES: ALL ELEVATIONS REFER TO  
MEAN SEA LEVEL DATUM.

N. W. S. - NORMAL WATER SURFACE.

CHANNEL EXCAVATION & LIFT CONSTRUCTION MATLACHA PASS CAPE CORAL, LEE COUNTY, FLORIDA APPLICANT: G.A.C. PROPERTIES, INC.				
DESIGNED D.H.D.	DRAWN G.J.B.	CHECKED <i>[Signature]</i>	JOB NO 71-133	DRAWING NO.
DATE 12-75	SCALE NOTED	APPROVED	FILE NO	SHEET OF

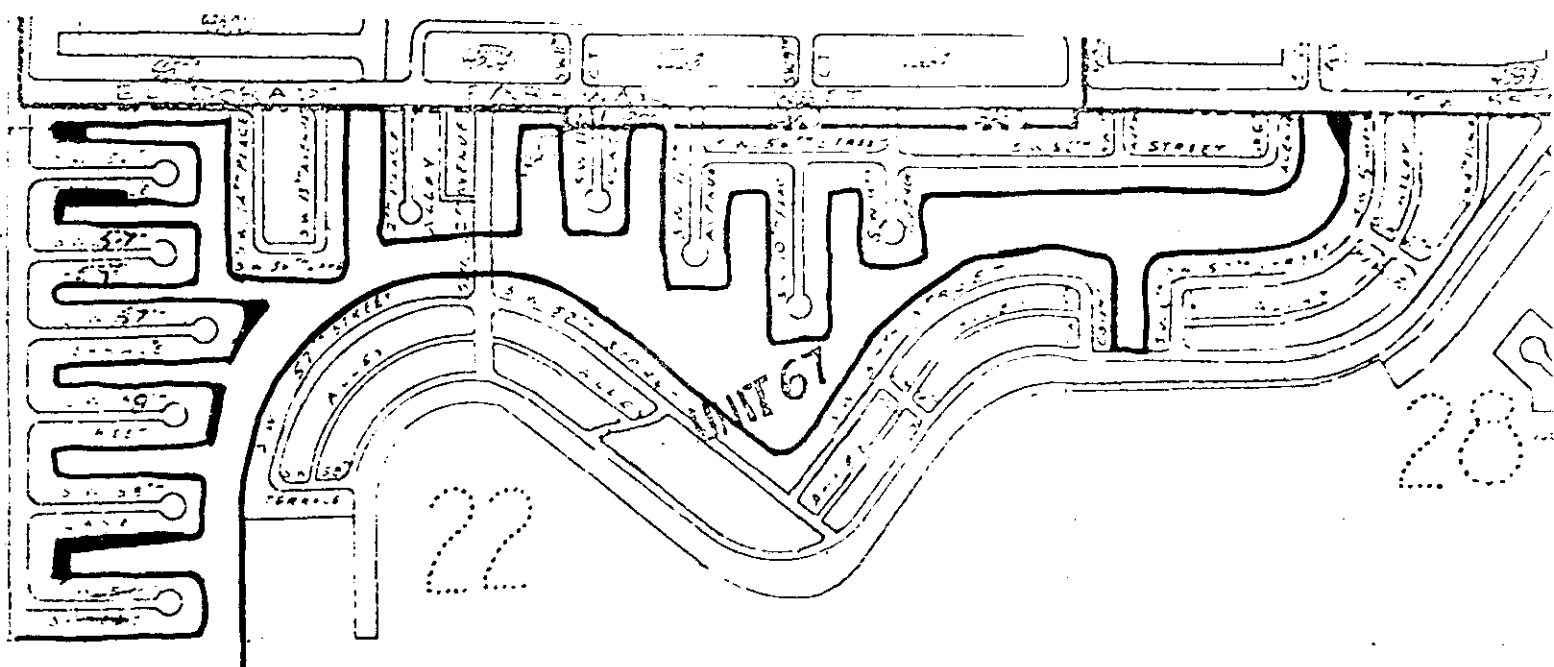


UNIT 67

TYPICAL CANAL SECTION (THOSE TO BE DUG)



NOTE: ALL EL. REFER TO MLW



■ TO BE EXCAVATED	65,000 C.Y.
■ PLUS SLOPE ALL BANKS	35,000 C.Y.
	<hr/>
	100,000 C.Y.
■ CANAL OVER DUG TO BE FILLED	8,500 C.Y.
FILL FOR LAND AREAS	250,000 C.Y.

Scale 1" = 1,000'

Exhibit 2      Plate 10

The Hydraulic Assessment is to evaluate and recommend adjustment to the water surface elevations, as required, to assure maximum retention and management of surface water while providing reasonable protection of the Cape Coral area from flooding during storms.

Included in the Assessment are the off-site drainage basin, storm drainage system evaluation, waterway analysis, control structure analysis, and discharge through the perimeter spreader waterway.

A report will be prepared depicting the Hydraulic System Assessment and recommendations for improvements to the system, such improvements to be implemented according thereto by GAC, upon concurrence by the District DER office.

# **EXHIBIT 3**

1091275

OFF. REC. 1268 PG. 1987

25.00

WARRANTY DEED

with

RESTRICTIONS ON USE

THIS INDENTURE made this 12 day of October, 1977 between GAC PROPERTIES INC, a Florida corporation, having its principal place of business in Dade County, Florida and lawfully authorized to transact business in the State of Florida, Grantor, and BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA, Grantee.

WITNESSETH: that Grantor, for and in consideration of the sum of \$10.00 and other good and valuable consideration to it in hand paid by the Grantee, the receipt and sufficiency whereof is hereby acknowledged, has granted, bargained and sold to the said Grantee, its successors and assigns forever, all of the land lying waterward of that certain "property line" in the City of Cape Coral, Lee County, Florida, such property line more particularly described and set forth in the "Exhibit" attached and made a part hereof by such reference.

- 1. (a) In consideration for the within-given grant and conveyance it shall be a covenant running concurrently with the title, such covenant being expressly assumed by Grantee in behalf of itself and its successors and assigns, pursuant to which, Grantee agrees that the land conveyed hereby shall never be developed in any way to provide use for commercial, industrial or residential purposes, nor shall same be used for more than limited public access for purposes of enjoyment of the premises in their natural state.
- (b) For purposes of accomplishing the foregoing limitations, Grantee agrees never to make changes to the surface topography or sub-surface elements through filling of same by deposit of any materials, by excavation, dredging, mining or drilling, to remove any of the soil, vegetation or minerals and petroleum from the premises nor interfering with the natural drainage of the area or using same in a manner contrary to preservation of such lands as part of the wilderness system of the state. Grantee shall take all steps

This Instrument Was Prepared By  
Robert L. Weintraub  
Attorney at Law  
Post Office Box 523030, Miami, Florida 33152



necessary to include the areas hereby conveyed as a wilderness area under Chapter 258, Florida Statutes.

- (c) At no time shall Grantee allow a use to be made of the premises which shall be inconsistent with preservation of same in accordance with acceptable principles of environmental conservation and shall retain the property's natural character and quality. This limitation is intended to preclude any operations for profit or commercial development and also to limit the building of any structures or improvements from adjacent property which may be inconsistent with limited use, access, or enjoyment in the public.
- (d) In the event of violation of any one of the foregoing limitations as to use or adoption of the property, Grantor or its successors and assigns shall have an immediate right to make application to the Circuit Court for Lee County, Florida or to any other court of appropriate jurisdiction, for a declaration of such court confirming said violation and breach of the foregoing covenant and to obtain, upon such determination, an appropriate judgment enforcing this covenant and ordering restoration of the natural conditions existing prior to any damage occasioned by the violation.
- (e) Failure on the part of Grantor to enforce any alleged violation of the foregoing covenant shall never be construed as a waiver at any subsequent time to declare such violation or others as operative and to commence proceedings as aforesaid.
- (f) Grantor shall have the right to enforce restrictions on the premises to the result that the premises shall always remain in their natural state, or in the event of violation thereof, Grantor may commence proceedings to effect reversion of title to Grantor in a court of appropriate jurisdiction upon proper notice to Grantee of the pendency of such proceedings. No reversion of title shall become operative if within 90 days Grantee shall, after receiving such notice, commence

proceedings to correct the violation and shall have a reasonable time to complete such proceedings successfully. If reverter of title shall occur, then Grantor so reacquiring title shall also be bound to maintain said premises in their natural state and the Grantor agrees that it will take such reacquired title subject to all conditions contained in this conveyance. None of the foregoing shall apply to any of the conveyed premises which might be within one hundred feet (100') on either side of the center line of State Road 78, commonly known as Pine Island Road.

2. Grantee acknowledges that Grantor is in the process of constructing a certain peripheral spreader waterway designated as "A" on Exhibit along the westerly and southerly portions of its properties in the City of Cape Coral, the purpose of which is for the collection of surface runoff waters from the interior canal system lying within said Cape Coral Subdivision owned and developed by Grantor. Such waterway, in the collection of said runoff waters, is designed to allow for a disposal of the excess waters so collected over and across the most westerly or southerly banks thereof onto the lands herein conveyed which lie waterward of such water. The construction of all the foregoing spreader waterway is authorized by the Department of Environmental Regulation and other regulatory agencies, and the operation thereof in the collection and disposal of such waters requires that same be allowed to flow toward navigable waters and across the lands herein conveyed; wherefore:

- (a) Grantor specifically reserves the right unto itself and its successors and assigns to allow uninterrupted surface runoff of waters originating on its lands lying upland of the property line, described in the attached Exhibit, to flow across the lands herein granted and conveyed, and by such reservation Grantee acknowledges an easement in gross for such surface water discharge across such lands.

(b) To the extent reasonably necessary for Grantor to construct, or maintain after construction, the aforesaid spreader waterway, Grantor reserves a right to enter onto portions of the lands hereby conveyed to accomplish such purposes without such entry constituting a trespass of any kind. Such rights of entry include the rights to use access of the subject lands at any time hereafter to accomplish any necessary or needful restoration work on dikes, spoil piles or other limited work required for such purposes. Grantor agrees to restore to natural condition any damage caused by the above work.

3. Subject to conditions, limitations and reservations of record and taxes for the current and subsequent years.

AND the said Grantor, GAC PROPERTIES INC, does hereby fully warrant the title to said land and will defend the same against the lawful claims of all persons whatsoever.

IN WITNESS WHEREOF the said Grantor has caused these presents to sign in its name by its proper officer and its corporate seal to be affixed on the day and year first above written.

GAC PROPERTIES INC

(Corporate Seal)

By: Norman S. Edelcup  
President  
Herbert S. Freehling  
Herbert S. Freehling, Trustee

Frank J. Callahan  
Frank J. Callahan, Trustee

STATE OF FLORIDA

COUNTY OF DADE

I hereby certify that on this day, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared Norman S. Edelcup well known to me to be the President of the corporation named as Grantor in the foregoing deed, and acknowledged executing the same freely and voluntarily under authority duly vested in him by said corporation and that the seal affixed thereto is the true corporate seal of said corporation.

Witness my hand and official seal in the County and State last aforesaid this 12th day of April, 1977.

*Patricia R. Reed*  
Notary Public, My Commission Expires:

STATE OF FLORIDA

COUNTY OF DADE

NOTARY PUBLIC STATE OF FLORIDA AT LARGE  
MY COMMISSION EXPIRES APRIL 17 1980  
BONDED THRU GENERAL INS. UNDERWRITERS

I hereby certify that on this day, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared Frank J. Callahan, well known to me to be the Co-Trustee of the corporation named as Grantor in the foregoing deed, and acknowledged executing the same freely and voluntarily under authority duly vested in him by said corporation and that the seal affixed thereto is the true corporate seal of said corporation.

Witness my hand and official seal in the County and State aforesaid this 13th day of April, 1977.

*Patricia R. Reed*  
Notary Public, My Commission Expires:

STATE OF FLORIDA

COUNTY OF DADE

NOTARY PUBLIC STATE OF FLORIDA AT LARGE  
MY COMMISSION EXPIRES APRIL 17 1980  
BONDED THRU GENERAL INS. UNDERWRITERS

I hereby certify that on this day, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared Herbert S. Freehling, well known to me to be the Co-Trustee of the corporation named as Grantor in the foregoing deed, and acknowledged executing the same freely and voluntarily under authority duly vested in him by said corporation and that the seal affixed thereto is the true corporate seal of said corporation.

Witness my hand and official seal in the County and State last aforesaid this 12th day of April, 1977.

NOTARY PUBLIC STATE OF FLORIDA AT LARGE  
MY COMMISSION EXPIRES APRIL 19 1980  
BONDED THRU GENERAL INS. UNDERWRITERS

*Patricia R. Reed*  
Notary Public, My Commission Expires:

JOINDER OF LAND TRUSTEE  
(Platted Lots)

CITY NATIONAL BANK OF MIAMI, a national banking association, of Miami, Dade County, Florida, as Trustee under the provisions of a certain Land Trust Agreement dated the 15th day of November, 1970, joins in the within deed for purposes of perfecting the conveyance of any platted lots included with the lands described therein, and does hereby covenant that said premises are free from all encumbrances made by it, and will warrant and defend the same against the lawful claims and demands of all persons claiming by, through or under it but against none other.

(Corporate Seal)

CITY NATIONAL BANK OF MIAMI, as Trustee



Signed, sealed and delivered  
in the Presence of:

By: Clifford L. Horn  
Sr. Vice President and Trust Officer

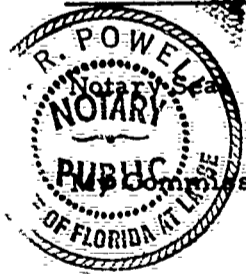
Witness: Ignacio E. Casiano  
Witness: James W. Peoples

Attest Betty A. Kleckner  
TRUST OFFICER

STATE OF FLORIDA )  
) ss  
COUNTY OF DADE )

I hereby certify that on this day, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments personally appeared CLIFFORD L. HORN and BETTY A. KLECKNER, well known to be the SENIOR VICE PRESIDENT & TRUST OFFICER and TRUST OFFICER respectively of CITY NATIONAL BANK OF MIAMI, Trustee under Land Trust Agreement dated the 15th day of November, 1970, and that they severally acknowledged executing the within Joinder of Land Trustee to the annexed Warranty Deed in the presence of two subscribing witnesses freely and voluntarily under authority vested in them by said corporation, and that the seal affixed thereto is the true corporate seal of said corporation.

WITNESS my hand and official seal in the County and State last aforesaid this 14th day of APRIL, 1977.



[Signature]  
Notary Public, State of Florida, at Large

Notary Public, State of Florida at large  
My commission expires Feb. 17, 1980.

2154 JOHNSON STREET  
TELEPHONE (904) 334-0916  
FORT O. FILE BOX 1243  
FORT MYERS, FLORIDA  
33907

February 11, 1977

CARL E. JOHNSON  
1910-1929

DESCRIPTION  
NEW PROPERTY LINE  
ALONG EASTERLY SIDE OF LAND  
BEING CONVEYED BY CAC PROPERTIES, INC.  
TO STATE OF FLORIDA  
SECTIONS 24, 25 & 36, T. 43 S., R. 22 E.  
AND  
SECTIONS 1, 12 & 13, T. 44 S., R. 22 E.  
CITY OF CAPE CORAL, LEE COUNTY, FLORIDA

A line running through Section 24, 25 & 36, Township 43 South, Range 22 East and Sections 1, 12 & 13, Township 44 South, Range 22 East, City of Cape Coral, Lee County, Florida said line being more particularly bounded and described as follows:

From the north quarter corner of said Section 24, Township 43 South, Range 22 East go on a bearing N 89° 47' 56" W along said north line of said section a distance of 1780.00 feet to the Point of Beginning of the herein described line.

From said Point of Beginning, which point is on the north boundary of "Cape Coral Unit 90" as recorded in Plat Book 24 at pages 12 through 29 of the Lee County public records, run through said Unit 90 the following course and distances: S 00° 49' 11" W for 794.99 feet; N 89° 47' 56" W for 899.24 feet to a point on the west line of said Section 24 and the west line of said Unit 90; thence run along said line S 00° 51' 34" W for 620.01 feet; thence leaving said section line run S 89° 47' 56" E for 495.02 feet; S 00° 51' 34" W for 120.00 feet; S 89° 47' 56" E for 589.74 feet; S 00° 49' 11" W for 852.73 feet; N 89° 26' 00" W for 590.30 feet; S 00° 51' 34" W for 1601.09 feet; S 6° 47' 42" E for 412.32 feet; S 00° 49' 11" W for 744.99 feet to the south line of said Unit 90 and the north line of "Cape Coral Unit 83" as recorded in Plat Book 23, page 41 through 54 of the Lee County public records; thence continue along said line through said Unit 83 the following courses and distances: S 13° 27' 59" E for 103.08 feet; S 00° 49' 11" W for 1955.82 feet; S 89° 23' 00" E for 770.00 feet; S 00° 49' 11" W for 2135.00 feet; S 89° 23' 00" E for 1001.05 feet to a point on a curve not tangent to the last mentioned course; thence run along the arc of said curve having a radius of 1255.00 feet, a central angle of 26° 39' 42", for an arc length of 583.99 feet, said curve having a long chord bearing S 26° 51' 00" E and a length of 578.74 feet, to a point on said curve not tangent to the next mentioned course; thence continue along said line S 00° 49' 11" W for 501.50 feet; thence continue along said line passing from said Unit 83 into "Cape Coral Unit 82" as recorded in Plat Book 24 at pages 113 through 126 of the Lee County public records the following courses and distances: S 26° 34' 35" W for 617.29 feet; S 00° 37' 00" W for 2020.00 feet;

PRESIDENT  
ARCHIE T. GRANT, JR.  
VICE-PRESIDENT  
FORREST H. BANKS  
SECRETARY-TREASURER  
LEIF E. JOHNSON  
ASSOCIATES  
LESTER L. BULSON  
ROBERT S. O'BRIEN  
DAN W. DICKEY  
DEAN C. THOMAS  
JOSEPH W. EBNER

JOHNSON ENGINEERING, INC.

New Property Line  
GAC to State of Florida  
24/25/36-43-22 & 1/12/13-44-22

Page 2  
February 11, 1977

S 64° 50' 37" E for 444.82 feet; S 89° 22' 20" E for 955.98 feet; S 48° 27' 23" E for 755.77 feet; S 89° 22' 22" E for 761.06 feet; S 00° 02' 45" E for 565.00 feet; N 89° 19' 15" W for 2364.22 feet; S 00° 42' 00" W for 1665.84 feet; and S 89° 18' 00" E for 15.00 feet; thence continue along said line passing from said Unit 82 into "Cape Coral Unit 81" as recorded in Plat Book 24 at pages 102 through 112 of the Lee County public records the following courses and distances: S 00° 34' 51" W for 375.00 feet; S 89° 18' 00" E for 1235.00 feet; S 00° 34' 51" W for 545.00 feet; S 2° 16' 27" E for 185.25 feet; S 00° 34' 51" W for 803.09 feet; N 89° 25' 09" W for 749.22 feet; S 00° 34' 51" W for 2437.83 feet; S 89° 25' 09" E for 1100.02 feet; S 00° 34' 51" W for 1085.01 feet; thence continue along said line running from said Unit 81 into unsubdivided lands the following courses and distances: S 00° 34' 51" W for 375.00 feet; S 89° 25' 09" E for 449.20 feet; S 00° 34' 51" W for 5052.84 feet; S 00° 01' 25" E for 942.11 feet to a point of curve; thence run along the arc of a curve to the left having a radius of 200.00 feet, a central angle of 76° 59' 42", for an arc length of 268.76 feet to a point of compound curvature; thence run along the arc of a curve to the right having a radius of 200.00 feet having a central angle of 76° 59' 42", for an arc length of 268.76 feet to a point of tangency; thence continue along said line S 00° 01' 25" E for 1500 feet more or less to the end of said line located on the southwesterly side of a waterway and said point lying S 48° 31' 56" W for 566.94 feet from a Permanent Reference Monument located at the westerly end of the division line between Lots 24 and 25 in Block 5318 as shown on "Cape Coral Unit 58" as recorded in Plat Book 23, pages 128 through 147 of the Lee County Public Records.

ROB/ds

APR 28 9 55 AM '78  
LEE COUNTY, FLORIDA  
RECORDS VERIFIED

LEE COUNTY  
RECORDS VERIFIED

# **EXHIBIT 4**



BEFORE THE STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

RECEIVED - D.E.P.  
MAY 30 2008  
SOUTH DISTRICT

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,

IN THE OFFICE OF THE  
SOUTH DISTRICT

Complainant,

OGC NO. 06-2345-DF

vs.

CITY OF CAPE CORAL,  
LEE COUNTY,

Respondents.

---

SECOND AMENDED CONSENT ORDER

This Second Amended Consent Order ("Amendment") is entered into between the State of Florida Department of Environmental Protection ("Department"), The City Cape Coral ("City"), and Lee County ("County") (collectively referred to as "Parties") to amend the Consent Order in OGC No: 06-2345-DF.

The Department and the Parties agree:

1. The County is a signatory to this Amendment for the express and sole purpose of escrow account creation and implementation as described below and is not alleged to have caused violations of law. This Amendment shall not create any permitting responsibilities or obligations for the North Spreader Waterway System on the County.

2. The Department and the City previously entered into Consent Order 06-2345-DF on February 13, 2007. That Consent Order allowed modification of the requirements of Consent Order 15 entered into between the DER, predecessor agency to DEP, and Gulf American Corporation (GAC). Consent Order 15 required GAC to take certain actions to protect the water quality of both the canal system of Cape Coral and the receiving waters of the Caloosahatchee River and Matlacha Pass. One of the actions required, pursuant to Paragraph 3 of Consent Order 15, was the installation of Boat Lift C1 as depicted in Exhibit 2 of Consent Order 15. In 2006, it came to the Department's attention that erosion had occurred at the west end of the boatlift structure allowing water to bypass the structure. The erosion may have occurred as a result of the volume of waters in the canal system and the lower elevation of mangrove wetlands on the west side of the boatlift. The erosion has caused the loss of mangrove wetlands to the west of the

CO#1

5-6-08

boat lift and has caused scouring of submerged sediments. The erosion is severe. It allows navigable depth and width bypassing the boat lift structure. It also results in shoaling upstream and downstream of the boatlift structure that requires dredging to maintain navigational access. The erosion is on-going and continues to impact additional acreage of mangrove wetlands. The modification contained provisions regarding certain restoration activities in the vicinity of the Ceitus Boat Lift. These provisions included the removal of the existing boatlift structure and the design and construction of a new stormwater barrier with either a boat lift or a boat lock to provide navigation access to the canal system.

3. The Department and the City met to discuss the existing conditions in the North Spreader Waterway. In a letter dated October 19, 2007 the City requested the Department suspend the restoration requirements of Consent Order 06-2345-DF. The City requested authorization to remove the existing boat lift structure. The City also requested authorization to pursue an Ecosystem Management Agreement (EMA) pursuant to Section 403.0752 Florida Statutes to provide a holistic approach to resolve the water quality and quantity problems associated with the North Spreader Waterway rather than pursuing the construction of a new stormwater barrier with a boat lift or a boat lock. The Department after reviewing the requests of the City and reconsidering the issues, determined that the requests made by the City may provide a better environmental outcome than the original proposal and adopted same in Amended Consent Order 06-2345-DF ( Amended Order).

4. The Amended Order was petitioned pursuant to Chapter 120 Florida Statutes.

5. The parties, petitioners and other interested persons met on April 10, April 18, April 25, 2008.

Therefore it is,

**ORDERED:**

**Corrective Action**

6 This Amendment supersedes the requirements of Consent Order 06-2345-DF. The City shall implement the corrective actions described below in the timeframes specified for each action. **This document does not modify or eliminate any other requirements specified in Consent Order 15 other than as expressly provided herein.**

7. Within ninety (90) days after the date this Amendment is entered the City shall remove the existing boat lift structure in accordance with Attachment 1. Prior to any construction required in this Amendment, the City shall provide notice to all property owners and residents that may be affected by this Amendment. The notice shall advise that although the existing boat lift structure is being removed, projects designed to allow the waterway to meet water quality standards will be constructed or a stormwater barrier and boat lift or boat lock will be constructed in the North Spreader Waterway in the timeframes specified in this Amendment. These property owners and residents include, at a minimum, all owners and tenants of properties bordering on the navigable portions of the North Spreader Waterway and associated canals upstream of the existing boat lift structure. Within thirty (30) days from the entry of this Amendment, the City shall submit the wording for the notice to the Department for review, modification as necessary, and approval prior to distribution to the residents and property owners. The City shall distribute the notice to the property owners and residents within thirty (30) days after the Department has provided the approved notice. The notice shall be provided via contact with the homeowners association and through a legal notice published one time only in a newspaper of daily circulation in Lee County, Florida.

8. The City shall initiate the EMA process by proposing a broad based team of stakeholders (Stakeholders Group) including federal, state, and local regulatory agencies with jurisdiction over the affected area, other governmental entities, environmental groups, citizen groups including not for profit organizations concerned with water quality, fishing, and the environment that request to participate and others for Department approval. The City shall work with the Stakeholders Group to develop a report (Report) that contains a list of recommended projects that will result in a net environmental benefit to the Charlotte Harbor Preserve State Park, Matlacha Pass Aquatic Preserve, and Charlotte Harbor Aquatic Preserve (receiving waters). The Report shall include at a minimum,

- a) A water quality loading analysis from the drainage basin that discharges into the north spreader waterway. This shall include computer modeling showing the loading data for the existing conditions and for the system as it will be when all of the lands in the basin are developed. Loading shall be calculated for nutrients (total nitrogen and total phosphorous), biochemical oxygen demand, fecal coliforms, and metals (copper, lead, arsenic).

- b) A list of Net Ecosystem Benefit (NEB) projects that will contribute to the restoration of pre-development historic freshwater flows to the estuary with regard to volume, timing and quality from the spreader waterway drainage basin. The list shall include a project description, estimated impact to flow dynamics or pollutant loading each project would reduce, and a timeframe for completion of each project. A recommendation of prioritization of the NEBs to be implemented, with a justification based on environmental benefit, time to implementation (to include permitting and construction), and cost analysis. This recommendation shall be developed to provide short and long term direction for a regional net ecosystem benefit over what the requirements of the original Consent Order 15 provided. In formulating the list of NEB projects the Stakeholder Group shall also develop funding strategies for each NEB project.
- c) **Responsibility for consensus or failure of consensus for the inclusion of NEB projects in the Report shall be by the Stakeholder Group as a whole and shall not be attributable to any singular party thereto.** Provided however, all parties who are to contribute funding to any particular NEB project, which shall include the City, shall be in unanimous written agreement as to the inclusion of such projects in the Report.

9. The initial meeting of the Stakeholders Group shall be held within thirty (30) days of the date of entry of this Amendment (initial meeting). The City shall ensure that timely notice of each meeting is published in the Florida Administrative Weekly. A copy of each notice shall be furnished to the Department at: Florida Department of Environmental Protection, P. O. Box 2549, Fort Myers, Fl. 33902-2549 prior to the meeting referenced in the notice.

10. Nine months after the initial meeting, the Stakeholders Group shall determine whether it appears reasonably probable that the Stakeholders Group will be able to develop a Report with recommended projects that will result in a net environmental benefit to the receiving waters at the end of the 12 month period. If it does not appear reasonably probable that the Stakeholders Group will be able to develop the Report, or if it appears reasonably probable that construction of a permanent stormwater barrier and boat lift to separate the canal water from the receiving waters will be one of the identified projects, the Stakeholders Group shall notify the Department in writing of same and the Department shall request that the City proceed with the permitting

process described in paragraph 12 below within 45 days after written notification by the Department.

11. The Report shall be completed and submitted to the Department as part of an application for an EMA within twelve (12) months after the initial meeting of the Stakeholders Group. The City shall complete the approved NEB priority projects contained within the Department approved EMA Report in accordance with the recommended timeframes contained therein. Any delays are subject to the force majeure provisions of paragraph 17.

12. If the Stakeholders Group is not able to develop a Report with recommended projects that will result in a net environmental benefit to the receiving waters at the end of the 12 month period referenced in paragraph 11 above, the City shall:

- a) Submit an application for an Environmental Resource Permit to the Department for the construction of a permanent stormwater barrier and boat lift to separate the canal water from the receiving waters within 45 days from notice by the Department that the Report is not sufficient to provide a net environmental benefit. The application shall contain a design for the stormwater barrier and boat lift as depicted in "Proposed Stormwater Barrier and Boat Lift" attached hereto as Exhibit "A". If the application is not complete when submitted, the City shall submit additional information requested by the Department within 90 days of receipt of an information request. If the design submitted by the City for the stormwater barrier and boat lift cannot be permitted, the City shall submit a modified design within 90 days of receipt of notice from the Department stating the design is not acceptable. The modified design shall address all the reasons identified by the Department for why the original design was not acceptable. . Nothing contained herein shall impose upon the City any obligation to undertake the design and construction of any other work to repair or prevent further erosion along the spreader canal other than the design and construction of the stormwater barrier and boat lift.
- b) Construct the permanent stormwater barrier and boat lift within 275 days after all applicable permits are issued.
- c) In the event that the City initiates permitting for a stormwater barrier and receives all applicable permits for the barrier then the City shall have no further obligation to

participate in the EMA process or to undertake the construction of any other NEB project.

13. With the exception of the activities described in Attachment 1, effective immediately and henceforth, the City shall not conduct any mangrove trimming or alteration, dredging, filling, or construction activities on or within wetlands and surface waters as defined in Chapter 62-340, Florida Administrative Code without first obtaining a valid Department permit or written notification from the Department that the activities appear to be exempt as proposed from Department permitting requirements; nor shall the City conduct any activities on state owned lands below the ordinary or mean high water lines without first obtaining a lease, easement, or other consent of use from the Department.

#### Escrow Account

14. Within 30 days of entry of this Amendment by the Department's Clerk, **The City of Cape Coral and Lee County shall each deposit One Million Five Hundred Thousand Dollars into an escrow account established at the Department of Financial Services, Division of Treasury ( "the Escrow Account")**. These deposits shall be made in accordance with the provisions of the Escrow Agreement attached hereto as Exhibit "B" and this Amendment.

15. Separate and apart from the Escrow Account, **the Department commits to spend no more than \$500,000 from the GAC Pollution Recovery Fund established and maintained by the Department pursuant to the terms of Consent Order No.15 ( "GAC Fund")**. The parties agree and the Department does hereby declare that this commitment does not create any obligation of the Department except as expressly stated herein or right for the City, County or any other person to share in any potential remainder of the \$500,000 subsequent completion of the work contemplated in 12a or 12b or any approved completed NEB project.

16. The Escrow Account and GAC Fund shall be restricted in the following fashion:

(a) Disbursements from the Escrow Account or GAC Fund may be made to any person or entity providing services as part of the EMA process, for completed work required under paragraphs 12a and 12b of this Amendment or other completed NEB project pursuant to the EMA process so long as the work and budget therefore has been previously approved by the Department ( County contributions to the escrow funds shall only be used for completed NEB project work subsequent to Department approval of the Report and EMA application or completed work under paragraphs 12a or 12b and not for the development of the EMA

application itself or development of the Report). Total disbursements for the development of the EMA Report shall not exceed \$1,000,000. The Department shall have sole discretion in the approval of disbursements from the Escrow Account and GAC Fund.

(b) To the extent monies remain in the Escrow Account after work of paragraphs 12a and 12b or the NEB's contained within the approved EMA has been completed, the monies shall be returned to the City and the County on a pro-rata basis consistent with the terms of this Agreement.

(c) The City shall be responsible for the additional funds in the event the work in described in paragraphs 12a and 12b exceeds \$3,500,000.

(d) The Escrow Account shall continue in effect until the Department confirms that the work contemplated in paragraphs 9 or 12 has been completed. At that time the City and the County shall be entitled to receive any remaining proceeds in accordance with this paragraph.

17. If any event, including administrative or judicial challenges by third parties unrelated to the City, occurs which causes delay or the reasonable likelihood of delay, in complying with the requirements of this Consent Order, City shall have the burden of proving the delay was or will be caused by circumstances beyond the reasonable control of the City and could not have been or cannot be overcome by City's due diligence. Economic circumstances shall not be considered circumstances beyond the control of City, 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 City, 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, City shall notify the Department orally within 24 hours or by the next working day 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 City 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 City, 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 the City to comply with the notice requirements of this Paragraph in a timely manner shall constitute a waiver of City's right to request an extension of time for compliance with the requirements of this Consent Order.

18. The City shall allow all authorized representatives of the Department access to the property at reasonable times for the purpose of determining compliance with the terms of this Consent Order and the rules and statutes of the Department. Entry of this Amendment does not relieve the City of the need to comply with applicable federal, state or local laws, regulations or ordinances.

19. The terms and conditions set forth in this Amendment may be enforced in a court of competent jurisdiction pursuant to Sections 120.69, 373.129 and 403.121, Florida Statutes. Failure to comply with the terms of this Amendment shall constitute a violation of Sections 373.430 and 403.161, Florida Statutes.

20. The City is fully aware that a violation of the terms of this Amendment may subject Respondent to judicial imposition of damages, civil penalties of up to \$10,000 per day per violation and criminal penalties.

21. The City shall publish the following notice in a newspaper of daily circulation in Lee County, Florida. The notice shall be published one time only within 15 days after the effective date of the Amendment by the Department.

**STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
**NOTICE OF AMENDED ORDER**

The Department of Environmental Protection gives notice of agency action of entering into an Amendment to Consent Order, **OGC Case No. 06-2345**, with The City of Cape Coral pursuant to Section 120.57(4), Florida Statutes. The Amended Consent Order addresses the removal of the existing Ceitus boat lift structure. It also requires the development of an ecosystem management approach to correcting the ongoing mangrove erosion and water quality problems associated with the discharge of water in the area. The boat lift is located at 3916 Ceitus Parkway, Cape Coral, Florida 33993 Section 18, Township 44 South, Range 23 East, Lee County. The Amended Consent Order is available for public inspection during normal business hours, 8:00 a.m. to 5:00 p.m., Monday through Friday, except legal holidays, at the Department of Environmental Protection, South District Office, 2295 Victoria Avenue, Suite 364W, Fort



Myers, FL 33901.

Persons whose substantial interests are affected by this Amendment have a right to petition for an administrative hearing on the Amended Consent Order. The Petition must contain the information set forth below and must be filed (received) in the Department's Office of General Counsel, 3900 Commonwealth Boulevard, MS-35, Tallahassee, Florida 32399-3000, 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 Department's identification number for the Consent Order and the county in which the subject matter or activity is located;
- (b) The name, address, and telephone number of each petitioner. The name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes;
- (c) A statement of how and when each petitioner received notice of the Consent Order;
- (d) A statement of how each petitioner's substantial interests are affected by the Consent Order;
- (e) A statement of the material facts disputed by petitioner. If there are none, the petition must so indicate;
- (f) A statement of which rules or statutes petitioner contends require reversal or modification of the Consent Order;
- (g) A statement of facts which petitioner contends warrant reversal or modification of the Amendment, including an explanation of how the alleged facts relate to the specific rules or statutes; and
- (h) A statement of the relief sought by petitioner, stating precisely the action petitioner wants the Department to take with respect to the Amendment.

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 Amendment 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 petition 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, 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;
- (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; and
- (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.

22. The Department 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 Amendment.

23. The Department, for and in consideration of the complete and timely performance by City of the obligations agreed to in this Amendment, hereby waives its right to seek judicial imposition of damages or civil penalties for alleged violations addressed in this Amendment.

24. The Parties acknowledges and waives its right to an administrative hearing pursuant to Sections 120.569 and 120.57, Florida Statutes, on the terms of this Amendment. The Parties acknowledges its right to appeal the terms of this Amendment pursuant to Section 120.68, Florida Statutes, and waives that right upon signing this Amendment.

25. No modifications of the terms of this Amendment shall be effective until reduced to

writing and executed by the Parties. This Amendment may be executed in one or more counterparts, each of which shall be deemed an original, but of which all together shall constitute one and same instrument. .

26. All submittals required by this Consent Order to be submitted to the Department, unless otherwise indicated, shall be sent to the Florida Department of Environmental Protection, South District Office, P.O. Box 2549, Fort Myers, FL 33902-2549.

27. This Amendment is a settlement of the Department's civil and administrative authority arising under Florida law to resolve the matters addressed herein. This Amendment 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.

28. This Amendment is a final order of the Department pursuant to Section 120.52(7), Florida Statutes, 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, Florida Statutes. Upon the timely filing of a petition this Amendment will not be effective until further order of the Department.

[This section intentionally left blank]

FOR THE CITY OF CAPE CORAL :

5/2-08

DATE

Terrance Stewart

Terrance Stewart  
City Manager

STATE OF FLORIDA

COUNTY OF Lee

The foregoing was acknowledged before me this 12<sup>th</sup> day of May, 2008 by (name of individual above). He/she is personally know to me or provided \_\_\_\_\_ as identification and did/did not take an oath.

Connie S. Barron

Notary Public, State of Florida

Printed/typed or stamped name



CONNIE S. BARRON  
MY COMMISSION # DD 615799  
EXPIRES: November 19, 2010  
Bonded Thru Budget Notary Services

My Commission Expires: \_\_\_\_\_

Commission/Serial No.: \_\_\_\_\_

APPROVED AS TO FORM:

By: Mark E. Luce  
Office of the City Attorney

ATTEST: CHARLIE GREEN  
CLERK OF COURTS

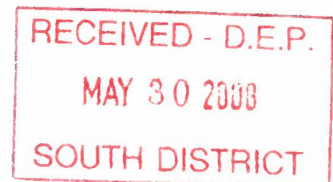
BOARD OF COUNTY COMMISSIONERS  
OF LEE COUNTY, FLORIDA

By: Christa Palencia  
Deputy Clerk

By: Ray Judas  
Chairman

APPROVED AS TO FORM:

By: [Signature]  
Office of the County Attorney

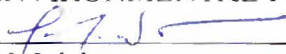


Please do not write below this line. For DEP use only.

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DONE AND ORDERED this 15<sup>th</sup> day of MAY, 2008, in Lee County, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

  
\_\_\_\_\_  
Jon M. Iglehart  
Director of District Management  
South Florida District  
P.O. Box 2549  
Fort Myers, Florida 33902-2549  
Telephone: (239) 332-6975

FILING AND ACKNOWLEDGEMENT

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

  
\_\_\_\_\_

CLERK

5-15-08  
\_\_\_\_\_

DATE

cc: Lea Crandall, Agency Clerk (Mail Station 35)

## ATTACHMENT 1

### REMOVAL OF EXISTING CEITUS BOATLIFT STRUCTURE GENERAL DESCRIPTION OF CONSTRUCTION MEASURES

#### Description of Existing Structure

The existing Ceitus Boat Lift Structure (Structure) is approximately 200 feet in length and consists of several different sections. A photograph showing the area of the structure to be removed is shown in Figure 1. The following description of the Structure is based on visual observations of the facility and a set of drawings prepared for the replacement of the boat lift foundation in 2002. The original design, drawings, and construction details of the Structure are not available. Therefore, the actual size, number and overall length of the foundation elements are not known.

The Structure consists of the following elements (described from East to West):

- East Platform – Triangular-shaped reinforced concrete slab approximately 12 inches thick and 40-ft +/- (length) by 40 ft +/- (base width) in plan, supported on sixteen (assumed) 14-inch square precast concrete piles embedded 30 ft (assumed) into the foundation;
- East Access Platform – Rectangular platform (5 ft wide x 13.2 ft long) supported on four 14–inch square concrete piles (assumed);
- Boat Lift Foundation – A 3’-2” thick x 6’- 8” wide x 10’ long reinforced concrete slab founded on four 14-inch square precast concrete piles (per Drawing S3) embedded approximately 30 ft (assumed) into the foundation;
- Boat Lift – Minuteman No. DSL20-R(15) hydraulic boat lift of 12,000 lbs (assumed) weight;
- West Access Platform – Rectangular platform (5 ft wide x 13.2 ft long) supported on four 14–inch square concrete piles (assumed);
- West Platform – Diamond-shaped reinforced concrete slab approximately 12 inches thick and 20-ft x 20-ft (widest part) in plan, supported on twelve (assumed) 14-inch square precast concrete piles embedded 30 ft (assumed) into the foundation;
- Structure Wall – The 200-ft long physical Structure is thought to be formed by precast reinforced concrete panels. The size of the panels is not known, nor is the embedment depth. For the purposes of this document, it is assumed that the panels

are 8-inches thick, 3-feet wide and 30-feet long embedded into foundation. The panels are assumed to extend the full 200-foot length of the Structure. The Westernmost 94 ft long section of the Structure wall has a concrete cap, and appears to be supported on both faces by an earth embankment (1V: 4H) covered by rip-rap and volunteer vegetation; and

- West End of Structure Wall – Unreinforced concrete has been dumped at the West end of the Structure wall presumably to provide erosion protection at the end of the Structure wall. The volume and strength of the concrete are unknown.

### Description of the Removal Work

It is anticipated that the removal of the Structure will involve the following activities. The East Platform, including its supporting piles and the 40 feet of seawall underneath it, will not be removed. The remaining 160-ft length of Structure wall will be removed (See Figure 1).

- Place turbidity controls around the entire work area;
- Cut electrical power to all systems, remove and dispose of wiring and conduit;
- Place necessary BMPs and disconnect and secure all hydraulic lines to prevent spillage of fluid into the Waterway or onto the ground;
- Remove and store the following items: Operations Shelter; Operations Panel; Hydraulic Power Unit; and Boat Lift;
- Demolish and dispose of concrete cap from West end of Structure wall to the West Platform;
- Demolish and dispose of West Platform slab concrete and Central Access Platform slab concrete
- Demolish and dispose of Boat Lift foundation concrete ;
- Demolish and dispose of East Access Platform concrete;
- Extract precast concrete pilings and dispose of (or demolish to three feet below minimum channel bottom, say -8.0 ft, NGVD);
- Extract precast concrete panels and dispose of (or demolish to three feet below minimum channel bottom, say -8.0 ft, NGVD);
- Remove and dispose of all vegetation along Structure;



- Demolish and remove concrete fill at West end of the Structure;
- Excavate and remove earth embankment material to depth of El. -5.0 ft, NGVD;
- Dredge Waterway to a depth of El. -5.0 ft, NGVD for a distance of 50 ft north and 50 ft south of the Structure. The width of the dredging shall be limited to the width of the original canal as it existed prior to the erosion of the west end of the Structure. The spoil shall be removed to a self contained upland site. No discharge of turbid waters will be allowed from the upland site back into the canal system.
- Remove turbidity-control measures

The above activities will involve land-based equipment, working from the East bank of the Waterway, as well as barge-mounted marine equipment, working in the Waterway.

1. This Consent Order or a copy thereof, complete with all conditions, attachments, exhibits, and modifications shall be kept at the work site of the ordered activity. The complete Consent Order shall be available for review at the work site upon request by the Department staff. The Respondent shall require the contractor to review the complete Consent Order prior to commencement of the activities authorized by this Consent Order.

2. Construction, dredging or filling activities approved by this Consent Order shall be conducted in a manner that does not cause violations of state water quality standards. The Respondent shall implement best management practices for erosion and pollution control to prevent violations of state water quality standards and impacts to wetlands. Temporary erosion control shall be implemented prior to and during construction and permanent control measures shall be completed within seven (7) days of any construction activity. Turbidity barriers shall be installed and maintained at all locations where the possibility to transferring suspended solids into wetlands or surface waters exists due to the ordered work. Turbidity barriers shall remain in place at all locations until construction is completed and soils are stabilized and vegetation has been established. All practices shall be in accordance with the guidelines and specifications described in Chapter Six of the Florida Land Development Manual; a Guide to Sound Land and Water Management (Department of Environmental Regulation, 1988), unless a project-specific erosion and sediment control plan is approved a part of the Consent Order. Thereafter the Respondent shall be responsible for the removal of the barriers.

## COMMENCEMENT NOTICE

3. The Respondent shall notify the Department of the anticipated start date within thirty (30) days of the date that this Consent Order is entered. At least forty-eight (48) hours prior to commencement of the activity authorized by this Consent Order, the Respondent shall submit to the Department an "Environmental Resource Permit Construction Commencement" notice (Form No. 62-343.900(3), Florida Administrative Code (F.A.C.) indicating the actual start date and expected completion date. This notice shall include the Respondent's name and the OGC number associated with this Consent Order, **which is 06-2345**.

4. Should any other regulatory agency require changes to the herein authorized act, the Respondent shall notify the Department in writing of the changes prior to implementation so that a determination can be made whether a Consent Order modification is required.

5. This Consent Order does not eliminate the necessity to obtain any required federal, state, local and special district authorizations prior to the start of any activity approved by this Consent Order. This Consent Order does not convey to the Respondent or create in the Respondent any property right, or any interest in real property, nor does it authorize any entrance upon or activities on property which is not owned or controlled by the Respondent, or convey any rights or privileges other than those specified in the Consent Order and Chapter 40E-4 or Chapter 40E-40, F.A.C.

6. The Respondent shall hold and save the Department harmless from any and all damages, claims, or liabilities which may arise by reason of the ordered activities authorized by this Consent Order.

7. If historical or archaeological artifacts are discovered at any time on the project site, the Respondent shall immediately notify the Department's South District Office, P.O. Box 2549, Fort Myers, FL 33902-2549.

8. The Respondent shall immediately notify the Department in writing of any previously submitted information that is later discovered to be inaccurate.

9. Respondent shall provide notice to boaters that may be affected by this construction that passage through the work area will be restricted. Respondent shall provide the notice through press releases and direct communications with the homeowners association representatives thirty (30) days prior to the start of construction. The notice shall set forth the schedule for the closure of the waterway to navigation giving specific dates and times. Respondent shall provide a copy of the notice to the Department at the time it is sent out to the homeowners.

10. Best management practices for erosion and turbidity control, including but not limited to the use of staked hay bales, silt screens, and turbidity barriers shall be used and maintained as necessary at all times during project construction. The Respondent shall be responsible for ensuring that turbidity control devices are inspected daily and maintained in good working order so that there are no violations of state water quality standards resulting in a degradation of the water quality.

11. All materials generated from the demolition including, but not limited to, concrete, rebar, loose fill materials, rock, and vegetation shall be taken to an upland disposal site. The Respondent shall notify the Department of the disposal location prior to commencement of the demolition.

12. Prior to the initiation of any work authorized by this Consent Order, floating turbidity screens with weighted skirts that extend to within 1 foot of the bottom shall be placed so as to surround and isolate the active work areas, including the stormwater barrier, boatlift, and dredge area 50 feet upstream and downstream of the stormwater barrier, from ambient waters. The screens shall be maintained and shall remain in place for the duration of each particular phase of project construction to ensure that turbidity levels outside the construction area do not exceed twenty nine (29) NTUs above background in the canal downstream of the stormwater barrier (Class III waters,). The Respondent shall be responsible for ensuring that turbidity control devices are inspected daily and maintained in good working order so that there are no violations of state water quality standards outside of the turbidity screens.

13. During dredging operations the Respondent shall monitor turbidity levels within 5 feet of the active work area once every four hours until project completion. Turbidity shall be monitored down current from the active work site and shall be taken within the densest portion of any turbidity plume within 5 feet outside of the turbidity curtains. An ambient sample shall be collected within 5 minutes of the sample collected above for comparison. The ambient sample shall be taken up current at mid-depth and at no time shall the ambient sample be within an apparent turbidity plume. All monitoring data shall be submitted weekly until the work is completed and any work related turbidity has stopped. The reports shall contain the following information:

- a. Consent Order number;
- b. Dates of sampling and analysis;
- c. A statement describing the methods used in collection, handling, storage, and analysis of the samples;

- d. A copy of the map indicating the sampling locations; and
- e. A statement by the individual responsible for implementation of the sampling program concerning the authenticity, precision, limits of detection and accuracy of the data.

Monitoring reports shall also include the following information for each sample taken:

- a. Time of day sample was taken;
- b. Depth of water body;
- c. Depth of sample;
- d. Antecedent weather conditions; and
- e. Velocity of water flow.

If monitoring reveals turbidity levels at the compliance location that appear to violate the State Water quality standards, construction activities shall cease immediately and not resume until corrective measures have been taken and turbidity has returned to acceptable levels. Corrective measures may include modification of the work procedures that were responsible for the violation, install more turbidity containment devices, and repair any non-functioning turbidity containment devices. Any such occurrence shall also be immediately reported to the Department's South District office, SLERP Compliance and Enforcement Section in Fort Myers. Monitoring reports shall be submitted to the Department's South District Office, SLERP Compliance and Enforcement Section, at P.O. Box 2549 Fort Myers, Florida, 33902-2549 or by fax at (239) 332-6969.

#### **Manatee Protection**

14. The Respondent shall comply with the following manatee protection construction conditions:

a. The Respondent shall instruct all personnel associated with the project of the potential presence of manatees and the need to avoid collisions with manatees. All construction personnel are responsible for observing water-related activities for the presence of manatees.

b. The Respondent shall advise all construction personnel that there are civil and criminal penalties for harming, harassing, or killing manatees, which are protected under the Marine Mammal Protection Act of 1972, The Endangered Species Act of 1973, and the Florida Manatee Sanctuary Act.

c. Siltation barriers shall be made of material in which manatees cannot become entangled, shall be properly secured, and shall be regularly monitored to avoid manatee entrapment. Barriers must not block manatee entry to or exit from essential habitat.

d. All vessels associated with the construction project shall operate at no wake/idle speeds at all times while in the construction area and while in water where the draft of the vessel provides less than a four-foot clearance from the bottom. All vessels will follow routes of deep water whenever possible.

e. If a manatee is sighted within 100 yards of the project area, precautions shall be implemented by the Respondent and the contractor to ensure protection of manatees. These precautions shall include not operating any equipment closer than 50 feet to a manatee, and immediately shutting down equipment if a manatee comes within 50 feet of the equipment. Activities will not resume until the manatees have departed the project area of their own volition.

f. Any collision with or injury to a manatee shall be reported immediately to the Florida Fish and Wildlife Conservation Commission at 1-888-404-FWCC (1-888-404-3922). Collision and/or injury should also be reported to the U.S. Fish and Wildlife Service in Jacksonville (1-904-232-2580) for North Florida or in Vero Beach (1-561-562-3909) for South Florida.

g. Temporary signs concerning manatees shall be posted prior to and during all construction/dredging activities. All signs are to be removed by the Respondent upon completion of the project. A sign measuring at least three feet by four feet which reads "*Caution: Manatee Area*" shall be posted in a location prominently visible to water related construction crews. A second sign shall be posted if vessels are associated with the construction and shall be placed visible to the vessel operator. The second sign shall be at least 8 1/2 inches by 11 inches and read:

Caution: Manatee Habitat. Idle speed is required if operating a vessel in the construction area. All equipment must be shutdown if a manatee comes within 50 feet of the operation. Any collision with and/or injury to a manatee shall be reported immediately to the FWC Hotline at 1-888-404-FWCC (1-888-404-3922). The U.S. Fish and Wildlife Service should also be contacted in Jacksonville (1-904-232-2580) for North Florida or in Vero Beach (1-561-562-3909) for South Florida.

Specific information on obtaining these signs may be obtained by contacting the Department or FWC at (850) 922-4330.

15. At least one person shall be designated as a manatee observer when in-water work is being performed. That person shall have experience in manatee observation, and be equipped with polarized sunglasses to aid in observation. The manatee observer must be on site during all in-water construction activities and will advise personnel to cease operation upon sighting a manatee within 50 feet of any in-water construction activity. Movement of a work barge, other associated vessels, or any in-water work shall not be performed after sunset, when the possibility of spotting manatees is negligible.

16. Blasting shall be prohibited. If no other alternative exists, a permit modification shall be required. This modification must include special manatee protection blasting conditions, as required by the Bureau of Imperiled Species Management, Division of Habitat and Species Conservation, Florida Fish and Wildlife Conservation Commission.

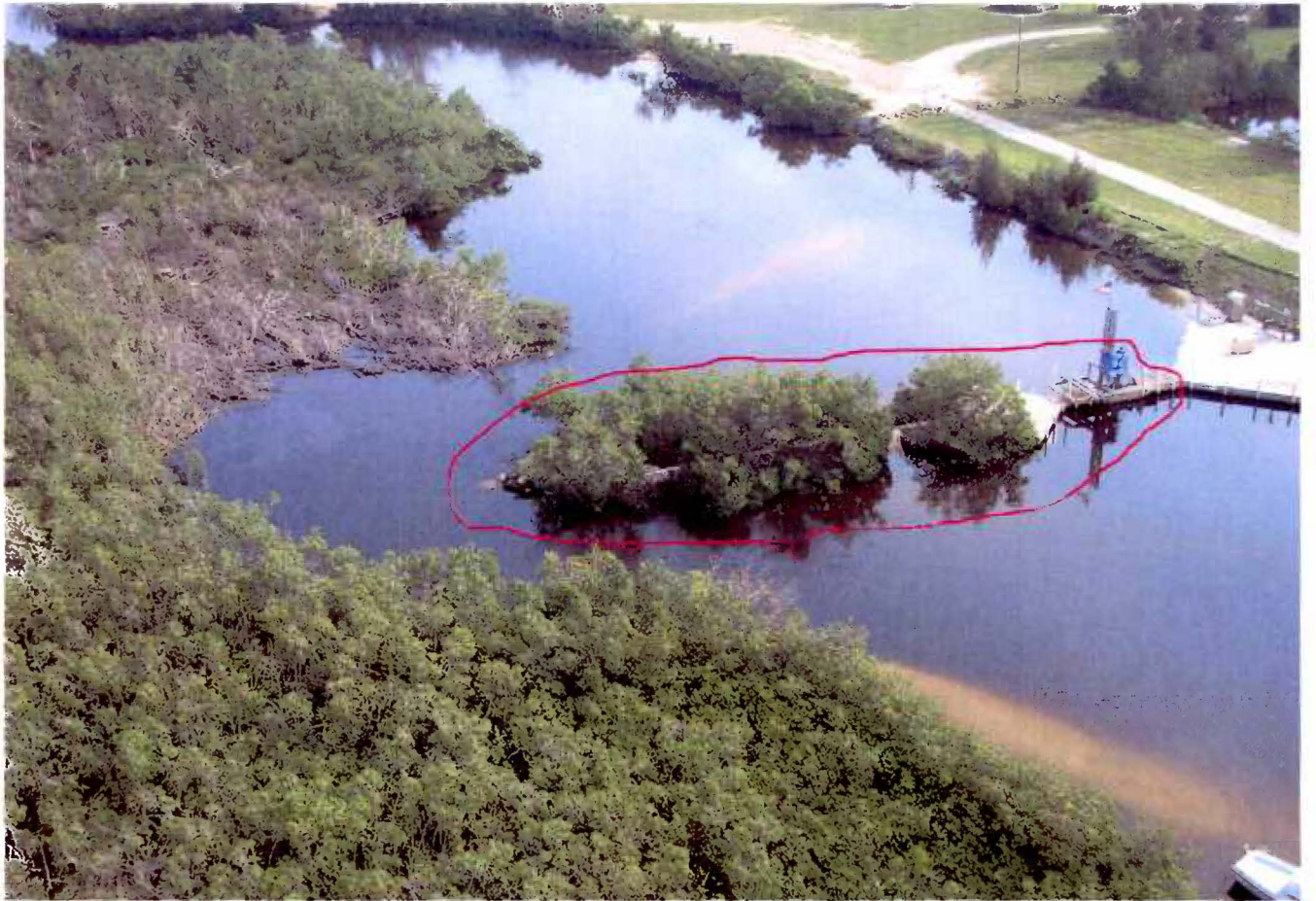
#### PROOF OF RESTORATION COMPLETION

17. Within 30 days of completion of the work referenced in this attachment, Respondent shall submit the following information to the Department:

- a. Written notification that the Restoration Actions have been completed.
- b. The notification shall bear the notations "OGC Case No. 06-2345-DF" and name of Respondent exactly as it appears on the first page of this Consent Order.
- c. Enough color photographs to show the entire completed restoration area taken from fixed reference points shown on a plan view drawing.
- d. The above information shall be submitted to the Florida Department of Environmental Protection, South District Office, P.O. Box 2549, Fort Myers, FL 33902-2549.

18. The project shall comply with applicable State Water Quality Standards, namely:

- 62-302.500 - Minimum Criteria for All Waters at All Times and All Places
- 62-302.510 - Surface Waters: General Criteria



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SOUTH DISTRICT



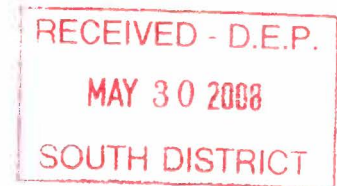
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MAY 30 2008  
SOUTH DISTRICT

**Stage 1**

- A. Demolish/remove existing stormwater barrier and boat lift.**
- B. Construct new stormwater barrier and boat lift.**



**ESCROW AGREEMENT**



WHEREAS, the State of Florida, acting by and through the Department of Environmental Protection (FDEP), 3900 Commonwealth Blvd. Tallahassee, Florida 32399 hereinafter referred to as "Agency", entered into an Amended Consent Order with the City of Cape Coral and Lee County (collectively "parties"), a copy of which is attached; and

WHEREAS, the FDEP and parties hereto desire to hold such funds paid under the above-referenced Order in an interest bearing account for eventual disbursement as directed by the Agency in accordance with that Order; and

WHEREAS, the FDEP and parties desire to establish this account with the Department of Financial Services, Division of Treasury, a governmental entity organized under the laws of the State of Florida, as Escrow Agent.

NOW THEREFORE, in consideration of the covenants set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the FDEP and parties agree as follows:

1. The State of Florida, acting by and through the Agency, agrees to establish a restricted account (Account) with Escrow Agent, to be held in trust and applied only as provided in this Escrow Agreement.
2. The Agency representative and/or his/her designees shall be the sole signatories on the Account with the Escrow Agent and shall have sole authority to authorize withdrawals from said account. Upon the Escrow Agent's receipt of a written notice from the Agency representative the Escrow Agent shall withdraw funds from the Account. The Escrow Agent is acting in an administrative and not discretionary role, and shall be obligated to act only in accordance with the terms and provisions herein.
3. Investments of moneys in the Account shall be made in accordance with Chapter 17, Florida Statutes, with due regard for the times at which withdrawals are expected to be made. All income, interest and proceeds of such investment shall accrue to the Account, with the Escrow Agent being compensated in accordance with Section 17.61, Florida Statutes from funds in the Account.
4. The Escrow Agent shall deliver to the Agency and parties quarterly statements in reasonable detail showing, as of the date of such statement: (a) the amount of cash held in the Account and (b) the amount of earnings credited to the Account.
5. This Escrow Agreement shall be governed by and construed in accordance with the laws of the State of Florida.

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Exhibit B

6. This Escrow Agreement shall terminate upon disbursement by the Escrow Agent of all moneys held by it hereunder.

7. Any provisions of this Escrow Agreement found to be prohibited by law shall be ineffective only to the extent of such prohibition, and shall not invalidate the remainder of this Escrow Agreement.

8. The Escrow Agent shall not be liable for any error of judgment or for any act done or omitted by it in good faith, or for anything which it may in good faith do or refrain from doing in connection herewith.

9. This Escrow Agreement may be signed in three or more counterparts each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

In WITNESS WHEREOF, the parties have executed this Escrow Agreement as of the date last shown below.

CITY OF CAPE CORAL  
FID: 46-13-043771-54C

ATTEST

By: Bonnie J. Vent  
Bonnie J. Vent  
City Clerk

BY: Eric P. Feichthaler  
Eric P. Feichthaler  
Mayor

APPROVED AS TO FORM:

BY: [Signature]  
Office of the City Attorney

ATTEST: CHARLIE GREEN  
CLERK OF COURTS

BOARD OF COUNTY COMMISSIONERS  
OF LEE COUNTY, FLORIDA

By: Christa Palencia  
Deputy Clerk

By: [Signature]  
Chairman

APPROVED AS TO FORM:

By: [Signature]  
Office of the County Attorney



STATE OF FLORIDA, AGENCY

FID:

By: 

Name: Jon M. Alexander

Title: Director of District Mgmt

Date: MAY 15, 2008

Address:

ESCROW AGENT:

STATE OF FLORIDA, DEPARTMENT OF FINANCIAL SERVICES, DIVISION OF TREASURY

BY: Y.T. Toulon

Name: Y.T. Toulon

Title: Bureau Chief

Date: 5.21.08

Address: 1801 Hermitage Blvd., Suite 470  
Tallahassee, FL 32308

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