

1 IN RE: CITY OF CAPE CORAL

2 TAKEN 12-1-2023

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11 written to the reporter and misspellings and other
12 discrepancies. The above discrepancies in the text will
13 be corrected when the text has been proofread, finalized
14 and certified to as the official record.

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16 (Recess.)

17 THE COURT: Let's go on the record.

18 All right. We are reconvening the final
19 hearing in DOAH case number 23-1786. We are now in
20 Sarasota and are picking up where we left off. Because
21 we have a new court reporter, I'm going to ask for
22 counsel to please make your appearances, starting with
23 the Petitioners'.

24 MR. HANNON: Good morning, Your Honor.

25 Everyone watching on television knows I have permissions

1 to remain seated. This is J. Michael Hannon, Qualified
2 Representative for the Petitioners'.

3 MR. THOMAS: And I'm John Thomas from
4 St. Petersburg for the Petitioners'.

5 THE COURT: Thank you. For the city.

6 MR. HENNESSY: Good morning, Your Honor.
7 Kevin Hennessey, Lewis, Longman & Walker for the City of
8 Cape Coral. With me is Fred Aschauer immediately to my
9 right. Next to him is Richard Green and at the end of
10 the table is Chris Perrigan. With us today in the
11 courtroom is our project engineer, Steve Neff. Our
12 environmental officer, Maya Robert. And the city
13 attorney, Alex Boksner. Thank you.

14 THE COURT: Thank you. And for the
15 Department.

16 MR. HOENSTINE: Thank you, Your Honor. My
17 name is Ron Hoenstine, I'm an attorney for the State of
18 Florida Department of Environmental Protection. Also
19 have Kenny Hayman as co-counsel. And next to him is
20 Ms. Jennifer Carpenter, the district director for
21 Florida South district office. Thank you.

22 THE COURT: Thank you. All right. Some
23 directions to the members of the public on Zoom. First
24 of all, if I could just get a thumbs up or somebody to
25 indicate at how volume is for those on Zoom.

1 Are you hearing us all?

2 UNIDENTIFIED: I am good, Your Honor.

3 THE COURT: Okay. Great. Thank you.

4 All right. For those of you who are on
5 Zoom, we're going to ask for you to please keep yourself
6 muted throughout this hearing. The attorneys have also
7 asked if -- if you are willing, if you would turn your
8 video screens off. It's just a little districting
9 having all the windows into your homes and offices at
10 this point.

11 Also, if you would, I will do my best to
12 make sure that if people are wanting to join that I do
13 let them in. Of course, my attention needs to be
14 focused on the parties and on the evidence that is
15 coming in. So if you would, once you are in, if you
16 would please stay in even if you are leaving for lunch
17 break or whatever it is. If you're going to be coming
18 back to that computer or device, if you would just stay
19 logged into the Zoom and then we don't have to, you
20 know, let you back in. It's not something I need to be
21 looking at.

22 On the flip side, I will also just be
23 leaving the Zoom open, so when we break for lunch, I
24 will not be, you know -- I will not be ending the Zoom
25 call for everyone; I will just be leaving it open and

1 hopefully remembering to mute it.

2 Anything else about Zoom from the parties?

3 Okay.

4 MR. HENNESSY: No, Your Honor.

5 THE COURT: Thank you. All right. Then
6 let's pick up where we left off on Wednesday. We were
7 on the prehearing stipulation, and there were concerns
8 about the actual issues, the legal issues that are in
9 dispute. We had argument, some lengthy argument
10 actually, on this issue on Wednesday. I'm going to ask
11 the counsel if you'll make -- if you'd like to make a
12 short argument on this issue before I rule.

13 And just to -- to encapsulate it, so if
14 there was some confusion, it looked like the petition
15 itself alleges that the ERP at issue does not meet the
16 public interest test as defined in the statute. But the
17 prehearing stipulation, the Petitioners' were listing a
18 number of other issues which the respondents contest
19 were pled.

20 So would you like to speak on that,
21 Mr. Hannon or Mr. Thomas?

22 MR. HANNON: Your Honor, Mr. Thomas will
23 speak on it, but we filed a memorandum this morning and
24 served it on anyone. I'm hopeful that everyone received
25 it.

1 THE COURT: All right. Do you have a copy
2 for me?

3 MR. HANNON: I do not have a hard copy. I
4 can e-mail to Your Honor.

5 THE COURT: That's okay. I can pull it up
6 on the docket. It's not something that I have looked
7 at, though, so if you'd go ahead and speak to it.

8 Or Mr. Thomas, if you would speak to it.

9 MR. THOMAS: Your Honor, I hate to start
10 this way, but I need to find our memorandum.

11 THE COURT: Okay.

12 MR. THOMAS: Which I don't have a piece of
13 paper. Just a moment.

14 THE COURT: And the other parties have seen
15 this memorandum?

16 MR. HOENSTINE: Yes, Your Honor.

17 MR. HENNESSY: We have, Your Honor.

18 THE COURT: Okay.

19 MR. THOMAS: Thank you, Your Honor.

20 All right. So our -- they've objected to
21 many, many paragraphs. Many of them are redundant of
22 other issues that we've stated. Our position is that
23 all of these issues have been raised in the petition and
24 have been further developed in the discovery in this
25 case. So the general response here is that the -- the

1 that cases that the Division of Administrative Hearings
2 are tried on a stipulation. That's always been my
3 experience. It's my understanding of how it is expected
4 to function.

5 Being tried on the stipulation is different
6 from being tried on the petition. The petition has to
7 meet uniform rules, and the Department of Environmental
8 Protection is required to ensure that it does before it
9 refers the matter to the Division of Administrative
10 Hearings.

11 In this case, the petition was referred to
12 the Division of Administrative Hearings without any
13 issue in the pleadings addressed in that referral.
14 There was a motion to dismiss on May 30th, and in that
15 motion there were claims regarding inadequacies of the
16 petition.

17 However, the inadequacies that are now being
18 argued or object -- the objections that have been raised
19 address the petition at this very late date and assert
20 that the petition is inadequate with respect to
21 citations to authority and perhaps other matters.

22 The objection is rather cryptic in the
23 respondents' objections which really puts us in a little
24 bit of a position of guessing exactly what their
25 objection is, which does create a little bit of

1 prejudice and may slow things, but it's our position
2 that we've clearly stated that the Petitioners'
3 position was made clear in the first proceeding.
4 Petitioners'' position has been made clear in the
5 petition in this proceeding in terms of all of the
6 allegations as well as the attachments, which cover all
7 of the issues that were raised in the disputed issues
8 that petitioner is -- would contend should be allowed.

9 Among other things the petition alleged that
10 all of the purported reasonable assurances are not
11 supported by the facts, and that the findings of the
12 administrative law judge in the previous proceeding may
13 have started this Isis effect or may have some estoppel
14 effect. Those are legal issues which will be addressed
15 later, but in incorporating many of those issues into
16 this -- into this pleading, we feel that those issues
17 are -- are definitely been raised. Definitely been
18 rather clearly presented.

19 And so really, the issue of the uniform rule
20 as stated in one of the cases that we cited is that the
21 state is entitled to notice, too. So it is, in essence,
22 about notice. The issues that we raised have been
23 clearly noticed, and the petition is required to be
24 substantially true to the uniform rules, which the
25 department found that it was.

1 Now, the respondents seek to shut down those
2 issues which have been, I would say, tried by
3 acquiescence, but really it was discovery, and it was
4 petition in itself that raised the issues. But there's
5 no issue of notice. I'm confident in saying that the
6 respondents are fully aware of what the petition is
7 alleging, and they've known for sometime.

8 So in this case, at this stage of the
9 proceeding, raising these issues is prejudicial to
10 Petitioners' actually and with the fact that respondents
11 are fully apprised of what the issues are through the
12 petition and through the discovery, they've accepted it.
13 They have not objected to it. They've not moved to
14 dismiss or strike any claims. Even though
15 administrative petitions aren't structured as causes of
16 action, each allegation is treated as a claim with
17 respect to 57.105, for example. Each allegation is a
18 claim.

19 So when they present these objections as
20 this late point in time, it's essentially -- it's either
21 a motion to dismiss those claims or it's a motion for
22 summary judgment on those claims. As a motion to
23 dismiss, the uniform rule would require that we have an
24 opportunity to conform the pleadings to the uniform rule
25 if they are not in compliance with the uniform rule. So

1 we should have an opportunity to amend under the uniform
2 rule. Alternatively, if it's treated as a motion for
3 summary judgment on claims that have been made in the
4 petition, then this -- no offense, but Your Honor does
5 not have the jurisdiction or authority to enter a
6 summary judgment in a licensing and permitting
7 proceeding.

8 So that's really what the -- what's
9 happening here. And not to cast aspersions, you know,
10 we find ourselves in a bit of a trap if we're not
11 allowed to amend the petition, and our due process
12 rights will be severely limited by striking any of these
13 claims that we've made. So I think waiting to this
14 point in time, the respondents have waived these issues.
15 And they are pleading issues which are properly
16 addressed as a -- in a motion to dismiss, and the timing
17 for a motion to dismiss has long since expired.

18 So to bring these issues forward on this
19 late date with a cryptic objection is an inadequate
20 notice. It's a late notice. It's about issues that
21 have been waived by the Respondent. We should be
22 allowed to cure any deficiencies, even at this late
23 time, since this is -- since we have not amended the
24 petition even once in this case, and we've not been
25 asked to amend the petition even once.

1 So the case law that we cite in the
2 memorandum that we presented yesterday holds that -- the
3 law that I've been arguing to you comes from the
4 Brookwood-Extended Care Center of Homestead, LLP versus
5 Agency for Health Care Administration at 870 So. 2d,
6 page 834, Florida 2003. That was a 4th DCA case. And
7 the other case that we cite is the Cross Saybar Creeks
8 case. And these cases clearly stand for the proposition
9 that a dismissal without an opportunity to amend must be
10 reversed, so we are clearly of the position that we have
11 presented all the issues.

12 We've made reference in paragraphs 60, for
13 example, that -- excuse me. In our paragraph 60, we
14 have allegations that the second part of which may have
15 been ignored. Paragraph 60 says -- begins with a
16 reference to Title 16 USC Section 1531, and the second
17 sentence -- which reminds that in paragraph 48,
18 "Petitioners' recount the findings of the administrative
19 law judge in a previous denial of the removal of the log
20 which demonstrates a failure to protect fish, wildlife,
21 and the mangroves."

22 The mangroves, by the way, are referenced
23 repeatedly throughout the petition and through the
24 attachments. The mangroves are adjacent, so many of the
25 issues regarding impacts relate to the mangroves.

1 And we also made allegations -- we brought
2 forward and booted in a number of paragraphs from the
3 prior proceeding, and the allegation has been included
4 in our petition that none of the reasonable assurances
5 that are required in this proceeding have been met --
6 have been provided. And with that and the references to
7 the previous proceeding and the findings in the previous
8 proceeding and the conclusions of law in the previous
9 proceeding, I think it's pretty clear that this is not a
10 case where the respondents lack notice, and that's
11 really what the uniform rule is about, is notice of the
12 issues in the case.

13 I would add that in these complex
14 environmental cases, we start with the statute. Then we
15 have rules that implement the statute, and then there
16 are applicant handbooks, which are very extensive and
17 very detailed. And I would remind the tribunal that
18 this is the Division of Administrative Hearings, which
19 was established to, among other things, but in
20 particular, to level the playing field between the
21 citizenry of this state and the agencies with their
22 special knowledge, their production of their rules.

23 So when we have covered the gamut of all the
24 issues in our petition and we've endeavored to identify
25 the statutes that -- statutes and rules that apply, it

1 seems that they could argue if we don't a cite but we
2 cite a rule, that we're inadequate; or if we cite a rule
3 but not a statute, then we're inadequate; or if we cite
4 an applicant handbook and not a rule or a statute, we
5 might not have complied with it.

6 So with that complexity of the regulatory
7 structure, we are required to do the best we can,
8 substantial compliance, and it is the stipulation which
9 brings forward, ultimately, the issues to be tried.

10 Many of those issues have been clearly, clearly
11 identified. Some of them have been very adequately
12 identified. And it would be extremely prejudicial to
13 have claims in our petition dismissed or a summary
14 judgment of our claims because we couldn't get into the
15 mindset of the regulator and identify all of the
16 specific provisions that might apply.

17 THE COURT: Thank you.

18 So you filed a thorough an well-organized
19 petition in the case, and it's organized by the type of
20 claim. And the only state claims that you allege are
21 violation of 373.414, public interest test, and then the
22 373.016, declaration of policy.

23 And I think that the -- I mean, you don't
24 argue that parties at DOAH are not limited to the issues
25 raised in their petition, right?

1 MR. THOMAS: They're not limited by issues
2 raised in the petition. It's my understanding petition
3 needs to endeavor to identify the statutes, but it needs
4 to identify the issues and our petition. I believe it
5 does that.

6 THE COURT: Okay.

7 THE REPORTER: I'm not -- you're trailing
8 off, Mr. Thomas. Can you please speak up?

9 MR. THOMAS: I need to speak up? I'm sorry.
10 I'm doing what everybody is doing and not being --

11 THE REPORTER: Thank you.

12 THE COURT: It was just that trail end of
13 what -- of that last sentence she needed to hear.

14 MR. THOMAS: I...

15 THE COURT: It's all right. I got it.

16 So the -- Mr. Thomas, yes, at DOAH, we do
17 hear cases. You know, the final issues are the ones
18 that are brought forward in the stipulation. Usually
19 what occurs is a broader petition, and then issues are
20 narrowed in the stipulation. But, you know, the
21 stipulation means that everybody's agreed that those are
22 the issues, and clearly that's not what we have here.

23 We have agreement among all the parties as
24 to one legal issue, clearly, and a lot of disputes about
25 the rest of them. So that's what I'm here on.

1 So let me hear from -- I don't know who
2 wants to go next, the Department or the City.

3 MR. HOENSTINE: Looks like the City does.

4 THE COURT: Okay. They jumped up.

5 MR. ASCHAUER: Permission to approach, Your
6 Honor?

7 THE COURT: Yes.

8 MR. HENNESSY: Mr. Aschauer is just
9 providing everyone with a copy of a couple cases that I
10 may be referring to. I may refer to a couple other
11 cases. They're DOAH cases.

12 THE COURT: And --

13 MR. HENNESSY: Mr. Green is going to
14 function as the IT person since the camera has gone off.

15 THE COURT: Oh. Actually, can we go off the
16 record? And let's just fix that. Just a second.

17 (Recess.)

18 THE COURT: Let's go back on the record.
19 Thank you.

20 MR. HENNESSY: Thank you, Your Honor.

21 In response, briefly, this is not the first
22 permit or the first proceeding. As Your Honor's pointed
23 out, this comes to you because of our objection that's
24 clearly stated in this stipulation to the issues that
25 are we contend are being added and exceed -- exceed the

1 statements in the petition.

2 The petition is, as you say, Your Honor,
3 paragraphs 57 and 58, limited to Florida statutes
4 373.016, declaration of policy, and 373.414, public
5 interest test.

6 We believe, again, that we have a conflating
7 and confusing of the issues by the Petitioners'. This
8 is not a question of the sufficiency of the petition or
9 a motion to dismiss or a motion for summary judgment.
10 That was a part -- we had a motion to dismissed. It was
11 argued. It was solely on the issue of timeliness.

12 It's not an issue of due process for the
13 Petitioners'. We agreed to a full and complete hearing
14 on the issues that they have pled, that they have raised
15 in their -- in their petition. That is their due
16 process entitlement.

17 Our due process entitlement is to be clearly
18 informed of the issues they are raising throughout
19 this case so that we properly prepare and then hear
20 today, this week, in this administrative proceeding. We
21 are -- have -- we have an obligation to be clearly
22 informed of the issues they're raising and the challenge
23 that they are making to this permit.

24 Your Honor, even before the burden-shifting
25 statutes were adopted, the case law was clear with

1 regard to the responsibilities being placed on a
2 petitioner, and that goes to the seminal case of Florida
3 Department of Transportation versus JWC Company, Inc.
4 from 1981, First District Court of Appeal. And I direct
5 your attention to the language on page -- well, it's the
6 10th page of the copy I provided. It's under head notes
7 17 through 23.

8 The court states, "We totally agree with the
9 sentiments expressed by amicus curiae at AgraCo that no
10 third party, merely by filing a petition, should be
11 permitted to require the applicant to completely prove
12 all items in the permit application down to the last
13 detail."

14 And frankly, you heard that yesterday in
15 Fort Myers. That's what they thought that they could
16 do, that they would make us prove up, you know, every
17 aspect of the permit, and then they'd just decide if
18 they thought it was sufficient or not. That's not the
19 way the process works.

20 "The petitioner must identify -- must
21 identify the ideas of controversy and allege a factual
22 basis." So it's two things; it's the issue and the
23 factual basis. I guess they're coming in now and saying
24 they've alleged a factual basis. Well, they have to tie
25 it into the actual legal issues. So they must also,

1 secondarily, "Allege a factual basis for the contention
2 that the facts relied on by the applicant fall short of
3 procuring the reasonable assurances burden case upon the
4 applicant. The burden of proof is upon the petitioner,
5 then, to go forward with evidence to prove the truth of
6 the facts asserted in the petition."

7 Your Honor, it's even more clear in the case
8 of Conklin versus Williams, which we provided you a copy
9 of, in the 1987 Fifth District Court of Appeal case,
10 which states, "It is elementary" -- and this is the
11 second full paragraph. It's a very short case.

12 "It is elementary that the parties to civil
13 and criminal proceedings, whether judicial or
14 administrative, are entitled to notice of the issues as
15 a matter of due process. At no time" -- well, we won't
16 go into what happened with Mr. Conklin. But that point
17 is clear, and it speaks to administrative proceedings
18 such as the one we are in. And there are administrative
19 cases that -- and statutes that support this.

20 120.545(b) of the Florida statutes states
21 that, "The petition must contain a statement of rules or
22 statutes that require reversal." 120.569(2)(c), "A
23 petition shall include items in -- that are listed in
24 the uniform rules adopted pursuant to 120.54."

25 And administrative cases, I direct your

1 attention to Mansoor Imaec versus Andy Estates. It's
2 case number 22-1564 from 2023. The ALJ disregarded the
3 testimony on matters not raised in a petition. They
4 were -- and nor were they tried by consent. And,
5 Your Honor, there's clearly no consent here because
6 that's why we're here, and we objected to what they were
7 trying to put in this -- in the stipulation.

8 I'd also point to the Highpoint Tower versus
9 South Florida Water Management District case. That's at
10 07-4834, a 2010 administrative decision. The ALJ did
11 not permit rule provisions not specifically pled in the
12 petition. In that case, they pled, generally, a large
13 rule -- I'm sorry. They pled a specific portion of a
14 large rule, and they were not permitted to raise issues
15 under the entire scope of that rule.

16 So we have that same situation here.
17 They've pointed us to the public interest test criteria.
18 That's what we're here on.

19 I'd also point to Sampson versus Harbor
20 Woods, case number 83-2134, a 1983 administrative
21 decision of DOAH that the -- where the court held the
22 attempt to raise an issue at hearing not pled in the
23 petition is untimely. Again, this is a situation of
24 their own making. You know, they're indicating what
25 motions need to be filed. They're indicating now that

1 they should be allowed to -- what they were asking for
2 is to say that this is being tried on consent.

3 It's not being tried on consent. They had
4 every opportunity, and they were alerted, as --
5 Mr. Hoenstine will talk about how he specifically
6 alerted them to the need to -- to amend their petition
7 if they were seeking to raise issues that they were
8 arguing at times in this case. Mr. Hoenstine was very
9 clear that they were not alleged in the petition, and
10 that they needed to amend, and they never took that --
11 they never headed that warning.

12 So this is another situation where this
13 is -- this is a creation of their own doing. This is
14 not them being sandbagged by the respondents. You know,
15 there is no motion pending from the Petitioners'. There
16 is no trial by consent to these issues, and it is too
17 late, once we've begun the proceeding, for them to seek
18 to amend their petition.

19 Thank you.

20 THE COURT: Thank you.

21 Mr. Hoenstine?

22 MR. HOENSTINE: Yes, Your Honor. I'll be
23 very brief.

24 So on June 27th, 2023, the Department filed
25 a response to Petitioners' motion to dismiss. In

1 paragraph 8 it says, "Moreover, as a stated basis for
2 Petitioners'' challenge to the ERP permit, the petition
3 for administrative hearing includes no legal citation to
4 either Section 373426(1) or Rule 62-330.302, and the
5 petition fails to include any relevant facts regarding
6 alleged past violations by the City of Cape Coral that
7 should be considered in relationship with either of
8 those rules or statutory provisions. These deficiencies
9 alone warrant denial of the Petitioners'' motion on this
10 point."

11 And so we raised it, we made a filing. They
12 were on notice, they read it. They should have been
13 alerted that they needed to amend their petition.

14 In addition, the DOAH case that Mr. Hennessy
15 pointed out, that was a -- the DOAH case 22-1564, that
16 was five months ago, and that was a case with Judge
17 Stevenson. It was a department case. I was the
18 attorney, and I made the argument, and Judge Stevenson
19 did not allow them to argue compliance with Rule
20 1820.003 or the applicants' handbook because neither of
21 those were pledged in the petition, and they were not
22 tried by consent from the department.

23 Thank you, Your Honor.

24 THE COURT: Thank you. I have a question
25 for you, so you're going to need to press to talk.

1 I -- what the -- I did some research, you
2 know, when you brought this up on Wednesday. And for
3 me, the consideration was which rule implements which
4 statute. So 62-330.302 is the rule implementing
5 373.414. Point 301, the other rule, implements a
6 different statutory section. So, to me, that was
7 dispositive of this issue.

8 However, point 302 contains standards in
9 addition to the public interest test. So if you look at
10 subsection B, subsection B is, "will not cause
11 unacceptable cumulative impacts upon wetlands or other
12 surface waters." C is, "the location adjacent to and in
13 close proximity to Class II waters or Class III waters."

14 So my question to you is: Then why aren't
15 those issues which Petitioners' are trying to add to
16 the stipulation cause in this hearing.

17 MR. HOENSTINE: Sure. So they could have
18 very easily cited those rules in their petition, but
19 more importantly, when they say the public interest test
20 is their problem, that's a seven-factor balancing test
21 that mirrors that portion of 62.330. There's also other
22 provisions in 373.414 that they did not comply with or
23 that -- I'm sorry -- that they did not cite. They just
24 cited the public interest test.

25 And so when you look at the public interest

1 test is doesn't say that the cumulative impact analysis
2 is part of the public interest test. It gives you
3 discrete factors to consider, cumulative impact analysis
4 would look at other issues, and you would make a finding
5 that they have or they haven't provided reasonable
6 assurance they complied with that cumulative impact
7 analysis, so I -- you're looking at -- it might the same
8 type of information, but from a statutory rule
9 perspective, it's a different test. It's not a weighing
10 and balancing, and the weighing and balancing mirrors
11 that 62.330.302 provision.

12 And we expanded, there are other rule
13 provisions there, and if they wanted to they could have
14 cited those other rule provisions, and they could have
15 said that the Department didn't provide reasonable
16 assurance for all these extra rule provisions. They
17 didn't do that; they only did the public interest test,
18 and that's just those seven factors that are weighed and
19 balanced.

20 THE COURT: So if they had pled 373.414
21 generally, and didn't mention the rules by number, would
22 that have been sufficient to capture everything within
23 62.330.302?

24 MR. HOENSTINE: I think they have a better
25 argument, you know, and we would look at 373.414, and we

1 say, Well, Your Honor, we think that our obligations are
2 to identify that 373.414, put it in front of you,
3 Your Honor, and put testimony as to those issues. If
4 there's something else that's not a cut-and-paste from
5 373.414, they'd have a better argument, I would say, but
6 I don't know if we would concede. I'd have to see it.

7 THE COURT: Okay. Thank you.

8 MR. HENNESSY: Your Honor, if I could also
9 respond to that one point in terms of the -- there's a
10 level of specificity that's needed. They've clearly
11 said that under 373.414 what they were interested in was
12 the public interest test. They didn't talk about
13 cumulative impacts. They didn't talk about these other
14 criteria. And, again, I would point to the Highpoint
15 Tower Technology case versus South Florida Water
16 Management District where it's -- it specifically states
17 that the "ALJ did not permit rule provisions not
18 specifically pled in the petition, despite other
19 provisions that were pled and were within the same
20 Florida Administrative Code rule."

21 You know, that you have to -- where, you
22 know, where a rule speaks to a number of different
23 issues, you have to tell us which issues under that rule
24 you're looking for. And that also -- that also goes --
25 there's a case, Seminole County Board of County

1 Commissioners v. Long which is at 422 So.2d 938. It's a
2 Florida District of Court of Appeals from 1982 that says
3 that -- again, this is our due process issue. "An
4 administrative complaint must be specific enough to
5 inform the accused with reasonable certainty of the
6 nature of the charge." And it's cited in the Hunter
7 versus Department of Provisional Regulation case at 458
8 So.2d 842, Florida District Court of Appeals, 1984.

9 In Hunter, the court reversed the decision
10 of a licensing board for making a determination on an
11 issue that was not contained in the administrative
12 complaint. The Court reasoned that the licensing
13 complaint must state with specificity, the acts
14 complained of in order to allow a fair chance to prepare
15 a defense. Thank you.

16 THE COURT: Thank you. All right.
17 Mr. Thomas.

18 MR. THOMAS: Your Honor, first off, I would
19 submit that the real issue is that we don't cite to all
20 the exact rules and statutes. I don't think they can,
21 in good faith, make the argument that we did not raise
22 the issues, and they were not aware of the issues. We
23 stated repeatedly and through our pleadings that we are
24 pursuing the same case, the same issues. They have
25 dressed up the application and -- no offense -- but

1 they've modified the application with what we consider
2 to be window dressing. And it doesn't change our case.

3 We've presented the same issues, the same
4 arguments, the same documents. The issues were
5 presented. The issues were brought forward and
6 referenced in the petition. The cases that they cite
7 to, I'm sure, although we did not receive them in
8 advance, I'm sure they are not like this case where very
9 substantial pleadings have been submitted, a petition
10 with multiple attachments which have, in their own
11 right, addressed many of these issues. And we've
12 clearly put them on notice; they know exactly what this
13 case is about. What they're contending is that we were
14 supposed to identify every rule and sub-rule and
15 subdivision and et cetera to tell them.

16 THE COURT: So Mr. Thomas, isn't that what
17 chapter 120 requires? I mean, the basic pleading
18 requirements require the petitioner whether represented
19 by a counsel or not, to list the statutes and rules
20 which require reversal of the decision or intended
21 decision.

22 (Court Reporter clarification.)

23 THE COURT: I'll try to keep my voice up at
24 the end of my sentences, too.

25 MR. THOMAS: I think the standard is not

1 perfect compliance but substantial compliance and I
2 think the time to raise issues of this nature is an even
3 as a motion for dismiss or a motion for summary judgment
4 in this proceeding basically.

5 THE COURT: Why would they need to raise a
6 motion. So you filed a petition. It said -- it alleges
7 that the ERP doesn't meet the public interest test that
8 was in 373.414. It's now time for re/PRAERG stipulation
9 you-all are trying to agree on the issues of law you've
10 agreed that the public interest test under 373414 is at
11 issue but then the Petitioners' have a litany of pages
12 abdomen paragraphs of other issues. And if we are
13 weren't having this airing meant those might be tried by
14 consent but we're having the argument now to determine
15 the scope of the legal issues in this proceeding.

16 MR. THOMAS: Your Honor, we would probably
17 have to go through paragraph by paragraph, but I think
18 we can address the fact that these allegations have been
19 made.

20 THE COURT: Well, but see, that's not --
21 you're -- you're asking me to go through your petition
22 and try to pull out from other sections of your petition
23 which were styled as allegations that the ERP doesn't
24 meet federal law, most of them. And try to glean from
25 that that, Oh, well, there was a water quality issue

1 raised here, and so really they meant to allege 373.413.

2 You know, that's -- that's just -- that's
3 not how it works, and I appreciate that you are
4 reminding me that DOAH is very much the people's
5 court and, indeed, when, you know, when I have
6 individuals who are unrepresented altogether, I do give
7 them a little more -- a little more leeway, but they
8 still have to meet basic pleading requirements, to me
9 that's what this boils down to. I'm ready to rule.

10 MR. HANNON: May I address Mr. Hoenstine ?

11 He -- and you asked.

12 THE COURT: You can address me. What would
13 you like to say?

14 MR. HANNON: His argument. I'm sorry.

15 THE COURT: Okay.

16 MR. HANNON: And you asked about having
17 raised this by motion to dismiss. Mr. Hoenstine relied
18 upon the Department's joinder with the City's first
19 motion to dismiss. And Mr. Hoenstine just read his
20 claim that the petition wasn't specific enough. And in
21 our response, which was filed on June 7th of 2023, in
22 paragraph 27, we addressed that argument. We said,
23 quote, "Second, the City says the petition on this issue
24 is deficient, citing Brookwood Extended Care," the same
25 case that we are talking about. Goes on to say, quote,

1 "In that case, the petitioner made only general denials
2 and nonspecific allegations which are no longer
3 permitted under the uniform rules. That is not the case
4 with the petition which not only goes through the
5 elements of the public interest test but cites to the
6 determinations on this issue by Judge Foulks in the
7 previous proceedings," end quote.

8 My point is this: Your Honor granted the
9 motion but only with respect to those federal
10 allegations that they raised. Your Honor did not grant
11 his motion, and, therefore, we had no reason at that
12 point to believe that the petition was deficient in my
13 way.

14 And this -- what they're doing today is a
15 motion to dismiss. So we have a right to rely on the
16 ruling on the issue that they raised in May.

17 MR. HOENSTINE: That reiterates our point,
18 Your Honor. He just said the public interest test,
19 right? That's the reason why the motion to dismiss was
20 not granted because you brought up the public interest
21 test and that is at issue, and my response was June 27th
22 in regards to your motion to dismiss, so it came after
23 that filing.

24 THE COURT: Okay. Okay. Let's go through
25 the Judge, please.

1 The point being, yes, so what you just read
2 to me doesn't change my mind. What you just read to me
3 says that you were reiterating that you adequately
4 raised the public interest test and referenced how Judge
5 Foulks ruled on this issue in a prior hearing, so that's
6 still limiting it to the public interest test under
7 373.414.

8 And this is not an insufficiency
9 determination. Your petition was sufficient. It was
10 found sufficient. Claims were stricken from it because
11 they are outside of the scope of the proceeding. It
12 sounds like what you're trying to do with your changes
13 to the stipulation is bring some of those back in, so
14 it's actually, you know, you want to be -- you want to
15 rely upon my order earlier; I want you to rely upon my
16 order earlier, as well.

17 So we're not going to broaden this out.
18 This is my ruling. Okay? The issue in this case is
19 limited to whether the ERP meets the public interest
20 test under section 373.414.

21 Now, we can go through the stipulation
22 and -- I tell you what I want to do, is we'll go through
23 the prehearing stipulation and incorporate Petitioners'
24 additional issues of law which meet that requirement.
25 Does that make sense?

1 So the DEP has already stipulated that
2 paragraphs 23, 24, 25, 26, and 27 are at issue because
3 they reiterate the public interest test. So if you want
4 those incorporated, those are being incorporated now. I
5 don't want to sit here and strike individually each and
6 every other one. What I would ask the parties to do on
7 the first break that we take today, though, is determine
8 together whether some of these are actually issues of
9 fact because we talked about that on Wednesday. It
10 appears that any of them are allegations of fact, which
11 would then fall under, you know, proving the legal issue
12 of public interest test, so those don't necessarily need
13 be stricken, they can just moved under the column of
14 disputed issues of fact, so I'm going ask the parties to
15 do that on our first break, and then we can have a
16 really clean prehearing stipulation.

17 All right. That said, are we ready for
18 opening arguments?

19 MR. HENNESSY: We are, Your Honor.

20 THE COURT: Are the Petitioners ready?

21 MR. HANNON: We are, Your Honor.

22 THE COURT: Okay. We're going start with
23 Petitioners.

24 MR. HANNON: Your Honor, I'm happy to begin.
25 However, we -- we on our side thought that the

1 presentation of the openings would follow the
2 presentation of the evidence.

3 THE COURT: You're welcome to do that, if
4 you would rather reserve your opening. Most people do
5 it at the very beginning, though, so if you would
6 prefer, you can waive it until --

7 MR. HANNON: I don't want to waive it. I
8 thought --

9 THE COURT: Well, until the presentation of
10 why you are evidence, if you'd like.

11 MR. HANNON: No. I would rather do it. I
12 just thought that the presentation of openings would
13 follow the order of the presentation of the evidence.

14 THE COURT: I'm sorry. I misunderstood you.
15 That's -- I will allow openings in whatever order you
16 all want to give them.

17 MR. HANNON: Well, I'd like to be third.

18 THE COURT: Okay.

19 MR. HANNON: Thank you.

20 THE COURT: Thank you.

21 MR. HENNESSY: Your Honor, I'd like to do it
22 in whatever order you prefer.

23 THE COURT: I would -- if you would just
24 begin, Mr. Hennessy, that would be great. I just want
25 to get through this so we can get through the actual

1 evidence.

2 MR. HENNESSY: Okay. I hear you.

3 Do we have a laser pointer, do you know, in
4 the courtroom?

5 SPEAKER: No. I can get one for you,
6 though.

7 MR. HENNESSY: That would be outstanding.
8 The only reason being is that since I'm constrained to
9 speaking in the microphone --

10 THE COURT: Or if you can use your own Vana
11 White.

12 MR. HENNESSY: That's hilarious, Your Honor,
13 because he accused me of making him his -- my Vana white
14 when I had him hand out the cases earlier.

15 All right. Good morning. Thank you.

16 THE COURT: Good morning.

17 MR. HENNESSY: For everyone on the
18 television, again, I'm Kevin Hennessy, and I'm
19 representing the City of Cape Coral. We're the
20 Respondent here. We are here on a challenge due to an
21 environmental resource permit issued by the Department
22 of Environmental Protection to my client, the City of
23 Cape Coral.

24 The permit is for the South Spreader
25 Waterway Environmental Improvement and Sustainability

1 Program. Now, Mr. Hannon and Mr. Thomas have stated on
2 many cases -- occasions only just this morning that we
3 are here on the same permit that Mr. Hannon challenged
4 five years ago. We are not.

5 But before we get to the evidence, I'd like
6 to have Mrs. White show you some of the important
7 locations on the map that -- to get us oriented. If you
8 look down, in the far right corner is Fort Myers, where
9 we were to start this proceeding. Across the
10 Caloosahatchee River, which separates them, is Cape
11 Coral, our client and the location of -- of the areas of
12 concern.

13 The Petitioners', or some of the
14 Petitioners' who are no longer here, they are located
15 off the map. There's a bridge that you can't see, but
16 if you go down onto the map, you'll see a reference to
17 Matlacha Pass. And you're going to hear a lot about
18 Matlacha Pass. And immediately to the east, or right,
19 of Matlacha Pass is a mangrove fringe area.

20 Thank you.

21 You're going to hear a lot of decision
22 about, you know, how that mangrove fringe is, the
23 condition of it, how water may be being delivered to it,
24 and the health of those mangroves. So that's an
25 important area .

1 Immediately to the east, really, basically,
2 separating it -- it's -- actually, from our
3 understanding, the South Spreader Waterway, with regard
4 to this part of Cape Coral, was designed -- no.

5 Just -- actually, use your one finger, Vana,
6 to show the actual -- not that finger -- the actual
7 South Spreader Waterway, the -- that -- thank you.

8 And --

9 THE COURT: So it's the dark -- that's the
10 dark --

11 MR. HENNESSY: There's a dark black-blue
12 line, yes.

13 THE COURT: Okay.

14 MR. HENNESSY: And if you start with the
15 circled area, that's the Chiquita Lock.

16 THE COURT: Okay.

17 MR. HENNESSY: That's what we're going to
18 hear a lot about from the Petitioners', because that is
19 a part of this program for improving that waterway.
20 That South Spreader Waterway begins all -- or starts in
21 the north, comes all the way down along the -- and it
22 creates the end of the developed area in Cape Coral.
23 And it goes to the lock, and then past the lock, it
24 makes a couple of turns and it opens out into the
25 Caloosahatchee River.

1 And before you get to the Caloosahatchee
2 River, one of the bends it makes is an area called
3 Glover Bight. And you're going to hear about that area
4 because it is known to be a nursery area for the
5 smalltooth sawfish. I don't know if you're familiar
6 with the sawfish. It's a form of ray or shark. It's
7 kind of a flat fish, and it looks exactly like it
8 sounds. It looks like it's got a saw on the end of
9 it's -- or a long nose. It's a bottom-dwelling fish,
10 and we're going to bring in an expert to talk to you
11 about the sawfish, depending upon what the Petitioner's
12 case ends up being.

13 The other -- I guess on the other side of
14 Matlacha Pass -- and again, it's more up and off to the
15 north -- is Pine Island and Matlacha. Oh, another point
16 that you're going to hear spoken to a lot related to the
17 South Spreader Waterway are what we refer to as
18 breaches. It's really unclear what Petitioner is going
19 to refer to them as, but they've been talked about as
20 breaches since the South Spreader Waterway was created
21 back in the '70s and '80s. And -- yes.

22 So Mr. Aschauer is actually pointing to what
23 is the largest breach, which is often referred to as
24 Breach 20, and it is connected to -- if you look closely
25 when we have it on the screen and blowups, you'll see

1 that it's pretty apparent to us, from the historic
2 photographs, that Breach 20 reflects the connection to a
3 canal that was starting to dug by the former developer
4 of Cape Coral and was -- essentially ceased to be dug.

5 But it did end up connecting to an existing
6 tidal creek, and there are a number of tidal creeks that
7 you will see that run through the mangroves to Matlacha
8 Pass. And that's going to be an important discussion
9 because -- there's going to be a lot of discussion about
10 some sort of sheet flow design for the South Spreader
11 Waterway. That sheet flow is supposed to deliver
12 freshwater across these mangroves, and what we believe
13 the evidence is going to clear show is that, while that
14 may have been an intention, you know, in addition to
15 ending development of -- the westward progression of
16 development, the idea that this waterway would be a
17 design such that it would be overtopped occasionally and
18 create freshwater sheet flow across those mangroves, the
19 evidence is going to show that that's not what's what
20 happened.

21 Because of these breaches, there's always
22 been channelized flow. And not only that, but because
23 Matlacha is a tidal body -- Matlacha Pass is a tidal
24 body, and those mangroves are impacted by the tides,
25 that those creeks through the mangroves are tidal

1 creeks, and it allows for water to come from the west,
2 up those tidal creeks, and into the South Spreader
3 Waterway. So the South Spreader Waterway was, very
4 early on from its creation, was, in fact, an estuarine
5 environment.

6 And, in fact, it has been designated as a
7 estuarine environment and has been designated in that
8 fashion by the Department by -- in terms of creating
9 what's referred to as WBIDs, water bodies identified --
10 identification.

11 And --

12 THE COURT: And what's the significance of
13 that, that it's designated as a estuarine water body.

14 MR. HENNESSY: The significance is --
15 estuarine means that it's often -- it's brackish. It's
16 a mix of salt and freshwater, and therefore, it's an
17 estuarine environment. It's supporting estuarine life.
18 And what we're going to hear as well is that -- and it's
19 been that way for some time. Petitioners seem to have
20 made much of the argument that no -- that that is a
21 salt -- a freshwater environment, and there is no
22 evidence supporting that that's ever been a freshwater
23 environment.

24 There's no evidence to say that there's been
25 freshwater being delivered from that water body into

1 those mangroves. In fact, the City, at one time,
2 investigated the use of the South Spreader Waterway to
3 be a source of freshwater for irrigation purposes, but
4 they couldn't because it was too -- it was too
5 estuarine, and they couldn't -- it was impossible to
6 create a bank level on the west side that was of
7 sufficient height and consistency that you wouldn't have
8 that channelized flow that was occurring through the
9 mangroves coming from Matlacha Pass, delivering
10 saltwater on a continuous basis.

11 THE COURT: Is the North -- it is fair to
12 say is that the North Spreader Waterway express is a
13 stormwater management system?

14 MR. HENNESSY: Well, again, we're talking
15 about the South Spreader Waterway.

16 THE COURT: I'm sorry. South Spreader
17 Waterway.

18 MR. HENNESSY: The North Spreader Waterway
19 is off the map to the north, and it's similar
20 construction of a -- of a canal that stopped the
21 western -- westward progression of development.

22 But, yes, it is true that a part of the
23 concept of the waterway was that it would -- it would
24 not only stop development, but it would capture
25 stormwater runoff, just as all the canals eventually do.

1 THE COURT: Okay.

2 MR. HENNESSY: But what the evidence will
3 show is that the City -- using the South Spreader
4 Waterway as a stormwater device is not an effective
5 or -- well, it's effective, but it's not the best water
6 quality practice.

7 The best water quality practice is to
8 address the contamination that's entering water bodies
9 upstream. So you educate the public to not
10 overfertilize. In fact, you have fertilizer bans. You
11 change catch basins to restrict the flow so that less
12 flow and less nutrient and less detritus go into the
13 ultimate receiving water body. And that's a lot about
14 what this program is, is addressing water quality not in
15 the -- not in the South Spreader Waterway, but before it
16 ever leaves the property.

17 Thank you.

18 Your Honor, you're going to hear -- I'm
19 pretty certain the Petitioner's case is going to be
20 about that North Spreader Waterway that Your Honor
21 mentioned, that we had damage in the North Spreader
22 Waterway and that damage is going to repeat itself.
23 Because what they want to blame damage in the North
24 Spreader Waterway to is the removal of a boat lift
25 called the Ceitus -- Ceitus Boat Lift. And...

1 I'm looking for the former location of the
2 Ceitus Boat Lift.

3 SPEAKER: It's not on there.

4 MR. HENNESSY: It's not on here?

5 SPEAKER: No.

6 MR. HENNESSY: No. We don't have North
7 Spreader, right?

8 SPEAKER: It's not on there.

9 MR. HENNESSY: It's not on either map.

10 Anyway, we will have pictures for you of the
11 area of the North Spreader Waterway and the former
12 location of the Ceitus Boat Lift, and they will quite
13 clearly show you that the mangrove system in the North
14 Spreader Waterway has had instances where mangroves have
15 been harmed. And they've been harmed clearly related to
16 hurricanes and storms.

17 In fact, in the area of the boat lift -- and
18 it's a distinction between a boat lift and a lock. Boat
19 lift picked up boats and took it from one side of the
20 fixed barrier to the other. This lock that we're
21 removing actually opens and closes and allows boats to
22 pass through, kind of like the Panama Canal on a very
23 small basis, except, in this case, it was strictly to
24 deal with the water quality issues. You know, it
25 wasn't -- this lock wasn't created because we had a

1 change in elevation that needed to be addressed, like
2 they do between the Pacific and the Atlantic Ocean and
3 Panama Canal.

4 Anyway, the -- what the evidence will show
5 is that, in fact, the storms caused a -- or accelerated
6 erosion around that boat lift. So what you'll see are
7 photographs that clearly show a boat lift and a newly
8 created oxbow around that boat lift. So it got to the
9 point where nobody was using the boat lift because
10 they'd just take their boats around it on the water.
11 And that erosion had with it a loss of mangroves,
12 because it went through a mangrove forest. It had a
13 loss of sediment downstream.

14 And it's just -- the subsequent removal the
15 boat lift didn't create those problems. Those problems
16 of sedimentation and mangroves, they were all -- they
17 were all -- predated the removal of the boat lift. So
18 not only are they factually incorrect about their
19 comparison to the North Spreader Waterway experience in
20 the context that, you know, the boat lift didn't cause
21 anything, removal of the boat lift didn't cause
22 anything. They're also factually wrong on the fact that
23 the North Spreader Waterway is not comparable to the
24 South Spreader Waterway because the South Spreader
25 Waterway is a clearly defined -- it's clearly defined.

1 The South Spreader Waterway is clearly
2 defined in terms of receiving watershed from this area
3 here, a much smaller defined, controlled watershed, all
4 controlled by weirs that the cities installed, slowing
5 water and the movement of water from freshwater canals
6 into salt water canals as opposed to the North Spreader
7 Waterway when you see those photographs, they're fed by
8 a number of very large sloughs that go well beyond the
9 city of Cape Coral.

10 Even their -- Petitioners' experts admit
11 that it's an order of magnitude difference in the water
12 sheds. So you can't really compare the two in that --
13 in that regard. And then, of course, as we said, too,
14 the, you know, the parade of /HORBLZ that the
15 Petitioners are going to try to suggest in terms of a
16 change in the South Spreader Waterway's environment from
17 fresh to salt, factually incorrect.

18 The idea that mangroves are going to be
19 impacted -- Your Honor, there are mangroves now, healthy
20 mangroves, all along the South Spreader Waterway. Okay?
21 And they're on -- they're on, you know, below the lock
22 and above the lock. Okay ? So below the lock, those
23 healthy mangroves are experiencing all the conditions
24 that once you remove the lock, the mangroves above the
25 lock will experience. So in other words it's the same

1 environment. You're not changing -- it's an estuary on
2 this side of lock; it's an estuary on that side of the
3 lock. So to suggest that somehow removing that lock is
4 going to change the ecosystem is a detrimental fashion
5 to those mangroves is simply scientifically
6 unsupportable and factually incorrect.

7 You know, Your Honor, we'll also point out
8 that in this -- you'll see another mangrove area up here
9 on this map (indicating)^ in the -- I guess it would be
10 considered the Northeast portion of Cape Coral, that's
11 where another -- where another portion of the city
12 was -- another spreader waterway was created to prevent
13 expansion of development and that area had a boat lift,
14 as well. That was the first boat lift removed. And as
15 you can see the mangroves as we'll show the mangroves
16 and the evidence will show the mangroves continue to be
17 healthy and hardy there despite the removal of a boat
18 lift in that location.

19 And if you're going to make a comparison
20 between a boat lift to the removal of this lock, it
21 would be this comparison because, again, you've got a
22 much smaller watershed controlled by urban development,
23 and -- and, again, there's no evidence and Petitioners
24 have no evidence that there's any -- any harm that's
25 associated in the, what's referred to as the area 89

1 area.

2 Again, this is not the prior permit. This
3 is not simply a permit to remove the Chiquita boat lift
4 which is -- I'm sorry -- lock which was what the prior
5 permit was. It's not simply engineering plans for
6 construction of a public works project, and we'll direct
7 your attention to the permit itself which is Joint
8 Exhibit 1, at point 48.

9 So if you'll bring that up on the screen.
10 Can you enlarge that any? You can't. You can't do it.

11 All right. The project is -- before you
12 go -- the project as indicated is referred to as the
13 South Spreader Waterway improvement project, and among
14 the -- this program, it includes, in addition to the
15 removal of the lock, seven environmental enhancement
16 projects that the Department describes and it's not just
17 described in the permit, it's made a condition. These
18 projects are a condition. They are required of this
19 permit, and they are in condition, permit condition 10,
20 if you turn to page 622. Bates page. And you see it's
21 under "Public Interest and Mitigation". All right.

22 So by mitigation, we're referring to
23 mitigation of any potential impacts that might have --
24 be considered as potentially resulting from this permit
25 and public interest refers to the specific public

1 interest criteria that we're dealing with as being
2 challenged in this case. And you have here seven
3 specific projects that are required in this permit.

4 A stormwater catch basin upgrade program as
5 we've stated that's the way to deal with stormwater
6 impacts well before they -- it reaches the South
7 Spreader Waterway, let alone, then ultimately reaching
8 the other areas in the -- in the areas of concern which
9 is the Caloosahatchee River, Matlacha Pass. We
10 extensively looked at it, because it is an outstanding
11 Florida water. It is a Class II water body, as is the
12 lower part of the Caloosahatchee River.

13 The second project on the -- discussed on
14 the permit is improvements to the stormwater management
15 system associated with a dog park at Rotary Park.
16 Again, we talked about this area at the end of the South
17 Spreader Waterway, Glover Bight. That is the same area
18 that the dog park is located. So basically, they went
19 after this improvement because it is immediately
20 downstream, and it is in an area that's been identified
21 as being a nursery area for the smalltooth sawfish.

22 Third project is actual funding of the FWC
23 that is engaged in this area extensively already in
24 smalltooth sawfish research. And -- and we will be
25 funding acoustic equipment which will be located in

1 areas including in the South Spreader Waterway and based
2 on a recommendation from our expert, even as the
3 breaches, because there have been sawfish that have been
4 identified even before this lock was removed in the
5 waterway and into those breach areas.

6 There will be an aquatic vegetation removal
7 project. Why is that important? Aquatic plants take up
8 nutrients, but they'll just turn around and die in the
9 water body so the nutrients are returned into the water.
10 So by removing those aquatic plants, you are removing
11 nutrients from the water body, so that's why that's a
12 water quality benefit. There will be mangrove planting,
13 upland restoration, and reef ball installation. That
14 project has important water quality benefits because
15 mangroves improve water quality. Mangroves also
16 improvement marine fisheries and nursery areas, and so
17 they have a benefit for the -- a benefit for the
18 ecosystem. They have a benefit for fisheries.
19 Recreational purposes.

20 It's -- and so these are multiple parts of
21 the public interest test that are addressed by mangrove
22 planting in the upland restoration of native species and
23 the reef ball installation. Again, reef balls create
24 substrate. They create ecosystem. And they all system
25 that they create are for oysters and barnacles, and

1 those are filter feeding organisms that themselves, not
2 only are they an ecosystem, but they themselves what
3 they would refer to as cleanse the water, so they are
4 removing contaminants in the water including nutrients.

5 The -- finally the -- the Calusa Connect
6 project, and that's actually depicted -- what we're
7 talking about is the connection between Fort Myers and
8 Cape Coral. What you'll hear in the evidence is that
9 Cape Coral is a leader in the United States in reefs
10 waters. A hundred percent --Cape Coral for decades, I
11 believe, at least a decade, has been a hundred percent
12 using reefs. They have -- not a single drop of water
13 from their advanced waste water treatment system has
14 gone into a surface water body. Okay?

15 And what -- what Cape Coral is doing is that
16 Fort Myers is not as advanced. Fort Myers currently
17 discharges quite a bit of their sewer into the
18 Caloosahatchee River by making this connection instead
19 of having that treated wastewater go into the river. It
20 will connect to our -- our system -- our reuse system,
21 and it will be fully used. And there is credit,
22 mitigation credit, being given to the city for agreeing
23 to take all of that -- that water which would otherwise
24 be impacting the areas of concern that this permit is
25 investigating and addressing and trying to improve.

1 Like I say, the Petitioners want to spend
2 all their time talking about the lock and say that
3 there's no environmental purpose for the removal of the
4 lock. I've heard them say that on more than one
5 occasion. We will bring to the Court's attention
6 representatives of Florida FWC. They are responsible
7 for protecting manatees. They will -- we will produce
8 letters that we've received from the FWC where they have
9 indicated that the lock itself is a danger to manatees
10 and has been identified as the cause of over eight
11 manatee deaths, or at least eight manatee deaths, since
12 2005. Because of the operation of the lock, the
13 crushing of manatees, those manatee bodies were
14 recovered, they were autopsied, or necropsied they call
15 it, and the cause of death was attributed to operation
16 of the lock. And we have the letters, the -- from the
17 head of the agency responsible or the person at the
18 agency responsible for issuing those letters as well as
19 we have the ability, if need be, to put on testimony
20 from the actual doctor who did the necropsies.

21 So removal of the lock will stop the injury
22 and injury deaths to manatees. It will remove a
23 navigation hazard. It will eliminate the risk of
24 management liability to the city. It will save public
25 funds. Removal of the lock will provide unfettered

1 boating access. It will eliminate frustration and
2 boater rage associated with lock operations, and will
3 uncrease South Spreader Waterway owner property value
4 because they'll that have unfettered access to deep
5 water.

6 When Mr. Hannon gets up here, I can assure
7 you he will not be discussing environmental enhancement
8 projects that the city is committed as an obligation or
9 condition of this permit. He will ask you to simply
10 ignore those. He will only want to discuss removing the
11 lock and why it is a bad project and why it is harmful
12 for the environment.

13 But take note, he will not discuss nor will
14 he present any evidence to you from his experts other
15 than speculation and opinion. There will be no tests.
16 There will be no modeling. There will be no detailed
17 written assessments, environmental assessments. No
18 environmental reports presented. What Petitioners'
19 experts will rely on is their story concerning the
20 design and history of the South Spreader Waterway which
21 we will -- which we dispute and which the facts will
22 prove incorrect. And they'll also rely on their claims
23 that the South Spreader Waterway is mostly a freshwater
24 canal, that it was signed to deliver the sheet flow to
25 the mangroves to the west and the south. And we will

1 again dispel that -- that fairy tale.

2 Mr. Hannon and his witnesses will say that
3 the lock is necessary to hold back water to cause sheet
4 flow and is necessary to provide water quality
5 treatment. We will show that the water quality
6 treatment will continue to happen within the South
7 Spreader Waterway because of the residence time. It
8 will take a very long time for any water that reaches
9 the South Spreader Waterway, particularly the northern
10 regions of the South Spreader Waterway, to even get all
11 the way down here, hundreds of days, over 300 days.
12 Well beyond the treatment capacity of any detention
13 system.

14 The crux of Petitioners' case is simple,
15 Your Honor. If given the chance they're going to argue
16 that the North Spreader Waterway is in bad shape. It's
17 got bad water quality. The mangroves are in -- in their
18 death throws. They're dying and decaying. This is all
19 they're going to say due to this removal of the prior
20 boat lift. If you allow the lock to be removed, in this
21 case, they'll say the South Spreader Waterway will
22 suffer the same fate.

23 Again, we will dispel those factual -- those
24 opinions. You know, the problem with Petitioners' case
25 is that none of the three parts of their arguments is

1 true, and the evidence will clearly show it.

2 I'd like to cue Joint Exhibit 149 at
3 page 634. I'm sorry. 1.49. The actual permit. I'm
4 sorry. The actual -- this is the notice of intent. I'm
5 sorry. I want to turn to 148. 1.48, page 623. I'm
6 sorry. 634. Let's start -- I'm sorry. 149, page 634.

7 So this is the notice of intent, Your Honor.
8 And in the notice of intent, it gives some background in
9 the basis for the issuance. And if you can -- it has a
10 list here, and basically what I want to point Your
11 Honor's attention to, and the Department recognizes
12 this, that the Chiquita lock began operations in 1984,
13 with the design that, you know, it's supposed to provide
14 stormwater treatment, but since that time the city of
15 Cape Coral has implemented programs to improve water
16 quality upstream including all of these programs.

17 And we will have evidence presented on them
18 installing public sewers, taking everybody off of septic
19 and putting them on sewers, a huge change in the
20 purported or expected design of Cape Coral.

21 Installing a deep injection well, so that
22 as -- at the reverse osmosis public works treatment
23 plant, which eliminated any discharge to a surface water
24 body. Implementing a dual water system for irrigation
25 with improvements at the waste water treatment plant.

1 Again we touched on that earlier.

2 Creating a stormwater utility to provide
3 funding for the numerous water improvement projects that
4 the city's been engaged in.

5 Let's go back to Exhibit 1.48. Specific
6 condition 13. Should be at page 623. There you go.

7 Starts at -- so we have a specific condition
8 with regard to water quality improvement. And so not
9 only the list of projects that we saw on the notice of
10 intent that already been done outside the permit, the
11 City has also has been very aggressive in the BMAP. The
12 B map's purpose is to protect this Caloosahatchee River,
13 and the Caloosahatchee River BMAP actually goes way off
14 the map.

15 But the -- what you'll find is that the
16 contributions to this BMAP, the nutrient contribution
17 that was allocated -- the reduction that was allocated
18 to the city to accomplish, that the city more than
19 doubled what it had to do. And because of that, it
20 created -- had an excess. And the Department, as part
21 of this permit, agreed to take that excess, those
22 projects attributable for that excess, and make them a
23 condition of this permit so that instead of being
24 essentially, like, bonus points in the BMAP, is it now a
25 condition.

1 If you'll turn to the next page.

2 It's a condition of this permit, and you'll
3 see that right in Condition 13. It says, "2020 BMAP
4 reduction excess," over 41,000 -- almost 42,000 pounds
5 per year. And there's an asterisk there that explains
6 that that credit, those projects, will be permanently
7 transferred to this permit. And they no longer -- they
8 can no longer be used by the City for BMAP credits.

9 So the City needs -- to do more BMAP,
10 projects they'll have to -- they can't utilize these
11 credits. They'll have to develop even more projects for
12 the BMAP, which is fine with the City because the City
13 continues and has plans for even more conversion of
14 septic -- septic plants into sewer.

15 Your Honor, we will go through the permit
16 application itself to show you how different it is. I'm
17 going to speed through this. We have several
18 attachments to the permit application; an engineering
19 report, an environmental report ,and a report on city
20 projects that's attached as A, B, and C, and I'm go
21 through that with my witnesses. But you'll see that --
22 that -- the extensive amount of work that the City has
23 done as part of this permit and to investigate and prove
24 to the department that this permit met all applicable
25 criteria.

1 We will -- we will also show that you that
2 they looked at alternatives to the removal of a lock,
3 and we'll discuss -- our witnesses will discuss why
4 removal of the lock in the design that was done is most
5 appropriate. We will show that we've done thorough
6 investigation into the surrounding water bodies,
7 including Class II OW Matlacha Pass, and Class II repair
8 of water bodies of the Caloosahatchee River.

9 While -- as indicated before, while there
10 are numerous environmental projects that are part of
11 this improvement program, the permit has been challenged
12 solely based on the alleged failure to meet the seven
13 criteria of the public interest test.

14 The application goes into great detail in
15 showing how each of the seven criteria are satisfied,
16 and we will present experts and evidence to you that
17 will demonstrate that.

18 And so we will have evidence to show that
19 the -- that this project will benefit the public health,
20 safety, and welfare; benefit the property of others;
21 that it will positively affect the conservation of fish
22 and wildlife, including endangered and threatened
23 species -- the sawfish and the manatee are both
24 benefited by the activities in this permit; that it will
25 have a positive impact on the flow on navigation and the

1 flow of water. It will not result in harmful erosion or
2 shoaling.

3 That the fishing and recreational values and
4 marine productivity will be benefited by the programs in
5 this project, and that the current condition and
6 relative function that is being performed by the areas
7 affected by the proposed activities will be benefited.

8 And in talking about the current conditions,
9 Your Honor, the currents condition are an important
10 consideration because the current condition of the lock
11 is that it's in an open position. It's in an open
12 position because the lock no longer functions. It no
13 longer functions because of Hurricane Ian, where this
14 lock was completely overtopped by storm surge and
15 rendered unusable.

16 And, therefore, many of the concerns and the
17 parade of horrors that the Petitioners are going to be
18 talking about, they need to answer the fact that -- why
19 hasn't any of that occurred, given the fact that the
20 lock has been open for a year and allowing an exchange
21 of -- a free exchange of saltwater into this system? And
22 the evidence will show that, you know, because -- it's
23 simply because their facts are not right.

24 And the -- as indicated before, we have --
25 we have mangrove system downstream of the lock, and we

1 have mangrove system upstream of the lock, and the
2 conditions on both sides of the lock are favorable to
3 mangrove growth. The only harm that's been occurring to
4 the mangroves is due to the horrific storm events that
5 have occurred, such as Hurricane Ian.

6 Your Honor, this permit meets all of the
7 applicable criteria, including the public interest test,
8 which has been challenged. That is a balancing test.
9 Your Honor will look at the weighing of those factors.
10 The Petitioners' case is one simply of speculation over
11 potential harm, and to -- has been, I think, clearly
12 dispelled and will be -- that situation will be
13 presented to you that -- an examination of the facts and
14 scientific evidence that we will present -- presenting,
15 both us and the Department -- both the City and the
16 Department will be presenting will demonstrate that the
17 concerns of the Petitioners are simply not well taken.

18 Thank you.

19 THE COURT: Thank you.

20 Mr. Hoenstine?

21 MR. HOENSTINE: Thank you, Your Honor. I'll
22 try to be brief. I think Mr. Hennessy covered
23 everything.

24 But -- so the Department will demonstrate
25 how the City provided reasonable assurance to meet the

1 environmental resource permitting criteria. We're going
2 to show you that it is going to be a benefit to not only
3 the South Spreader Waterway, it's also going to benefit
4 the Caloosahatchee River and Matlacha Pass.

5 We're also -- as Mr. Hennessy discussed,
6 this is a very different project from the one that was
7 denied in 2019. All of those water quality enhancement
8 projects, mitigation projects were not part of that
9 previous permit application. I know he had shown you
10 the -- the Calusa Connect project, and where that red
11 dot is, that's where they currently discharge their
12 effluent into the Caloosahatchee River.

13 So for us, this is a very big deal to get
14 that thing offline and not dumping effluent into the
15 river, and that is part of this project. They are
16 taking -- I think it's maybe 12- or 14,000 pounds of
17 nitrogen out per year that would go there, it's going
18 now to Cape Coral's central sewer system.

19 The other thing is -- so the water quality
20 enhancement projects, a total of 70,000 pounds of
21 nitrogen annually, being taken out -- or -- yeah,
22 being -- otherwise that would have went to the
23 Caloosahatchee River are now being taken out of the
24 river. The Department did extra analysis this time
25 around that they did not do in 2019. We looked at the

1 impact of removing the lock to Matlacha Pass, and that
2 was something that was one of the deficiencies of the
3 last case. And what we found is that it's actually go
4 to improve Matlacha Pass by opening up the lock.

5 And how that does that is when it's opened,
6 there are -- currently, there's a lot of nutrients in
7 Matlacha Pass that are now going to go out of Matlacha
8 Pass, and you're going to have a net decrease in
9 nitrogen -- I'm sorry, I said "nutrients." I meant
10 nitrogen -- net decrease in nitrogen to Matlacha Pass.

11 So from our perspective, it benefits the
12 outstanding Florida water that we were -- noted in 2019
13 as not evaluated. And when I say "outstanding Florida
14 water," those waters are protected by the state more
15 because of the ecological significance that they have.

16 So the other thing that we did differently
17 is that we -- we evaluated the South Spreader Waterway
18 to determine whether it really was a freshwater system,
19 as argued at the last hearing, or whether it was an
20 estuarine system. And so we went through historical
21 aerials and we showed that when the South Spreader was
22 constructed, there was actually a dredged canal that was
23 attached to those tidal creeks that empty into Matlacha
24 Pass.

25 And so we -- so you'll hear about the --

1 the -- was it the breaks? I guess they're the breaks.

2 The --

3 SPEAKER: Breaches?

4 MR. HOENSTINE: The breaches, yes. There's
5 three breaches, and so we can show you, in the late
6 1970s, how those breaches began. And so what that meant
7 is that when the tide would come in and out, that water
8 would get into the South Spreader Waterway.

9 And then what we looked at is -- we have
10 historical salinity content, and so we're going to show
11 you the historical salinity content that will
12 demonstrate this has been an estuarine environment since
13 we started reading those numbers back in the early '90s.
14 Why that's important is because you're not shocking the
15 system. What you're doing is opening up the lock from
16 one estuarine system to another, and so the -- a lot of
17 the impacts to the -- alleged impacts to the mangroves
18 is just unfounded. You're not going to see that drastic
19 of a shock to the system when on both sides of the lock
20 in the Caloosahatchee, all the water quality is
21 essentially the same.

22 And the last thing that we looked at was the
23 North Spreader. There was a lot of testimony at the
24 last hearing about how since the North Spreader had all
25 these impacts to mangroves, allegedly, from the removal

1 of that Ceitus Boat Lift, the same thing what happened
2 here. And what we looked as is we looked at the aerial
3 photography, and you could see clearly that those
4 impacts to the mangroves are from hurricanes. They're
5 not from removal of the lock. You can see before and
6 after removal of the lock, and you can see before and
7 after hurricanes. We're going to show that evidence to
8 you.

9 And the last thing is, when we removed this
10 lock, it's not like this is some experiment. There are
11 thousands and hundreds of miles of canals across South
12 Florida that all have mangroves on each side of them,
13 and they're all thriving. So we're going to show you
14 that this is just going to be one of those canals.

15 Thank you, Your Honor.

16 THE COURT: Thank you. All right.

17 MR. HANNON: May have a comfort break?

18 THE COURT: Yes. We -- let's take a very,
19 very short comfort break. I'll say 10 minutes, because
20 I don't know how far away restrooms are.

21 (Recess)

22 THE COURT: Thank you. Please be seated.

23 Are you ready, Madam Court Reporter?

24 THE REPORTER: Yes.

25 MR. HENNESSY: Your Honor.

1 THE COURT: Yes.

2 MR. HENNESSY: In a slightly unorthodox
3 move, because we have a witness who's here and has a
4 commitment, in discussion with Petitioners' counsel,
5 they agreed to allow us to put our police chief on as a
6 brief witness before he does his opening.

7 THE COURT: Okay.

8 Mr. Hannon, you agree to this?

9 MR. HANNON: It's my pleasure.

10 THE COURT: Okay.

11 MR. HANNON: And the condition I think Mr.
12 Aschauer put on it is afterwards, we have lunch.

13 THE COURT: All right. Well, we'll talk
14 about that when he's finished. Okay.

15 MR. HENNESSY: Your Honor, if that's
16 agreeable to you, we'll call the chief.

17 THE COURT: Yes.

18 MR. HENNESSY: But before we do that, I'd
19 like to go ahead and move Joint Exhibit 1 into evidence.

20 THE COURT: Okay. Let me get to the right
21 tab here so I can make sure that we get it into the
22 official record.

23 MR. HENNESSY: We have a hard copy of Joint
24 Exhibit 1 for Your Honor.

25 THE COURT: Okay. Thank you.

1 MR. HENNESSY: And we won't make you drive
2 it back to Tallahassee.

3 THE COURT: Thank you, sir.

4 All right. You may call your first witness.

5 MR. ASCHAUER: Thank you, Your Honor.

6 The City of Cape Coral would call Police
7 Chief Anthony Sizemore.

8 SPEAKER: Raise your right hand.

9 THEREUPON,

10 ANTHONY SIZEMORE,

11 Being by me first duly sworn to tell the truth testifies
12 as follows:

13 THE WITNESS: I do.

14 THE COURT: Thank you. Please be seated.

15 Mr. Aschauer, you may proceed.

16 MR. ASCHAUER: Thank you, Your Honor.

17 DIRECT EXAMINATION

18 BY MR. ASCHAUER:

19 Q. Chief Sizemore, would you please state and spell
20 your name for the record?

21 A. Yes. Anthony Sizemore. A-N-T-H-O-N-Y,
22 S-I-Z-E-M-O-R-E.

23 Q. And I realize, Chief, that you're in your
24 uniform, but for the record, by whom are you employed?

25 A. I'm the chief of police for the City of Cape

1 Coral.

2 Q. And how long have you been in the position of
3 chief of police for the City of Cape Coral?

4 A. For three years.

5 Q. And how long have you been with the City of Cape
6 Coral police department?

7 A. Twenty-five years.

8 Q. As chief of police for the City of Cape Coral,
9 what are your responsibilities?

10 A. Ultimately, I'm responsible and accountable for
11 the overall safety -- of public safety of the entire
12 city.

13 Q. Chief Sizemore, are you familiar with the
14 Chiquita lock?

15 A. Yes, I am.

16 Q. Chief Sizemore, does the City of Cape Coral
17 police department have any marine units?

18 A. Yes, we do.

19 Q. Do those units have the responsibility to respond
20 to emergencies on the waters behind the Chiquita lock on
21 the South Spreader Waterway?

22 A. Yes.

23 Q. Chief Sizemore, how many marine units do you have
24 in the City of Cape Coral police department?

25 A. We have four and four marine units and one marine

1 sergeant.

2 MR. ASCHAUER: Can we pull up, Mr. Perrigan,
3 Joint Exhibit 1.07, page 1 of the pdf and Bates No.
4 JNT154.

5 BY MR. ASCHAUER:

6 Q. So Chief Sizemore, we are showing you now what we
7 have premarked and what has been admitted into this
8 proceeding as Joint Exhibit 1.07.

9 Do you recognize this letter, Chief Sizemore?

10 A. Yes, I do.

11 Q. And are you the author of this letter, sir?

12 A. I am.

13 Q. As the chief of police for the City of Cape
14 Coral, do you have any concerns about your department's
15 responsibilities related to the waters behind the
16 Chiquita lock?

17 A. Yes, I do.

18 Q. And can you -- how long have you held those
19 concerns?

20 A. For a long time. Long before I was a chief, as
21 an officer on the street, all the way through my
22 supervisory career. I've held every supervisory rank up
23 the chain, and at every rank there's a different
24 perspective on reliance upon marine patrol and that's
25 gone on for almost the entirety of my career.

1 Q. Okay. Can you generally explain those concerns
2 to the administrative law judge?

3 A. Yes. Behind the lock is the majority of our
4 waterways. We have roughly 400 miles of canals, and our
5 marine units are responsible for the patrol of routine
6 patrol, speed, maintenance, responding to marine
7 crashes, any type of quality of life concern, slowing
8 down jet skiers, boaters, et cetera. And oftentimes a
9 street-based or land-based patrol officer will respond,
10 determine that something is a waterway-based emergency
11 or semi emergency or routine response and need them to
12 respond, and there's a good majority of the time they
13 have to come through the lock, and when they do, it's
14 an -- a very long delay, and depending upon the type of
15 call for service that delay could be detrimental.

16 Q. And so when you say it's detrimental, Chief, does
17 that present an issue with regards to the public health,
18 safety, and welfare?

19 A. On those types of calls where time of the
20 essence, yes.

21 Q. Okay. Are the concerns that you have about the
22 Chiquita loft also expressed within the letter that you
23 authored?

24 A. They are.

25 Q. Okay. Thank you, Your Honor. No further

1 questions.

2 THE COURT: All right. Thank you.

3 Let's see what order are we going in. The
4 Department.

5 MR. HOENSTINE: No questions, Your Honor.

6 THE COURT: All right. Mr. Hannon or
7 Mr. Thomas.

8 MR. HANNON: Thank you, Your Honor. If I
9 don't mind.

10 THE COURT: Go ahead.

11 MR. HANNON: And Chief, I hope you'll hear
12 me.

13 THE WITNESS: I can, yes, sir.

14 MR. HANNON: All right. Am I able to share
15 my screen, Your Honor? I believe I am.

16 THE COURT: Yes. You should be able to.

17 BY MR. HANNON:

18 Q. And Chief, are you able to see the screen in
19 front of you?

20 A. I see a --

21 MR. HANNON: You're not seeing my document?

22 THE WITNESS: No, sir. I see the myriad of
23 Zoom .

24 MR. HANNON: One moment. Here we go.

25 BY MR. HANNON:

1 Q. That your letter?

2 A. Yes, sir, it is.

3 Q. Okay. Thank you very much. I've highlighted the
4 last sentence in the second paragraph.

5 It's -- could you read that, please?

6 A. "We have had complaints of boats coming close to
7 colliding and tempers flaring from boaters in the
8 queue."

9 Q. Are those complaints often from other boaters?

10 A. Yes.

11 Q. And are they often on weekends?

12 A. Often -- I don't know that -- they do occur on
13 weekends.

14 Q. Do you get reports of drunken boaters?

15 A. We do.

16 Q. And does your marine force deal with that?

17 A. Yes, sir.

18 Q. And Chief, your marine officers have any problems
19 dealing with people who exhibit tempers?

20 MR. ASCHAUER: I'm going to object, Your Honor,
21 as vague.

22 THE COURT: Hold on a second. I'll overrule
23 and allow him to answer the question.

24 BY MR. HANNON:

25 Q. That a problem for your marine forces?

1 A. Could you repeat the question.

2 Q. Yes. The sentence says, there are complaints
3 about tempers flaring from boaters. Are your marine
4 officers trained with deal with boaters with tempers?

5 A. Yes.

6 MR. ASCHAUER: I'm going to object, Your Honor.
7 Outside the scope.

8 THE COURT: I'll overrule. Go ahead.

9 BY MR. HANNON:

10 Q. And are you a boater?

11 A. I used to be. I'm a recovering boater.

12 Q. You probably don't have time any longer?

13 A. Correct. I took the worst job for recreational
14 boating.

15 Q. You fish entirely from the dock?

16 A. When I do. When I have time.

17 Q. Then in the third paragraph, I've highlighted the
18 last sentence. Would you mind reading that?

19 A. (As read.)^ "When the lock is closed or not
20 operational, our marine unit cannot get a vessel into
21 the South Spreader and adjoining waterways."

22 Q. You talked about the time constraints. Is that
23 principally when there's a time constraint when it's
24 closed or not operational?

25 A. When it's closed due to operational. As of right

1 now, it is open and not operational. But in the time --
2 at the time of this letter, this is pre-Hurricane Ian,
3 so when it's operational and closed, and there is a
4 queue, the ability for us to jump the line or expedite
5 is not present, so it does.

6 Q. I got it. So your marine officers have to
7 exercise their authority to get into the queue?

8 A. We have to enter the queue or we have to abandon
9 that entryway and take an alternate, which is what
10 really adds to the delay, is if it's too backed up or
11 it's not going to work, we'll have to find another
12 boater in another part of the city, or we'll have to
13 abandon that trailer and go to another launch behind the
14 lock and launch from there. That's the delay that I
15 spoke of earlier.

16 Q. And you talked about the different perspectives
17 on how to handle the marine units that you've
18 encountered in your career; is that correct?

19 A. Yes.

20 Q. So I take it that your perspective is that it's
21 important to have marine units because of the length of
22 the canals and the number of them?

23 A. Yes.

24 Q. But that hasn't always been the policy in the
25 Department; is that correct?

1 A. I don't follow.

2 MR. ASCHAUER: I'm going to object as outside the
3 scope, Your Honor.

4 THE COURT: We are getting pretty far beyond
5 the scope of his direct.

6 MR. HANNON: I'll move on.

7 THE COURT: Okay. Thank you.

8 MR. HANNON: Let me share my screen. I
9 believe that -- well, that didn't work. One moment.

10 BY MR. HANNON:

11 Q. What I have on the screen now is Joint Exhibit
12 1.05 at page 0101. I've just gotten off it. Here we
13 are.

14 And you recognize this aerial view?

15 A. Yes.

16 Q. And what is it?

17 A. It's an overview of the -- it was an overview of
18 the Chiquita lock.

19 Q. Let me get back to it. Now, I think you
20 mentioned in your letter there are other marine units or
21 other forces besides the Cape Coral police?

22 A. Yes.

23 Q. And if you see my cursor, this large flat roof is
24 a dry storage facility for boats; is that correct?

25 A. I believe it is.

1 Q. And there's a dock area along here, correct?

2 A. Yes.

3 Q. And is your marine unit headquartered in that
4 location?

5 A. We were not headquartered there, no.

6 Q. Well, there is an office there for your marine
7 unit?

8 A. We -- our marine units can operate out of there.
9 It's not our headquarters or it's not our main marine
10 area, but we're in that area, yes.

11 Q. So is there a Cape Coral marine unit there at all
12 times or?

13 A. No.

14 Q. I see. And that's the outside of the lock,
15 correct?

16 A. Yes.

17 Q. Following my cursor takes you out in the channel
18 to the Caloosahatchee River, correct?

19 A. Yes.

20 Q. And behind the lock there are horizontal docking
21 areas for boats where we see some boats docked; is that
22 correct?

23 A. Yes.

24 Q. And have your boats on occasion docked there?

25 A. I'm sure they have.

1 Q. And there are how many locations where you can
2 launch inside the waterways of the city of Cape Coral?

3 A. I don't have that number.

4 Q. Okay. And you also have some --what I would call
5 kicker boats that you're able to launch? You know, what
6 I mean by kicker boat? I guess you don't?

7 A. I do not.

8 MR. ASCHAUER: Your Honor, I believe we're
9 getting outside the scope.

10 THE COURT: So I'm going to give him a
11 little leeway. I think I know where it's going; I'm not
12 sure. Try to get us there.

13 BY MR. HANNON:

14 Q. Are there other smaller boats that can be
15 launched elsewhere in the canal system?

16 A. Our boats?

17 Q. Yes, sir.

18 A. No.

19 Q. I see. So are you aware that in 2006, the City
20 permitted a new parallel lock -- boat lock?

21 MR. ASCHAUER: Objection, Your Honor. Outside
22 the scope.

23 THE COURT: I'm going to allow it.

24 Go ahead. You can answer the question.

25 BY MR. HANNON:

1 Q. Are you aware of that?

2 A. I'm not familiar with it.

3 Q. Okay. The -- excuse me.

4 Your department, of course, has statistics about
5 all of the events that you've described to us, do they
6 not?

7 A. We do.

8 Q. And those statistics would reflect exactly where
9 events take place?

10 A. Yes.

11 Q. And we would be able to note from those
12 statistics the time frame between the call for service
13 and the arrival of someone from your force?

14 A. Yes.

15 Q. And what is the average depth of the canals
16 behind the South Spreader, do you know?

17 A. I do not.

18 THE COURT: For the record, you said the
19 "behind the South Spreader." I assume you mean behind
20 the Chiquita lock.

21 MR. HANNON: Thank you.

22 THE COURT: Okay.

23 MR. HANNON: Thank you. I have no other
24 questions.

25 THE COURT: All right.

1 Any redirect?

2 MR. ASCHAUER: I do, Your Honor, a couple.
3 May I just finish my thought here?

4 THE COURT: Certainly.

5 Is it okay if Mr. Hannon stops screen
6 sharing, or do you need that picture up?

7 MR. ASCHAUER: I do not need that picture
8 up, Your Honor.

9 EXAMINATION

10 BY MR. ASCHAUER:

11 Q. Chief, let's start with the very last question
12 that Mr. Hannon asked you about the statistics of the
13 Department.

14 Are there times where the responses to -- or
15 where responses to calls regarding the South Spreader
16 Waterway are abandoned due to the lock's presence?

17 A. I wouldn't say "abandoned," because we respond to
18 any and everything. I would say significantly impacted
19 or delayed.

20 Q. Okay. Is that because you have to find another
21 avenue to the emergency?

22 A. Yes.

23 Q. Would that affect delay time -- response time?
24 I'm sorry.

25 A. Yes, it would.

1 Q. And Mr. Hannon asked you a number of questions
2 about some docking facilities inside and outside of the
3 lock.

4 Do you recall those questions?

5 A. I do.

6 Q. Do your marine units patrol the waters of Cape
7 Coral?

8 A. Yes, they do.

9 Q. Do they sit around in an office all day waiting
10 for calls?

11 A. No. There's two different types of public marine
12 response, and I believe you'll hear from the fire chief
13 later. Theirs is more of respond-at-the-time, and ours
14 is a hybrid. We also respond to emergencies as they
15 come in, but we are on active patrol, moving patrol for
16 the bulk of the shift.

17 Q. And after Mr. -- well, Chief, do you support the
18 removal of the Chiquita Lock?

19 A. I do.

20 Q. And do you still support the removal of the
21 Chiquita Lock after Mr. Hannon's questions?

22 A. I do.

23 THE COURT: Did you get your answer?

24 THE REPORTER: I did not hear the answer.

25 THE COURT: She didn't hear the answer.

1 What was your answer?

2 THE WITNESS: I do support it.

3 BY MR. ASCHAUER:

4 Q. I want to clarify. I asked you a question about
5 responding to issues behind the lock.

6 Are there times when a marine response is
7 abandoned in lieu of another type of response due to the
8 presence of the lock?

9 A. I'm not aware of any particular instance where we
10 have abandoned response. I'm pretty adamant that we --
11 even if it's hours later, we're going to respond. It
12 could be an alternate response where it would be a
13 land-based response based upon that. So it's almost two
14 different questions -- or two different responses I have
15 in my head.

16 We don't abandoned any call. We would never just
17 throw our hands up and say, you know, "That's too hard."
18 You know, we're going to go. It may be a redirect of
19 the resource, if that's a better answer. We would go
20 more land-based than marine-based, if that helps.

21 Q. It does.

22 MR. ASCHAUER: Thank you, Your Honor.

23 THE COURT: Thank you.

24 All right. Is the witness executed?

25 MR. ASCHAUER: Yes, Your Honor.

1 THE COURT: Okay. Thank you very much,
2 Chief.

3 All right. What's your pleasure, Mr.
4 Hennessy?

5 MR. HENNESSY: Well, Your Honor, actually,
6 it's Mr. Hannon's pleasure. He's prepared to give his
7 opening, although he, I think, was requesting lunch.

8 THE COURT: Okay. Mr. Hannon --

9 MR. HENNESSY: He was suggesting that there
10 was a quid pro quo.

11 THE COURT: Mr. Hannon, do you want to go
12 ahead and give your opening before lunch?

13 MR. HANNON: I prefer not to. I won't be as
14 long as Mr. Hennessy, but I don't want to keep people
15 from lunch.

16 THE COURT: Okay. I would prefer if you
17 just made your opening and then we went to lunch. But
18 if you want to wait, that's fine.

19 MR. HANNON: Well, I'm going to do what you
20 want.

21 THE COURT: Okay. Come on up, or you can
22 give it from there. That's fine.

23 MR. HANNON: Thank you. I need to operate
24 the equipment --

25 THE COURT: Okay.

1 MR. HANNON: -- and try to do better.

2 Am I shared? Yes.

3 Your Honor, may it please the Court and my
4 newfound colleagues, or respondents. This is a Google
5 overhead. I'd like to orient the Court to the physical
6 area of this part of Southwest Florida that we all
7 enjoy, and what we're looking at here, obviously, is
8 Matlacha.

9 So if I begin to scroll out --

10 MR. HENNESSY: I'm sorry, Your Honor. I
11 didn't catch it. What is the exhibit number we're
12 looking at?

13 MR. HANNON: This is Google Earth.

14 MR. HENNESSY: Okay.

15 THE COURT: It's not an exhibit, then.
16 Okay.

17 MR. HANNON: Right. It's just a
18 demonstrative.

19 So as we scroll out, we begin to see --
20 forgive my voice -- we begin to see some of the
21 geography that has already been mentioned here. There's
22 been a mention about Pine Island, which is to the left.
23 This is little Pine Island, which is a preserve. This
24 is Matlacha, and we have Pine island Road, probably one
25 of the oldest roads in Cape Coral, that runs east to

1 west. And you'll learn that that road pretty much runs
2 the demarcation line between south Cape Coral and north
3 Cape Coral.

4 And if we come out a little farther, we see
5 Fort Myers, which has -- one, two, three, four -- five
6 bridges. Across the river here, we see Cape Coral,
7 which is actually a peninsula between the Caloosahatchee
8 River and the Matlacha Aquatic Pass. And you'll learn
9 from our expert, Kevin Irwin, that this land was
10 purchased by a couple brothers from Baltimore in the
11 '50s and '60s, who then began to dig canals and mound
12 up the spoils of the digging of the canals to create
13 locks. Prior to that, it was sort of a mini version of
14 the Everglades.

15 If we step out a little more, we see some
16 more well-known landmarks, such as Fort Myers Beach,
17 Sanibel Captiva Island, Cayo Costa, which is a state
18 park, and Boca Grande Gasparilla. These beaches all
19 have white sand and are very popular for that reason.
20 Pine Island is 20 miles long and has no white sand.
21 Matlacha has no white sand.

22 So if we switch over to a layered version of
23 Google maps, we then see some configurations of the
24 waterways around these areas. And the photograph that
25 was shown by Mr. Aschauer looks like it may have --

1 might have been made from this type of -- of a feature.

2 And so what we see here is the
3 Caloosahatchee River, which we've spoken about ,and then
4 we have what was called the mangrove fringe. This is
5 actually -- will be referred to by Kevin Irwin as a
6 buffer. And where you see Matlacha and the bridge
7 coming across here in Route 75 is the demarcation
8 between what we've called the South Spreader and what we
9 call the North Spreader.

10 So to be able to see in some more detail the
11 South Spreader, here we have Rotary Park at the bottom,
12 which was mentioned in the opening. Glover Bight is in
13 the opening. And one comes in from the Caloosahatchee
14 River into the South Spreader adjacent to the Westin at
15 Marina Village. You go north, and then you head west,
16 and this is where the Chiquita Lock is located, where my
17 cursor is. And behind it is a marina, and that marina
18 has many, many boats, very large boats that moor there.

19 And we see the dry storage facility for
20 boats here outside the lock, and adjacent to it, there
21 is a boat ramp which allows conventional delivery of
22 boats into the water outside the spreader that may come
23 out of the dry storage or be brought there by boaters
24 who wish to get into the Caloosahatchee from that
25 location.

1 So transport into the Chiquita Lock, one
2 must travel at no wake speed. As soon as you're out of
3 the Chiquita Lock, those restrictions are lifted. The
4 South Spreader was built in the -- was built in the
5 early '80s, late '70s after Kevin Erwin, who was, at
6 that point, one of the very few ecologists with the
7 Department of the Environmental Resources at the time,
8 had been watching the construction that was being
9 conducted in Cape Coral and the digging of the canals by
10 the developer, GAC, and called a halt to it.

11 The Department, which at that time was
12 pretty much run by the governor, supported Mr. Erwin in
13 his insistence that the continued development westward
14 of Cape Coral into these mangroves, digging these canals
15 through the mangroves, had to cease. And the
16 consequence of that action by the Department of
17 Environmental Resources, at that point in time, was the
18 largest bankruptcy in the history of the state of
19 Florida; that is, the bankruptcy of GAC.

20 And the spreader system was created by
21 Mr. Erwin, in consultation with engineers and others, as
22 a compromise to prevent punishment of persons who had
23 bought lots in Cape Coral and were -- many of whom were
24 then living in Cape Coral, and a need to protect the
25 mangroves and the Matlacha Aquatic Pass and the

1 Caloosahatchee River from pollution.

2 And the spreader waterway system was unique
3 for its time, and the South Spreader Waterway consisted
4 of this main wide canal that goes south to north up to
5 Trafalger, right about this location before this golf
6 course. And the mechanism that that spreader waterway
7 created was a detention system for all of the water that
8 flowed off the impervious surfaces, off the lawns, off
9 the roads, off of every surface of this area of Cape
10 Coral.

11 All that water went into that canal, where
12 it was detained by the Chiquita Boat Lock. It
13 functioned as, in a sense, a water detention system.
14 And the purpose of the system, which Mr. Erwin will
15 describe to you, was to retain this water that was full
16 of nutrients, pollutants, road oils, gasoline, runoff
17 from yards in this wide spreader canal to allow it to
18 experience a residency period during which those
19 nutrients could, in some instances, fall to the bottom
20 of the canal and become what we call legacy nutrients,
21 or roll over the perimeter, the berm, of the canal on
22 the west and through the mangroves.

23 And the benefit of that, Mr. Erwin will tell
24 you, is that the mangroves took up the nutrients. The
25 nutrients acted as fertilizer for the mangroves and

1 cleaned the water. Also, in those days, there were
2 oysters and shellfish in this area which are little
3 factories for cleaning the water. And the system
4 depended upon this berm being maintained and the
5 Chiquita boat lock containing the water creating what's
6 called a head, so that what I just described to you can
7 take place. You asked whether this was a stormwater
8 system - or stormwater management system. The City of
9 Cape Coral later adopted it as a stormwater management
10 system, but it was anyway.

11 And you will learn that the stormwater pipes
12 that come from the roads, all go into the South
13 Spreader. There is no cleaning up stormwater before
14 it's allowed to enter the South Spreader Waterway, which
15 you will hear from experts is why, in part, the
16 Caloosahatchee River is one of the most polluted rivers
17 in Florida.

18 Similarly, on the north, Mr. Erwin, who is
19 the author of this spreader waterway system, will
20 explain to you the need to do the same in the north.
21 The north is a bit different than the south because the
22 south is almost completely built up residentially and
23 commercially, and the north is less so. The south has a
24 sewer system; the north less so, particularly farther
25 north less so.

1 And so what you see here as part of the
2 North Spreader perform the same function as I just
3 described to you in the South Spreader, and it travels a
4 little bit of a larger distance, and it goes all the way
5 up to a very, very short gap which goes out to Charlotte
6 Harbour. And as the population of Cape Coral increased,
7 more and more people bought lots along the canals north
8 of Pine Island Road where they could travel by boat out
9 to the spreader south through the lift. You see this
10 boat lift. Get their butt up on it, swing it up over.
11 And go on out, and from there go out into the Matlacha
12 Aquatic Pass. They can go south near to Sanibel. They
13 can go north over the top of Loquilla and out into the
14 Gulf of Mexico where there are fish galore, and there
15 are fish galore in all these areas of the Matlacha Pass
16 and Pine Island Sound.

17 There were folks who were so anxious to get
18 out there, they used their boats to drive canals through
19 the mangroves, and they did the same in an attempt to
20 get around the Ceitus boat lift area. So this is the
21 geography that's important to know. And you will hear
22 from some witnesses who will talk about their actual
23 experience when the Ceitus boat lift barrier was
24 removed. It was located here. At is a written I can't
25 vista park which is famous as a manatee viewing site.

1 And when the lock was removed, the sediment
2 that you see in this overhead came pouring out of the
3 North Spreader. And one of the witnesses you'll hear
4 from is Nancy Hindenach, and Nancy lives at this house
5 that's right here (indicating)^ where you see the
6 sediment, and she's lived there since 1980. And she'll
7 tell you how this area has changed since the removal of
8 the Ceitus boat lock.

9 You will also hear from a man who's become
10 almost a legendary commercial fisherman, Casey Streeter.
11 Casey came from Michigan, and here is what used to be
12 called the fishingest bridge in America, the Matlacha
13 bridge, Casey has Island Seafood Market located right
14 here in Matlacha, and he has a commercial --

15 (Court Reporter clarification.)^

16 MR. HANNON: -- fishing fleet that brings
17 fish to that market, fresh fish, on a regular basis.
18 And he goes out into the Gulf of Mexico where the
19 majority of the fish come from to his market. Going out
20 in the Gulf of Mexico and being out there in some some
21 cases for a week at a time, and having to go farther and
22 farther out as the pollution on the West Coast of
23 Florida made it impossible to find market fish .

24 You'll also hear from a gentleman by the
25 name of Carl Dikert. Mr. Dikert came to Matlacha after

1 living other locations around the United States that he
2 thought were the ideal, most pristine place, to be on
3 the water. And Mr. Dikert purchased a four-room hotel
4 called Anglers Inn, located right where my cursor is on
5 this canal (indicating)^ that comes in behind the
6 Matlacha community park and over around behind Leoma
7 Lovegrove Gallery and Mr. Dikert will tell you what
8 happened to the waters of Matlacha, the Matlacha Aquatic
9 Pass, where it went under the Matlacha bridge, the
10 waters up over and into the bay here when the Ceitus
11 boat lift barrier was removed, and, in particular, when
12 red tide struck the coast of southwest Florida in 2018
13 destroying our tourist industry.

14 And one of the things that you'll hear, and
15 I've gone back to the South Spreader. One of the things
16 that you'll hear is that the Chiquita boat lock creates
17 a closed system of canals over here (indicating)^ on
18 the west or the southwest part of Cape Coral. The
19 canals over here along the river are open. Open to the
20 river. And in 2018 that's where algae, red tide,
21 cyanotoxins and other dangerous and poisonous substances
22 proliferated throughout the open canals of the City of
23 Cape Coral. In the closed system, there was no
24 occurrence of that phenomenon.

25 This is Plaintiffs' Exhibit 19, which is

1 like an exhibit that was prepared by the -- the
2 Department to prove Mr. Hoenstine's assertion that the
3 problems of the North Spreader were caused by Hurricane
4 Charlie. This is from the lead appraiser, and it's a
5 time sequence. Here's the (indicating)^ -- see this
6 boat lock -- boat lift. Here's the North Spreader.
7 Here's the canal that comes out by Nancy's house and out
8 into Matlacha. Here's the bridge. And this is a time
9 sequence over years showing that once the spreader was
10 removed --

11 MR. HENNESSY: Your Honor, I'm going to
12 object to the extent that we're now -- we've -- I guess
13 clearly moved off of what I thought was just the current
14 Google Earth map to this time sequence exhibit, which is
15 clearly more than a demonstrative and not, you know, not
16 on their exhibit list and certainly not been introduced
17 by any expert.

18 THE COURT: Well, this is still just opening
19 statement. You know, there's -- I'm not accepting
20 anything into evidence at this point. This is just
21 opening statement, so I'll allow him to use it.

22 MR. HENNESSY: All right, Your Honor.

23 THE COURT: I mean, you know, I don't take
24 notes during opening statements. It's not evidence. So
25 I will not be confused.

1 MR. HENNESSY: I agree because Mr. Hannon, I
2 believe --

3 THE COURT: Thank you. Let's let him finish
4 his opening.

5 MR. HENNESSY: Yes, Your Honor.

6 MR. HANNON: So the sedimentation that you
7 see covered all the seagrass, covered all the oysters.
8 There's nothing left there today. Here's a difference
9 from 2003 where the lock was here, and 2018 where this
10 entire area is now -- is now dead.

11 This is Plaintiffs' Exhibit 139, page 1.
12 This is an overview of the area where the Chiquita Lock
13 here provides access to the canal and out to the
14 Caloosahatchee River. North of it, you can see the
15 bridge of Matlacha. You can also see the mangrove
16 buffer that continues north, which, by the way, provided
17 a tremendous amount of protection to the City of Cape
18 Coral when Hurricane Ian came through.

19 Here you see a closer shot. Here's the
20 Chiquita Lock there. This is an area where the city now
21 says there are, what they call, breaches that come out.
22 And according to the city, have been delivering
23 pollution and nutrients into the Matlacha Aquatic Pass,
24 they say, since almost as soon as the system was
25 established.

1 Now we're sharing what is part of Joint
2 Exhibit 1. This is Joint Exhibit 1.48. And I'd like to
3 describe the first of two phenomenon that we were going
4 to suggest to Your Honor creates great difficulties for
5 granting this application. At page 623, this is the --
6 these are the specific conditions that were spoken about
7 by counsel for the City in his opening. This represents
8 a conflict of the position between the Department and
9 the City in this case. The City says that removal of
10 the lock will not cause any nitrogen to go into the
11 Caloosahatchee River. In fact, it will cause nitrogen
12 to be sucked out of the Matlacha Pass and somehow or
13 another remain in the South Spreader even though the
14 lock is open.

15 This is a condition that the Department
16 imposed on this permit. The Department is saying in
17 paragraph 13, that you must offset 58.062 -- 58,632
18 pounds per year of nitrogen by mitigating that addition
19 of nitrogen into the Caloosahatchee River. This is a
20 case where the Department is saying to the City, We know
21 you say you're not going to pollute the river. But we
22 don't agree with you, and we think that 58,632 pounds of
23 nitrogen are going to go into the river. So the city
24 says, Okay. We will mitigate that.

25 Now, Your Honor will learn there are lots of

1 ways to mitigate degradation of water so that you can be
2 granted a permit. You can -- you can mitigate. You can
3 buy credits out of a system. You can figure out ways to
4 mitigate in that particular location.

5 This method of mitigating has never been
6 accepted in an ERP because these are assumptions. These
7 are not measured numbers. The City will have to engage
8 in aquatic vegetation harvesting for which the scientist
9 model a credit of 14,000 pounds of nitrogen per year
10 based upon their modelling of what harvesting vegetation
11 would accomplish. The Caloosahatchee Connect river
12 crossing reuse project is the project on the right where
13 you see the green pipe.

14 And incidentally, Fort Myers is dumping its
15 pollution right off the shores of where the Edison and
16 Ford museums are where they had summer homes. And they
17 continue to do that. It's not built yet, Your Honor,
18 and what the City of Cape Coral has done is they've
19 entered into an agreement with Fort Myers to have that
20 water cross the river and be cleaned. That's a great
21 thing. And to do that, they get 20 percent of the
22 credits that the modelers conclude are going to be the
23 benefit to the water of doing that. It's a model
24 assumption of how much that project is going to reduce
25 nutrients.

1 But it's going to reduce nutrients in the
2 river. Not in the spreader. It has no impact on the
3 nitrogen that's coming out of the spreader. And they
4 get 20 percent, which is simply part of the deal they
5 made. Catch basins are supposed to be maintained
6 anyway. Dog parks are supposed to be maintained anyway.

7 And they talked about Glover Bight. Glover
8 Bight is outside the lock, but these numbers are close
9 to fictitious. Then we have the 41,965 BMAP reduction
10 credits that somehow or another are going to be shifted
11 away from the Basin Management Action Plan that Cape
12 Coral must follow. To this project.

13 I saw nothing in the application in Joint
14 Exhibit No. 1 that demonstrated that this methodology
15 for mitigating admittedly 58,000 pounds of nitrogen per
16 year going into the Caloosahatchee River has ever been
17 found to be valid. This project, the reduction excess
18 comes from a 2015 plan to build sewers in the south of
19 Cape Coral. And the experts formulate that credit in a
20 manner that's accepted by the Department for the BMAP.

21 The second thing I want to bring to your
22 attention is part of Joint Exhibit 1.05, page 77.

23 Okay. Forgive me. Thank you for your
24 patience.

25 This page, here we go, is figure 12. This

1 is in the application to model water levels. But I want
2 to use this to explain what I call the recirculator
3 theory. The recirculator theory has it that since
4 almost when this system was set up, nitrogen and other
5 pollutants that have been gathered in the spreader canal
6 at the south have been going out through breaches into
7 the Matlacha Aquatic Pass.

8 So this theory is admitting to the public
9 that they've been sending pollutants into the Matlacha
10 Aquatic Pass for decades. And the Matlacha Aquatic Pass
11 since 2015 is now impaired. It's also an outstanding
12 Florida water, and it's on the EPA 303 list.

13 So what the theory is now is, with the
14 removal of the lock, the flow of water is going to
15 reverse. That's why I call it the recirculator theory,
16 and they're going to begin to suck water up out of the
17 Matlacha Aquatic Pass. They're going to bring nutrients
18 in from the aquatic pass. They're going to go down the
19 spreader waterway, and they won't be detained by the
20 lock because the lock won't be there any more. However,
21 they won't go out into the river because the theory is,
22 once they get down to where the lock used to be, all the
23 water there is just going to slosh around with the
24 tides, in and out, slosh around theory; it's like a
25 bathtub. And even though today there are tens of of

1 thousands, hundreds of thousands of square yards of
2 water that go out of the spreader and out of the
3 Caloosahatchee River, nutrients that are going to come
4 in through the recirculator are not going to get out
5 into the river.

6 The entire theory of the mitigation that
7 they plan is based upon the BMAP system. The BMAP
8 system was created 20 years ago, and it's a FDEP-created
9 system where they try to model the total amount of
10 nitrogen and figure out a way that everybody has to take
11 it out and who has to take out how much. It's an
12 entirely modeled system, and events of the last three
13 years have shown that it is devastatingly failing.

14 That the modeling of the nutrients in our
15 water basin is -- in reality, we have 280 percent more
16 pollutants in this water basin than the model predicted
17 that created the BMAP system. So we have essentially, I
18 think, four problems; no reasonable assurances that what
19 happened in the north won't happen again; the
20 recirculator theory, which is a product of modeling that
21 defies common sense; we have the use of credits under
22 the BMAP system, which doesn't represent any kind of
23 measured proof that the degradation standards of Florida
24 waters wasn't be respected here; and the fact that these
25 projects aren't even in this particular watershed.

1 And the result of this will be the same
2 result in the north. It will be the predictable and
3 unremitting pollution and continued pollution of the
4 Caloosahatchee River and the Matlacha Aquatic Pass.

5 Thank you for your patience.

6 THE COURT: Thank you.

7 All right. Is there anything else before we
8 break for lunch?

9 MR. HENNESSY: Your Honor, timing issue. I
10 have had an opportunity to speak to our valiant bailiff
11 here, and he's in it for as long as we need him. And,
12 therefore, it -- I don't know if you needed to do any
13 other confirmation with the court administrator, but we
14 certainly are willing to go till 6:00 night.

15 THE COURT: Oh, I did -- I had my assistant
16 make that request shortly after you asked for it this
17 morning.

18 MR. HENNESSY: Excellent.

19 Oh, and the other issue is that we -- we did
20 inquire about the availability for Thursday and Friday,
21 and I don't know if Your Honor was looking to her
22 calendar to see if that was available for her.

23 THE COURT: Okay. I have not -- you mean
24 inquired about the availability of this room for
25 Thursday and Friday?

1 MR. HENNESSY: No. We have inquired --

2 THE COURT: Okay.

3 MR. HENNESSY: -- and it is available
4 Thursday and Friday.

5 THE COURT: Okay.

6 MR. HENNESSY: It's just a question of
7 whether it works on your calendar or not.

8 THE COURT: Okay. All right.

9 I definitely can do a large portion of the
10 day on Thursday. Friday is going to be tough, but I'm
11 still looking at whether I can rework it if we need it.
12 But let's try to plow through.

13 Deputy, is there any food in the building or
14 do we have to leave the building?

15 THE BAILIFF: There is not.

16 THE COURT: Okay.

17 THE BAILIFF: You've got to go down to the
18 front door and go right out -- right across the street
19 is a little breezeway to the Law and Order Cafe. They
20 have hot meals, soups and sandwiches. And then one
21 block over is Main Street. We've got tons of
22 restaurants down on Main Street. Whatever you want.

23 SPEAKER: But Law and Order is better. He's
24 a partner in that.

25 THE COURT: Given that, how long do we think

1 it will take for everyone to get some decent sustenance
2 and get back here? Do we need a full hour?

3 MR. HENNESSY: 45 minutes? Well, we were
4 expecting a police escort to the restaurant.

5 THE COURT: All right. Let's try that.
6 Let's adjourn and we'll reconvene at 2:15.

7 And for those of you on Zoom, I am leaving
8 it open. Please do not get out of the Zoom call if you
9 don't have to, because that will limit of the number of
10 people I need to be admitting when we return.

11 Thank you.

12 (Recess.)

13 THE COURT: All right are we ready to go
14 back on the record ?

15 MR. HENNESSY: Yes, Your Honor. We're
16 ready.

17 THE COURT: Madam Court Reporter?

18 THE REPORTER: Yes.

19 THE COURT: All right. Then we'll go back
20 on the record.

21 Mr. Hennessy, you may call your next
22 witness.

23 MR. HENNESSY: Your Honor, the City would
24 call Steven Neff, professional engineer.

25 THEREUPON,

1 WITNESS,
2 Being by me first duly sworn to tell the truth testifies
3 as follows:

4 THE WITNESS: I do.

5 THE COURT: Thank you.

6 You my proceed, Mr. Hennessy.

7 DIRECT EXAMINATION

8 BY MR. HENNESSY:

9 Q. Good afternoon, Mr. Neff.

10 A. Good afternoon.

11 Q. Could you please state your name and current
12 employment for the record?

13 A. Steven Michael Neff. AIM Engineering &
14 Surveying.

15 Q. Mr. Neff, could you please spell your name, both
16 the first and last?

17 A. Okay. First name is Steven, S-T-E-V-E-N. Last
18 name is Neff, N-E-F-F.

19 Q. And I'm going to show you City's Exhibit C50,
20 titled, "Steven M. Neff, PE professional profile."

21 THE COURT: Did the parties -- have the
22 parties stipulated to areas of expertise of any of the
23 expert witnesses?

24 MR. HENNESSY: Don't know, Your Honor. I
25 don't think so.

1 THE COURT: Okay.

2 MR. HENNESSY: We would be offering Mr. Neff
3 as an expert professional engineer.

4 THE COURT: Okay. Is there any objection to
5 the qualifications of Mr. Neff as an expert engineer?

6 MR. HOENSTINE: No objection from the
7 Department.

8 MR. HANNON: No, Your Honor.

9 THE COURT: Okay. That may just help you
10 streamline some of your preliminaries.

11 MR. HENNESSY: Yes. Absolutely, Your Honor.

12 THE COURT: I don't know. The deputy might
13 want you to give it to him the next time.

14 Let's just go off the record while we fix
15 this.

16 (Recess.)

17 THE COURT: Let's go back on the record.

18 Mr. Hennessy, you may continue.

19 MR. HENNESSY: Thank you, Your Honor.

20 BY MR. HENNESSY:

21 Q. Since you have been accepted as an expert
22 professional engineer, I'm going to curtail my
23 questioning. I would like to have you briefly state
24 your educational history.

25 A. I have bachelor's in science in civil engineering

1 from Purdue University.

2 Q. Go Boilermakers.

3 A. Go Boilers, yes. Number 1.

4 Q. Are you currently a registered professional
5 engineer in the state of the Florida?

6 A. I have. I have been continuously since 1983.

7 Q. Do you hold any memberships in any professional
8 associations?

9 A. Yes, sir. American Public Works Association and
10 the Florida Stormwater Association.

11 Q. Has your professional engineering experience been
12 focused on stormwater and public works?

13 A. Yes, sir, it has.

14 Q. All right. Do you have any experience in the
15 management of the design and permitting of projects
16 requiring environmental resource permits from the
17 Department of Environmental Protection?

18 A. Yes, I do. That's been part of any career, so
19 I've been involved in numerous permits.

20 Q. Okay. Do you have any particular experience with
21 the City of Cape Coral or its surrounding areas?

22 A. I'd say that's the -- probably the most
23 experience I have. I worked for the City of Cape Coral
24 for almost 32 years in public works -- as a public works
25 director near the -- at various times in my career, and

1 my last five years, almost six years, as the public
2 works director for the City of Cape Coral.

3 Q. Did you also serve, for a time, as the City's
4 engineer?

5 A. I was a city engineer for a time also.

6 Q. Okay. While at the City of Cape Coral, did you
7 participate in any projects that had any particular
8 relevance to the matters at issue in this permit?

9 A. Yes, sir, I did. I've been involved in a number
10 of projects I think are pertinent. So historically, a
11 lot of projects that have benefited water quality, I've
12 been involved in those. Involved at the locks,
13 specifically, for major maintenance efforts on the lock.
14 Stormwater maintenance -- a stormwater master plan,
15 oversight of the implementation of a citywide stormwater
16 master plan was part of what I was involved in, and
17 numerous other projects.

18 Maybe -- okay. Make sure I'm still -- I just --

19 THE COURT: If you'll just try to bring the
20 microphone closer to you.

21 MR. HENNESSY: Yeah, you were a little back
22 from the microphone.

23 THE WITNESS: Okay.

24 MR. HENNESSY: Speak like you see all those
25 people, you know, when you're talking to the Senate.

1 THE WITNESS: Okay.

2 MR. HENNESSY: Kind of hunched over.

3 THE WITNESS: At this point, yeah, I see all
4 the -- am I supposed to just see the -- basically, the
5 Zoom screen with the people versus the screen?

6 Okay. Thank you.

7 BY MR. HENNESSY:

8 Q. So you can see the exhibit now?

9 A. I can now. Thank you.

10 Q. Okay. Great.

11 I appreciate you bringing that to my attention,
12 because I have no idea what you're seeing on that TV. I
13 assume it's --

14 A. Yeah, my resume. I'm pretty comfortable with my
15 resume. But, yes, it's now there. Thank you.

16 Q. Okay. Did you have any experience with
17 stormwater projects for the City?

18 A. I certainly did. That was big part -- that was
19 one of the many things I did. So the stormwater utility
20 was under my leadership for a number of years. I was
21 part of the initiation of the stormwater utility in the
22 City of Cape Coral, so I had a lot of involvement in
23 stormwater issues throughout the years.

24 Q. Did you have any experience with the dredging of
25 canals within the City of Cape Coral?

1 A. Yes. That was one of my responsibilities, and we
2 developed a canal-dredging master plan during my tenure.

3 Q. Are you familiar with the existence of weirs, or
4 water control structures, within the City of Cape Coral
5 separating freshwater from saltwater canals?

6 A. Yes, very, very familiar with the weirs
7 throughout Cape Coral, both from my almost 32 years with
8 the City as well as with AIM Engineering. We did a
9 project recently, a weir maintenance master plan, so
10 I've seen virtually all of them, touched them, and am
11 well aware of them and how they operate.

12 Q. Prior to being involved in this permit, did you
13 have any particular experience with the South Spreader
14 Waterway?

15 A. Certainly involved with it one of the -- one of
16 the projects that I was involved with, we had received a
17 grant from FDEP for plugging the breaches in the South
18 Spreader and so I was working with our -- engineer of
19 record was Ablong Engineering, working with them on that
20 project, so I was involved with that which we did not
21 take to completion because there became a requirement to
22 maintain the -- these improvements in perpetuity. And
23 based on discussions with our engineer of record that we
24 were going have a maintenance problem because they
25 weren't really going to be sustainable to fully plug the

1 breaches, so we stepped away from that. The City of
2 Cape Coral stood away from that activity.

3 Q. You said that that project was in the 1990s?

4 A. It was in the '90s, yes, sir.

5 Q. So even in the 1990s, these areas of transfer of
6 water between tidal canals and South Spreader Waterway
7 were considered breaches?

8 A. Yes.

9 Q. Okay. And I'm sorry. Did you testify as to what
10 ultimately was done about those breaches? I understand
11 you said the city didn't --

12 A. The City didn't pursue it after the FDEP picked
13 it up on their own, and had Wilson Miller design
14 improvements to the breaches. I won't say plugs because
15 they are -- they're not designed to be full plugs. They
16 are -- they have notches so there's -- they look like a
17 weir, so they're -- they have a 10 foot by approximately
18 2 foot notches so they -- their discharge is controlled
19 primarily through those notches. At certain levels it
20 discharges over the entire structure, but -- but it's
21 not a full plug. And it's clear it's not designed to be
22 a full plug.

23 Q. So there has -- the structures that are in place
24 are intent to allow a transfer of water both into and
25 out of the South Spreader Waterway?

1 A. Yes.

2 Q. All right.

3 THE COURT: I'm not hearing an objection as
4 to leading. But it's much more helpful to me if you
5 allow your expert witness to explain those things for
6 me.

7 MR. HENNESSY: Sure. I'm sorry, Your Honor.
8 I'm just trying to move quickly.

9 THE COURT: I know. Especially since it's
10 an area in which I have no expertise, and also don't be
11 surprised if I interrupt and ask questions of your
12 witness directly.

13 MR. HENNESSY: No. That's fine. I'm
14 familiar with that. That's a very common experience.

15 Where is the laser pointer?

16 May I approach the witness, Your Honor.

17 THE COURT: Yes, you may.

18 BY MR. HENNESSY:

19 Q. Are you familiar with those?

20 A. They're all different, so far, so good.

21 Q. All right. Could you point out, using the map on
22 the wall, the South Spreader Waterway that we're
23 referring to? And can you explain for the Judge the
24 location of some of the breaches that -- that you
25 investigated in your time at the City of Cape Coral?

1 A. This is a location -- approximate location of
2 Breach 20; that's the largest breach by far. It looks
3 like a -- it looks like a creek. It's a pretty wide
4 open body of water. FDEP, Wilson Miller is their
5 designer --

6 It is coming? Am I loud enough now?

7 -- so it looks like a creek. It's pretty wide
8 opening for breach number 20, again. By far the
9 largest. The FDEP design putting basically concrete
10 bags, stacked concrete bags, sort of a pyramid-looking
11 device that is basically level with the soil adjacent to
12 that west side of the berm. In the middle of those
13 concrete bags -- the concrete bags drop by about 2 feet
14 by 10 foot wide, and they're still concrete bags that go
15 all the way down to the breach of water body.

16 But it's -- it's a control connection to some
17 degree, so there's -- that's the device that was
18 installed, to plug up the entire breach, and a similar
19 device was installed in Breach 16 and 17 which are just
20 a little bit north, like a half mile to a mile north of
21 Breach 20.

22 THE COURT: You said that same type of --

23 THE WITNESS: Same type.

24 (Speaking simultaneously.)^

25 THE COURT: -- structures.

1 THE WITNESS: The breaches are not nearly
2 as big, but the same type of device was installed.

3 BY MR. HENNESSY:

4 Q. All right. As part of this permit, did you also
5 visit these breaches and determine the existing
6 conditions?

7 A. I did. Yes, I did.

8 Q. Explain to the Judge what your -- what your
9 current observations were of these breaches?

10 A. Well, there's definitely water moving at times
11 rapidly between.

12 THE COURT: Tell me what a time frame is
13 here, when you...

14 THE WITNESS: When I was there?

15 BY MR. HENNESSY:

16 Q. The application was filed in 2021 --

17 A. 2021, yes.

18 Q. -- so subsequent to the filing of the
19 application, did you do a site visit?

20 A. I did a site visit, yes, subsequent to that.

21 Q. At that site visit, did you -- was the site visit
22 via boat?

23 A. A kayak, actually, so yes.

24 Q. Okay. And did you go to the breaches?

25 A. Yes, we did.

1 Q. Including Breach 20 that you were talking about?

2 A. Yes.

3 Q. Can you describe for me what you observed in
4 terms of the conditions of Breach 20?

5 A. So you have the -- continue to have a big
6 connection, a big wide body and connection between the
7 South Spreader Waterway and Breach 20. And the water
8 moves through the notch, and at times, depending on the
9 water elevations, tide elevations, you'll see water
10 moving over the top of the concrete bags also. Not as
11 much, obviously, but in the -- it will fill up the notch
12 and at times go over the top of the concrete bags.

13 Q. And were you able to navigate your kayak through
14 the breach?

15 A. We -- I didn't try. It's -- we stood on top of
16 it. We walked on it. You had to be careful. At
17 different -- certain tides, the water is moving pretty
18 quickly through those connections, so we went to it,
19 stood on it, took photos, took measurements of it. Same
20 with 16 and 17, which, again, is much smaller. Much
21 easier -- it's easier to, like, lots of mangroves around
22 it, but also observe it.

23 Q. Now, did this structure at Breach 20, has it
24 changed since the work that the Department did, you
25 know, prior -- I guess, pursuant to the Wilson Miller --

1 A. Difficult to tell. It is not built exactly.
2 It's similar; it's very similar to the way Wilson Miller
3 designed it. The depths are a little different. Could
4 that be through deterioration or may -- I could not find
5 record drawings of -- I have design plans, Your Honor,
6 not the final construction plans. The notch was bigger
7 than what was anticipated or shown in the design. It
8 was supposed to be 16 inches; it's like 2 feet.

9 In looking at early surveys, it looked like there
10 might have been deterioration. It's hard to tell. It
11 might have filled in with, you know, organisms on there,
12 so it's difficult to tell.

13 Q. By organisms, you mean things like oysters?

14 A. Yes.

15 Q. And barnacles?

16 A. Yes.

17 Q. Okay. Is that indicative, oysters and barnacles,
18 is that indicative of estuarine environment?

19 A. Yes, sir, it is.

20 Q. And with regard to the flow of water that you
21 saw, was that flow in one direction, or was it -- has it
22 been -- have you observed it flowing in both directions
23 in and out of that breach?

24 A. While I was there -- for the time I was there, it
25 was flowing out.

1 Q. All right. In the past, have you seen it flowing
2 into the canal?

3 A. I can't recall.

4 Q. All right. In your experience at the City of
5 Cape Coral and at AIM Engineering, has the South
6 Spreader Waterway ever been a freshwater system?

7 A. No, it has not.

8 Q. What is your understanding of the -- of the
9 nature of the salinity of the South Spreader Waterway?

10 A. It's a brackish system.

11 Q. What do you mean by brackish?

12 A. It's not fresh. It's not fresh. The salinity is
13 above freshwater use.

14 Q. Is it -- is it below the salinity for an open
15 ocean marine environment?

16 A. Yes.

17 Q. Okay. And with regard to this environmental
18 resource permit, what has your role been concerning the
19 South Spreader Waterway improvement project?

20 A. I've been the agent for the City of Cape Coral,
21 so they are portions of the document that I've been
22 fully responsible for. The entire document I've been
23 responsible for assembling with team member assistance
24 and submitting to the Florida Department of
25 Environmental Protection for a permit.

1 Q. Now, can you briefly describe for us the initial
2 process you went through in approaching designing and
3 permitting a project for the -- this environmental
4 resource permit?

5 A. Yes, I can. So I reviewed the previous
6 application to learn from that application. I learned
7 also and read what the concerns were with the previous
8 application for the civil engineering portions, the
9 concerns seem, as far as the design for the removal,
10 seem -- there didn't seem to be any, so the design
11 seemed really fairly good, so the design at AIM
12 Engineering under -- with my seal, prepared is very
13 similar, not identical, to the AIM one and to the one
14 previously submitted. We did our due diligence. Also
15 did an updated survey of the area, found a 4-D immediate
16 footprint of the lock and immediately adjacent very
17 little had changed, so we prepared the plans based on
18 that. That was my first step.

19 Q. All right. After that first investigation step
20 of looking into the prior designs for removal of the
21 lock, did you and the permitting team perform a full
22 environmental assessment of the long-term impacts have
23 from having the lock removed and the associated project?

24 A. Yes. The team did that so we had Brown and
25 Caldwell come on board -- on board with that team to

1 perform a full environmental assessment looking at many
2 issues.

3 Q. Would that include looking at potential secondary
4 or indirect impacts from the removal of the lock?

5 A. Yes.

6 Q. Did -- did the environmental assessment include
7 any hydrodynamic modeling work?

8 A. Yes, it did.

9 Q. Did that hydrodynamic modelling work look at any
10 particular parameters?

11 A. To the output from that model looked at salinity,
12 looked at nitrogen nutrient loadings. Water levels.

13 Q. Did it also look at any change in currents that
14 might occur from -- or the velocity of water that might
15 occur with the lock removal?

16 A. It did. It looked at that location specifically.
17 It also looked at that, yes. As did I, in the
18 engineering portion also. So both of us looked at that,
19 yes.

20 Q. Okay. Great. I'm showing you what's Exhibit
21 J -- Joint Exhibit 1.01. It's entitled, "Application
22 For Individual and Conceptual Approval Environmental
23 Resource Permit State 404 Permit Program Permit and
24 Authorization to Use State Owned Submerged Lands."

25 Do you recognize this document?

1 A. Yes, I do.

2 Q. What do you recognize it to be?

3 A. Our application for the South Spreader
4 environmental improvement sustainability project.

5 MR. HENNESSEY: Mr. Perrigan, if you could move
6 to the next page of the application. I'm sorry. Stop
7 to show the bottom.

8 BY MR. HENNESSEY:

9 Q. So in fact -- is this a document, Joint Exhibit
10 1.01, in fact, an application that you prepared for the
11 South Spreader Waterway environmental improvement and
12 sustainability program?

13 A. It is. With team assistance as necessary at
14 certain times, but yes.

15 Q. All right. Now, just at the outset, is this
16 permit application for the same project that was applied
17 for several years ago where a permit was issued but
18 ultimately denied?

19 A. No. No. It's definitely not. It has a number
20 of projects that are -- the City has put forth as part
21 of the lock removal, so it's not the same project.

22 Q. Okay. Are you listed in the application as the
23 registered professional consultant for the project?

24 A. Yes, I am.

25 Q. All right. And was this application submitted to

1 the Department in August of 2021?

2 Maybe go to page 2.

3 A. Thank you.

4 THE COURT: There might have even been a
5 stipulation as to the date that it was applied for.

6 MR. HENNESSY: Yeah, could have been.
7 Actually, I think that it's reflected in the e-mail,
8 which is a different document, so...

9 BY MR. HENNESSY:

10 Q. Do you recall submitting this in -- in 2021?

11 A. Yes, I do recall submitting it in 2021.

12 Q. Thank you.

13 Well, I want to go through some attachments to
14 this. The first attachment is the engineering report.
15 It's identified as Attachment A, which is Joint Exhibit
16 1.004.

17 A. Thank you.

18 Also has my date on it there, so -- that's my
19 sign and seal date on it.

20 Q. All right. Let's roll down to that.

21 What's the date on this engineering report?

22 A. August 27th, 2021.

23 Q. Okay. And do you believe that it's approximately
24 the date that the application itself was submitted?

25 A. Yes.

1 Q. All right. And you've mentioned a signed
2 signature and a seal. Is that for you, Mr. Neff?

3 A. Yes, it is.

4 Q. All right. And so you prepared -- you personally
5 prepared Attachment A, this engineering report?

6 A. I did.

7 Q. Does this report include looking at the
8 engineering aspects needed for removal of the lock?

9 A. Yes, it does.

10 Q. Does it discuss or identify the reason for
11 removing the lock?

12 A. Yes, it does.

13 Q. Do you recall what those reasons were?

14 A. Yes. There's a number of reasons that are --
15 that are listed there. So certainly impediment to
16 navigation and safety. Navigation safety is one of the
17 issues.

18 Q. And I'm sorry to interrupt you, but if -- Mr.
19 Pair can scroll down if there's a particular page that
20 will help you.

21 A. Yeah, thank you. It's the beginning of the
22 report, yeah, the introduction -- I think it's the
23 introduction.

24 Yep. So scroll down just a little more.

25 Yeah. "Removal of the locks" -- I won't read it

1 all, but I'm sure -- safety and efficiency of vessel
2 navigation, the potential passage by fish and other
3 aquatic organisms, potential for future failure of the
4 lock. It's happened in the past, so if you -- and
5 challenged it's happened now, I guess, thanks to the
6 hurricane. But it's happened in the past prior to the
7 hurricane.

8 Injuries to endangered species, such as manatees,
9 and any harmful erosion associated with if you have a
10 future failure of the lock, potential damage to
11 wetlands.

12 So those are the issues.

13 Q. All right. Now, Mr. Neff, this application was
14 filed before Hurricane Ian struck the area?

15 A. Yes.

16 Q. And so at the time the application was filed, was
17 the -- was the lock generally working?

18 A. Yes, it was.

19 Q. To your knowledge, though, did it experience
20 maintenance issues?

21 A. Well, there are ongoing maintenance issues. But,
22 yeah, it was working -- generally working, yes.

23 Q. What kind maintenance issues do you know that the
24 city experienced with the lock?

25 A. Well, historically -- again, that's -- I had

1 significant involvement with the -- a two-month
2 shutdown. It's a tough environment in the saltwater
3 world with metal in the saltwater, so it's had
4 significant issues. The gates are -- the gates and
5 components that operate the gates that are mostly metal
6 in a highly corrosive -- even in a brackish environment,
7 highly corrosive environment.

8 So things are deteriorating.

9 Q. Well, tell me about that two-month shutdown.

10 A. Personally, it was painful as a public works
11 director because no one wants to be shut down. The
12 boaters are not happy to be out of commission and not be
13 able to get from one side to the other, so we expedited
14 as much as we could. The gates were actually shipped up
15 to Jacksonville. We had a fabricator that had to do
16 major reconditioning --

17 Q. You're kind of jumping around a little bit, Mr.
18 Neff.

19 A. Okay.

20 Q. Kind take a second, maybe, and explain for the
21 Court. What was it that had to be repaired for that
22 two-month shutdown?

23 A. Well, virtually everything. But the major
24 component that took the most time, the -- there are
25 gates on this lock. There are sector gates, if that

1 makes sense, Your Honor, that look like a part of a
2 pizza, and they -- components were significantly
3 corroded, rusted to the point where you needed to have
4 major reconstruction done by a metal fabricator.

5 Q. Do you have a picture in your engineering report
6 that kind of demonstrates that more clearly? Maybe we
7 can --

8 A. Yeah, there are some. There are some that show
9 the gates, yeah. I think there's -- we have some
10 pictures that you'll get closer. Those are probably --
11 I don't know. Can you scroll back a little bit?
12 Maybe -- there's from a high level.

13 Q. I think there's one further --

14 A. Yeah. There is it from a high level. You can
15 see the --

16 THE COURT: Yes. Hold on.

17 What's the issue?

18 MR. HANNON: Can everyone slow down?

19 THE COURT: Well, not too much, but there
20 was a little talking over one another. So just try not
21 to interrupt one another.

22 MR. HANNON: I'm just concerned about the
23 court reporter having to keep up.

24 THE COURT: All right. Well, the court
25 reporter can let me know if she's having trouble, for

1 sure.

2 Are you having any trouble, Madam Court
3 Reporter?

4 THE REPORTER: I was getting ready to speak
5 up.

6 THE COURT: Okay.

7 THE REPORTER: He is moving quickly.

8 THE COURT: Okay. Is it that Mr. Neff
9 speaks quickly?

10 THE REPORTER: Yes.

11 THE COURT: Okay.

12 THE WITNESS: People from Indiana don't hear
13 that very often, but...

14 MR. HENNESSY: All right.

15 BY MR. HENNESSY:

16 Q. Perhaps using the laser pointer, if you could
17 point out to the judge what it is -- does it work on the
18 screen?

19 On the screen behind you, you can point out to
20 the judge what you're referring to as the gates and the
21 pizza shape.

22 You need to speak. Explain -- you need to
23 verbally speak.

24 THE WITNESS: Okay. Your Honor -- I could
25 see she was nodding her head.

1 Those are the two gates.

2 THE COURT: I can see the gates that look
3 like pizza slices, yes. I got it. Thank you.

4 BY MR. HENNESSY:

5 Q. Was there a significant cost associated with
6 getting these gates replaced?

7 A. Yes, there was.

8 Q. Do you recall what it was?

9 A. I do not.

10 Q. Are we talking about millions of dollars?

11 A. Hundreds of thousands. I don't know -- I don't
12 think it was millions.

13 Q. Okay. Several hundred thousand dollars per gate?

14 A. I think total -- and again, this was -- this is
15 20-some years ago, so the cost today would be much
16 different than the cost then.

17 Q. Okay. So I want to turn to page -- Figure 7 on
18 page eight.

19 MR. HENNESSY: There you go. Maybe you
20 could enlarge us a little bit. Little too far. There
21 we go. No. Kind of shrink it down a little bit.

22 BY MR. HENNESSY:

23 Q. Can you explain for us -- I'm looking at what
24 looks like a picture with no lock. Can you explain to
25 me what's being depicted here?

1 A. To -- for -- this is the represent the desired
2 recommended option for lock removal. We looked at three
3 different options. This is the recommended one.

4 Q. Okay. Perhaps you could just slowly go through
5 the three different options that you looked at.

6 A. So the first option that we looked at for this
7 location -- for the lock location was to leave the
8 majority of the structure in -- where it is, and only
9 remove the gates.

10 Q. Maybe if we scroll back to Figure 6. And again,
11 you can turn around and use your pointer, if need be.

12 MR. HENNESSY: Make that figure 5. Keep
13 going. Okay. Right there.

14 BY MR. HENNESSY:

15 Q. Point out to the judge the lock and the
16 different, I guess, land sides of the lock.

17 A. South, north, lock building, the lock itself. So
18 the first option was just remove the gates. Therefore,
19 boats could traverse the area without obstruction. The
20 downside to that is the velocities are significant,
21 not --

22 Q. What velocities?

23 A. The water velocities. The South Spreader canal
24 velocities within that lock chamber are significant.

25 Q. Is there an engineering term for what causes

1 increased velocities through a small area like that?

2 A. Q equals VA. That's the formula. So the smaller
3 the area, same amount of water going through, it's going
4 to go faster.

5 Q. Is that sometimes referred to the Venturi effect?

6 A. Wow. Could be, yes.

7 Q. Okay.

8 A. Yes.

9 Q. One the few things I remember from science, high
10 school. Anyway, so that option, just removing the
11 gates, was that rejected?

12 A. That was rejected for safety reasons.

13 Q. All right. What was the other alternative that
14 was looked at?

15 A. The second option that was looked at was to
16 remove evert -- all of the facility, all the structure
17 for the entire width of the spreader canal.

18 Q. And when you refer to "structure," are you
19 including what looks like a -- you know, land?

20 A. Yes. Everything within the seawalls that are
21 projecting into the spreader canal, the lock building,
22 the locks, the seawalls, and earthen material on the
23 south side. So you would have a -- a very -- you'd be
24 consistent with the rest of the spreader canal and have
25 the widest facility possible.

1 THE COURT: I'm going to back up just a
2 second.

3 MR. HENNESSY: Sure.

4 THE COURT: So in option one, I understand
5 that the increase in water velocity was the reason the
6 option was rejected. But what's wrong with that?
7 What's wrong with increasing the water velocity?

8 THE WITNESS: It's a boater safety issue.

9 THE COURT: Okay. Thank you.

10 THE WITNESS: It's -- navigating that is
11 highly unrecommended -- not recommended. It's -- so
12 it's navigation safety.

13 THE COURT: Okay. Thank you.

14 BY MR. HENNESSY:

15 Q. Are there other navigation safety issues
16 associated with a 25-foot channel for this -- for this
17 waterway?

18 A. The 20-foot channel is -- it's -- a 20-foot
19 channel is a challenge period, even with a fully
20 functioning lock it's a challenge, but with high
21 velocities that 20-foot narrow -- 20 foot relatively
22 narrow -- 20-foot channel creates challenges for
23 individual boaters, and if you were -- had to take, as
24 is shown in the photo where there are boats queued up
25 that would magnify that problem.

1 Q. All right. So it would -- would a -- simply
2 removing the gates allow for simultaneous passage of
3 boats in two directions?

4 A. I don't recommend doing it. Period. In two
5 directions would be -- wow. No, would not be safe.

6 Q. So, I mean, currently when the -- when the lock
7 was operating, is it a single direction at a time boat
8 lock, or is it a -- does it allow passage in dual
9 directions?

10 A. No, it's operates as a single -- single direction
11 at a time, so eastbound they're a go, complete their
12 movement, and the westbounders would -- you know, once
13 the eastbounders leave, then the west bounders would
14 enter, and then repeat.

15 Q. Okay. And how is it decided or controlled as to,
16 you know, which direction a boat gets to go in? Is that
17 the lock tender?

18 A. That's the lock tender, yeah.

19 Q. Okay. All right. So if you had a situation
20 where you had no gates, are you also creating a
21 situation that's, I guess, essentially a navigation
22 free-for-all?

23 A. Again, it's just would be -- it's not
24 recommended. One direction to your point, two
25 directions would be -- the one direction is unsafe, so

1 two directions would be even more unsafe. So, yeah.

2 Q. But what I mean is, if you remove, simply remove,
3 the lock gates, you now have an uncontrolled situation?

4 A. Yes.

5 Q. How is it determined which boats go when?

6 A. Would be a big challenge, yes. Would be a
7 challenge. How about, it's a challenge, yes.

8 Q. All right. What was -- okay. Why was the second
9 alternative of removing the lock and the land mass on
10 both sides of the lock not chosen as the recommended
11 project?

12 A. Couple issues. So the -- that's as far as it
13 goes I think.

14 So removing -- removing this material on the west
15 side, you're getting close to the mangroves. You have
16 an opportunity to create erosion. There is a concrete
17 bottom that you obviously can't see. At the bottom of
18 boat lock is the concrete bottom so other potential
19 erosion constraints. On the north side, to remove it,
20 in line with the other seawall, which is the full width
21 of the spreader, doesn't really give you room to build
22 your seawall. So there's constraints on that side also.
23 Would be a challenge to construct that based on the
24 city's available land to build it.

25 Q. So the -- removing the lock to the full width of

1 the channel was rejected for both engineering and
2 environmental reasons?

3 A. Yes.

4 Q. Okay. So let's go back to figure 7, which is the
5 rendering of what the permitted project would look like
6 and perhaps you can explain a little bit to the Judge
7 the details of the proposed lock removal project?

8 A. So for what you're looking at now, this is an --
9 it's a Photoshop of the actual lock that you were just
10 looking at. This is a reasonable depiction of our
11 engineering plans and what would be the result of our
12 engineering plans for removal of the lock. As you can
13 see, Your Honor, on the south side you'll see the
14 seawall still jutting out there, so we're not touching
15 that. What you can't see under water is a concrete
16 bottom, slab, to the lock, we're leaving that in place
17 also. No reason to take that out, in our opinion. So
18 that stays. So there's no erosion with removing that,
19 no erosion with removing that wall.

20 On the north side, you see the seawall juts out a
21 little -- it juts out 20 feet from the other -- from the
22 seawall that you see adjacent -- on the adjacent
23 properties and that allows you space to appropriately
24 construct a seawall with tie backs for the seawalls so
25 the seawall won't fall over, so it's structurally sound.

1 It seems like a great design in that, as you can
2 see from the -- this is a great time -- great time,
3 great photo. You see on the south side the mangroves
4 are nearly -- they're not as far as that seawall, but
5 nearly, so not touch them, not doing erosion, not
6 getting in there is a great idea.

7 On the north side, you can see already you have
8 boat slips both to the west and to the east, so really
9 not creating a great impact by constructing a seawall in
10 the most logical place anyway, based on available land.
11 So this is the option that was -- provides a
12 125-foot-width canal in that location.

13 So it's wide enough that that velocity issue that
14 we talked about earlier with the 20-foot channel goes
15 away. And I looked that, as did our Brown and Caldwell
16 team member also, and came up with a similar -- the same
17 answer, in different ways, that that's an acceptable
18 velocity with that 125-foot-width canal.

19 Q. All right. And this option, option three, does
20 it allow for the passage of boats in opposite directions
21 at the same time?

22 A. Yes, it does.

23 Q. All right. By the way, during his opening,
24 Mr. Hannon stated something about the boater regulations
25 for the South Spreader Waterway somehow ending at the

1 point of the lock.

2 What is your understanding of the boater
3 regulations, particularly with regard to speed, both
4 upstream and downstream of the lock, currently?

5 A. That would be slow speed for both sides.

6 Q. So, to your knowledge, is there a -- there's no
7 change in the regulation on either -- from either side
8 of the lock?

9 A. No.

10 Q. Okay. Is that slow speed consistent for the
11 canals in -- the saltwater canals in Cape Coral?

12 A. Yes.

13 Q. Now, in looking at the removal of the lock, did
14 you also study the potential impacts to water levels and
15 navigation?

16 A. Yes, I did.

17 Q. Okay.

18 MR. HENNESSY: Perhaps, we could scroll down
19 a little bit. About there.

20 BY MR. HENNESSY:

21 Q. In fact, there's a paragraph titled, "Potential
22 upstream water level and navigation impacts," and it
23 uses the term "upstream." Is that -- I take it, then,
24 there's no potential impacts to water levels or
25 navigation downstream?

1 A. No, there is not.

2 Q. Okay. Downstream today, with the lock in place,
3 is that a -- is the -- are the water conditions tidally
4 influenced or not?

5 A. Yes, they are.

6 Q. Without restriction?

7 A. Without restriction. That's correct.

8 Q. And is the expectation that that with removal of
9 the lock, those conditions that exist outside the lock,
10 immediately adjacent to the lock, will essentially be
11 replicated upstream of the lock?

12 A. Yes.

13 Q. All right. Did your study include any
14 investigation into what restrictions may currently exist
15 on navigation, both upstream and downstream of the lock?

16 A. Yes. That's -- yes, indeed.

17 Q. What were your conclusions?

18 A. Minimal impact to upstream. Of course, no impact
19 to downstream. Looked at -- we have bathymetric survey
20 data for the canals upstream of the lock. We have some
21 bathymetric data for the canals downstream of the lock.
22 So, yeah, no -- certainly no impact downstream.

23 Q. Well, are there -- in looking at those elevations
24 downstream, are those elevations the same or shallower
25 than elevations upstream?

1 A. There are some that are higher -- or that are
2 more restrictive, but the depth is less downstream than
3 it is upstream. There are some locations that are half
4 a foot to a foot higher downstream of the lock than
5 upstream of the lock.

6 Q. So today, a boater has as many or more concerns
7 with regard to bottoming out downstream of the lock than
8 he does upstream of the lock?

9 A. You would have those concerns downstream -- if
10 it's okay to scroll down to my chart with the colors --

11 Q. Sure. Absolutely.

12 A. -- I think it might be helpful.

13 So, yes, there are locations south of the lock
14 that have obstructions that do not exist immediately
15 upstream of the lock --

16 MR. HENNESSY: There. That's --

17 THE REPORTER: Hold on. Hold on. You guys
18 can't talk at the same time.

19 BY MR. HENNESSY:

20 Q. All right. Is the chart that you're referring
21 to?

22 A. Yes, this is it.

23 Q. Can you explain what we -- what's being shown in
24 this chart?

25 A. If it's possible, can we --

1 Q. Zoom in, zoom out?

2 A. -- make it smaller? It will be helpful --

3 Q. Zoom out?

4 A. -- to the judge to be able to see the legend.

5 Then maybe we can -- maybe we'll zoom in after we see
6 the legend.

7 Yeah. I'm sorry. Wait. There's pop-ups coming
8 up on the -- there's chats on the screen.

9 Q. Okay. We're not -- we're going to try to ignore
10 the chats.

11 MR. HENNESSY: Is there a way to shut the
12 chats off, Your Honor? I understand that --

13 THE COURT: I meant to check on that on the
14 break. I'll have to do it on the next break. I'm
15 afraid it will require starting the Zoom over again,
16 though, because I think that's one of the settings I
17 have to go in and shut off.

18 So next week, we will make sure we don't
19 have it on. Thank you.

20 THE WITNESS: It's okay. Most of the time,
21 it's fine. Just, like, this particular time, the chat
22 pops up over the legend. That's all. It goes away.

23 BY MR. HENNESSY:

24 Q. But what we're saying is you have a hard copy in
25 front of you, if it's easier to work off of the hard

1 copy.

2 A. I'm fine. Thank you.

3 Q. All right.

4 A. So the chart you have in front of you is helpful
5 to answer that question. The one on the left is
6 looking -- let's see. Let me focus on the one on the
7 right first. That maybe sounds backwards.

8 But the one on the right, the slab that we just
9 talked about, the concrete slab in the bottom of the
10 lock, is approximately a -7.2 NABD, so -- of that data.
11 So -7.2.

12 Q. That's going to be in the area where you see the
13 words Chiquita Lock?

14 A. Yep. Where the star is.

15 Q. Thank you.

16 A. So this is the bathymetric survey of the spreader
17 canal system, so this is the entire South Spreader canal
18 system. I'm calling it upstream of the lock. If you
19 see blue, you're good. That means you're deeper than --
20 your at 7.22 or deeper. And you can see that many of
21 them, by the darkness of the blue, they're deeper.

22 So these canals in southwest Cape Coral were dug
23 deeper than any other canals in Cape Coral. So for
24 boating navigation's sake, it's helpful. So you'll see
25 most of them are blue, and there are some at the extreme

1 north and Northeast area that are red. That means that
2 they may be of concern, and they likely are of concern.
3 They are actually low enough that you would need to
4 dredge them whether this lock was there or not.

5 I'm probably jumping ahead.

6 Q. Yeah. Mr. Neff, let's focus here a little bit.

7 A. Okay.

8 Q. The question that led to this was that you
9 indicated that there -- that the darker blue indicates a
10 deeper canal, correct?

11 A. Yeah. The darker the blue, the deeper it is,
12 yes.

13 Q. Okay. And the deeper canal tends to attract
14 boats that are bigger and draw deeper water?

15 A. I would -- that would be a prudent move by
16 boaters, yes.

17 Q. I mean, it's -- and that's your experience?

18 A. Unfortunately, I have some of experience where
19 boaters don't always check that. But, yes, that is good
20 experience.

21 Q. Is it fair to say that downstream of the existing
22 location in the Chiquita Lock, the water depth is not
23 indicated as the keep deepest water depth in the
24 channels that are being examined?

25 A. Yes. It -- on the -- on the chart on the right,

1 there is data that shows that you would be in the red,
2 just barely, but you would be the red downstream from
3 the lock in isolated locations.

4 Q. All right. And in the -- in that -- we're
5 talking about outside the lock?

6 A. Outside the lock, yes.

7 Q. Okay. So looking at the chart on the left, that
8 would -- the same conditions would exist that the water
9 downstream of the lock is still not, like, the darkest
10 blue that we see throughout the -- some of the canals
11 upstream of the lock?

12 A. Yes, the one on the left was done looking at the
13 the Cape Coral typical dredging 5 feet below mean low
14 water. That's -- so it's a slightly different chart,
15 but it shows the same information.

16 Q. So the chart on the right is reflecting actual
17 conditions?

18 A. They both reflect actual conditions. The one on
19 the right is relative to the concrete bottom --

20 Q. Okay.

21 A. -- elevation. The one on the left is relative to
22 the City's typical dredging depth.

23 THE COURT: I still don't understand that.

24 THE WITNESS: Okay.

25 THE COURT: So explain to me -- and don't be

1 afraid to explain it to me like I'm a fifth grader --
2 what -- the difference in these two charts. Because I
3 thought I was with you when we are at -- the one on the
4 right is actual conditions, but now you're
5 saying they're both--

6 THE WITNESS: They're both actual
7 conditions, and they both are based on exactly the same
8 survey. I apologize if it's confusing.

9 So the one on the right, we thought it
10 was -- this is comparing you to the bottom. That -7.2
11 is the elevation of the concrete slab --

12 THE REPORTER: I didn't hear what you said.
13 97.2?

14 THE WITNESS: The bottom of the concrete
15 slab is -7.2.

16 MR. HENNESSY: Minus.

17 THE WITNESS: And that is why that chart on
18 the right is prepared, and then it shows you everything
19 that is better -- is, you know, deeper than 7.22, and
20 then it shows you the things that are not as deep as
21 7.2, and those are in red.

22 So the ones that you would be concerned
23 about as the dredging manager for Cape Coral would be
24 those that are in red, based on that -7.22. And I
25 thought that was important because that is -- that's a

1 constraint that exists today.

2 That bottom -- that concrete bottom is
3 there. It's open to the tide. That is a constraint
4 that boaters that go in and out of there use every day.
5 That is the way the gates open. They open so that when
6 you do that, your boat is exposed to that concrete slab,
7 if you will.

8 BY MR. HENNESSY:

9 Q. Maybe what will make it clearer is you're only
10 showing the channels that are reflective of -- or you're
11 stating that on the graph on the right, your -- you're
12 making reference to this 7.2.

13 A. Yes.

14 Q. How is that -- how does that 7.2 manifest itself
15 with regard to the changes in that -- in that diagram
16 from the diagram on the left?

17 A. So the elevations obviously don't change.
18 They're exactly the same. The bathymetric survey is
19 exactly the same. There was two reference points, and
20 in the document, it talks about those reference points.

21 So the concrete slab, -7.2, that's an important
22 reference point, I thought. The one on your left is
23 relative to the City of Cape Coral's typical dredging
24 depth. So Cape Coral typically dredges to 5 feet below
25 mean low water, which is a minus 6.4. So it's another

1 point of information, is really what it is.

2 So that's all it is, and it shows you -- it shows
3 you relatively the same thing, as it turns out, because
4 the red changes very little from one -- as you can see,
5 there's very little change in the red from one to the
6 other.

7 Is that --

8 THE COURT: Okay. And then I thought that
9 the reason this was originally brought up, the question
10 was whether the depths were greater on one side of the
11 lock than the other. And so if I'm looking at either
12 one of these, it's showing me that the depths are the
13 same?

14 THE WITNESS: There are locations, and
15 they're -- they're -- we have a survey from 2018. The
16 locations are isolated, but there are locations east and
17 south of the lock that are actually half a foot to a
18 foot higher than 7.22.

19 And they're isolated. They're small, so...

20 THE COURT: Okay. Thank you.

21 BY MR. HENNESSY:

22 Q. What other kinds of concerns are addressed in the
23 construction plans for lock removal?

24 A. Best management practices are addressed in the
25 lock removal. So concerns about turbidity, about

1 erosion control during construction, manatee safety,
2 those items are addressed.

3 MR. HENNESSY: Perhaps you can scroll down.

4 BY MR. HENNESSY:

5 Q. So this -- beginning on page 11, there's removal.

6 A. Yes. So in addition, navigation considerations.
7 So we make sure and let the public know what's going on,
8 communicate well to the boaters that would be using the
9 area.

10 Q. Okay.

11 MR. HENNESSY: Scroll down, please.

12 BY MR. HENNESSY:

13 Q. How did you look at water -- what water quality
14 considerations did you look at in the construction
15 activities?

16 A. So in addition to the normal turbidity barriers,
17 the floating turbidity barriers in the canals, there'd
18 be erosion control screens up -- on uplands, where
19 appropriate, adjacent to seawalls. I think one of the
20 unique things on this one is that, to the greatest
21 extent possible, you would be removing everything. So
22 removing all the material behind the seawalls, the --
23 you'd remove the building. You'd remove the dirt behind
24 the seawalls, to the greatest extent possible.

25 So you'd have turbidity barriers, plus you're

1 doing your work within the confines of the seawalls
2 until the end. Then at the end, then you pull out the
3 seawalls and other -- divide the pilings and things that
4 are in the water. You would do that. So you would have
5 sort of a belt and suspenders for your turbidity erosion
6 control.

7 Q. Okay. The belt and suspenders would be the
8 seawall and the turbidity curtains?

9 A. Yes, sir.

10 Q. Which one's the belt and which ones the -- now,
11 you then talk about implementation of best management
12 practices. What type of best management practices did
13 you seek to employ with regard to the removal of the
14 lock?

15 A. Sediment erosion control barrier. So you have
16 silt screen along the top of the seawalls an around any
17 area where you might have discharge runoff, stormwater
18 runoff through loose materials. So you'd have that
19 above ground, as well as the turbidity barriers.

20 Again, the seawalls that we mentioned previously.

21 MR. HENNESSY: Let's scroll down.

22 BY MR. HENNESSY:

23 Q. I believe you mentioned something about manatees.
24 Are there some specific conditions that were included to
25 deal with concerns to the impacts to manatees?

1 A. Yes.

2 MR. HENNESSY: You've gone too far, sir.

3 THE WITNESS: There are the -- I think we
4 would call them the standard manatee conditions, as
5 these are used frequently in projects that are in areas
6 where manatees might be present. Training of personnel,
7 signage, how -- who to notify if you have issues. So --
8 training of the people.

9 So all of the standard manatee protection
10 items that you would see on items in water where they
11 might be present.

12 BY MR. HENNESSY:

13 Q. To your knowledge, did these conditions actually
14 become conditions of the permit?

15 A. Yes, they did.

16 Q. All right. Let's go ahead and turn to Attachment
17 B to the application.

18 MR. HENNESSY: Thank you.

19 So we're at Joint Exhibit 1.05.

20 BY MR. HENNESSY:

21 Q. Did you provided some assistance in the
22 preparation of the environmental resource permit
23 application, attachment B?

24 A. Primarily, this was prepared by Brown and
25 Caldwell. I provided some level of review.

1 Q. All right. Do you have a familiarity of what
2 this environmental report -- the scope of the
3 environmental report?

4 A. Yes.

5 Q. What --

6 MR. HENNESSY: Let's scroll down to the --
7 right there. Let's look at the table of contents.

8 BY MR. HENNESSY:

9 Q. Could you go over for us some of the potential
10 environmental impacts and benefits that were examined by
11 the -- this environmental report?

12 A. Yes.

13 MR. HANNON: Your Honor.

14 THE COURT: Yes.

15 MR. HANNON: I object. Unless he can speak
16 to those parts of this report that he dealt with, the
17 rest of it is hearsay and he doesn't know anything other
18 than what it says.

19 THE COURT: Your response?

20 MR. HENNESSY: Your Honor, he's permitting
21 engineer. He is the agent for the applicant, for the
22 City of Cape Coral. He was the one responsible for --
23 for compiling and submitting and ensuring that the
24 criteria were met, and then, as we'll hear later,
25 responding to the request for additional information.

1 And as he's indicated, he did provide
2 editorial review and input on this report.

3 THE COURT: Okay.

4 MR. HOENSTINE: It's part of the permitting
5 file, too, which means it gets to come in.

6 THE COURT: Right. Well, and the
7 objection -- I mean, the objection is not to the
8 document coming in. It's to his testimony about the
9 document. I think that's -- it's the -- the document is
10 admitted, and it's an exception to hearsay. I think the
11 objection is to this witness's testimony about the
12 document.

13 Do I understand your objection correctly?

14 MR. HANNON: Yes, Your Honor.

15 THE COURT: Okay. If we could just get a
16 little bit more -- I mean, all I heard was that it was
17 prepared mostly by Brown and Caldwell with some witness
18 review.

19 Could we have a little bit more explanation
20 about what his involvement with Attachment B was?

21 MR. HENNESSY: Absolutely, Your Honor.

22 THE COURT: Thank you.

23 BY MR. HENNESSY:

24 Q. Mr. -- Mr. Neff, I understand that Brown and
25 Caldwell is the primary author of Attachment B. Could

1 you explain in more detail your role in the development
2 of Exhibit B [sic] and how it came to be in the
3 permitting file?

4 A. I reviewed the entire document, read the entire
5 document, provided some editorial comments, used parts
6 of the document for the some of the data, some of the
7 hydrodynamic modeling. Some of the outputs were used in
8 my report, so -- which was important to be familiar with
9 the -- from my City of Cape Coral background overall
10 knowledge. Looked at it for consistency with -- at a
11 high level.

12 Q. So you did some factual fact-checking as well
13 with regard to the document?

14 A. Those that -- for items that were within my
15 historical knowledge, yes.

16 THE REPORTER: "For items"?

17 THE WITNESS: Within my historical
18 knowledge.

19 THE COURT: Okay. I will overrule the
20 objection, but clearly it's an issue that you can
21 cross-exam the witness on.

22 BY MR. HENNESSY:

23 Q. You mentioned some model outputs. Was there some
24 hydrodynamic modeling that was done that is reported on
25 in this environmental report?

1 A. Yes, there is.

2 MR. HANNON: Your Honor, I object
3 specifically to that unless he's an expert on it. This
4 is really important.

5 THE COURT: Okay. Overruled.

6 MR. HENNESSY: All right. I'd like to turn
7 to -- go ahead and turn to page 8 on Section 3. Yes.
8 There's a listing of environmental concerns.

9 BY MR. HENNESSY:

10 Q. Can you explain to the judge the environmental --
11 potential environmental concerns that the report
12 addressed with regard to seeking this environmental
13 resource permit?

14 A. I looked at a number of items. I looked at
15 impacts on -- looking at those, looking at impacts on
16 adjacent waters, the river, Matlacha Pass, immediately
17 adjacent waters, the movement of water. I looked at
18 water levels that we just talked about and the impacts
19 of the water levels, changes in water quality, nitrogen,
20 which -- being the key one, looking at that one and
21 salinity. Effects on wetland vegetation, particularly
22 mangroves, and how that might change with the changes in
23 water levels. Seagrasses near the mouth of the canal
24 system. Threatened and endangered species, such as
25 manatees.

1 And then navigability.

2 Q. And the reported ultimately reached conclusions.

3 MR. HENNESSY: Can you turn to the
4 further -- to the conclusion section?

5 BY MR. HENNESSY:

6 Q. The report reaches a number of conclusions with
7 regard to the proposed actions. Have you reviewed those
8 conclusions?

9 A. Yes, I have.

10 Q. Did you agree with the conclusions in this
11 report?

12 A. Yes, I do.

13 Q. What is your understanding, generally, of the
14 conclusions with regard to the potential environmental
15 impacts with the project?

16 MR. HANNON: Objection.

17 THE COURT: What's the objection?

18 MR. HANNON: He's not competent. He's only
19 an engineer.

20 THE COURT: Okay. I understand your
21 objection. It's the same objection I've already ruled
22 on, but I will give it the weight that it is due.

23 Go ahead.

24 THE WITNESS: The overall program provides
25 improvements to hydrology, stormwater quality, upland

1 and wetland habitats, wildlife resource management,
2 makes improvements to hydrologic habitat conditions,
3 provides -- with -- everything we're doing will provide
4 additional environmental enhancement in the overall
5 system.

6 BY MR. HENNESSY:

7 Q. Did you agree with the conclusions of the
8 report --

9 A. Yes.

10 THE COURT: Let him finish the question.

11 THE WITNESS: Oh, sorry.

12 BY MR. HENNESSY:

13 Q. Did you agree with the conclusions of the report,
14 Mr. Neff, that the -- from the environmental evaluation
15 with regard to the -- the environmental resource permit
16 criteria that this project would be consistent with that
17 criteria?

18 THE WITNESS: Yes.

19 BY MR. HENNESSY:

20 Q. Okay. There was a -- also an Attachment C, a
21 historical overview of actions taken by the City.

22 MR. HOENSTINE: 1.06.

23 MR. HENNESSY: Thank you.

24 BY MR. HENNESSY:

25 Q. They were Joint Exhibit 1.06.

1 Did you have a role with regard to the
2 preparation of the Attachment C?

3 A. I had a similar role to Attachment B. I was not
4 the primary author of Attachment C, but provided
5 editorial comment. I did provide some number -- there
6 was at least one item I provided specific numbers. I
7 provided, I think, some assistance in this in that I
8 because of my 30 -- roughly 32 years with the City, I
9 have good historical knowledge of what's happened in the
10 past.

11 Q. Well, based on this attachment, did you also
12 assist in the -- or were you responsible for the
13 preparation of engineering drawings related to some of
14 the projects being discussed in Attachment C?

15 A. Yes, I was.

16 Q. Okay. For example, what was your role with
17 regard to replacement or renovation of catch basins?

18 A. I -- yes, I prepared plans -- prepared plans for,
19 of course, the lock removal, which you saw plans for,
20 catch basin improvements, plans for improvements to the
21 dog park, plans for mangrove plantings, oyster ball
22 locations, upland plantings.

23 Q. And these are --

24 MR. HENNESSY: Can we scroll through
25 Attachment C?

1 BY MR. HENNESSY:

2 Q. These projects that you're referring to are also
3 discussed in more detail in Attachment C?

4 A. In Attachment C, it's -- it touches very well on
5 the catch basin improvement project, the Rotary dog
6 park, mangrove plantings --

7 THE REPORTER: "Mangrove"?

8 THE WITNESS: Mangrove plantings, upland
9 plantings, and the reef balls.

10 MR. HENNESSY: Let's scroll down to the
11 catch basin plan.

12 BY MR. HENNESSY:

13 Q. There's some photographs relating to, I guess,
14 the change-out of the existing catch basins to proposed
15 new catch basins. Perhaps you can explain to the judge
16 what's -- the nature of the project and the importance
17 of the project.

18 A. So what you see on top is the old style catch
19 basin that the original developer of Cape Coral used.
20 So -- with what we call an open throat for the
21 stormwater to enter in, and no -- I would say no delays
22 to that water entering. It was a direct entry.

23 What you see on the bottom are the new style
24 inlets that -- Cape Coral has installed thousands of
25 these modifications. It has replaced thousands -- well,

1 the old style with the new style. And you can see -- in
2 the bottom, you'll see that the -- you'll see a small
3 bleeder hole. That's where the water now, the initial
4 first flush of stormwater, would be -- enter that
5 bleeder hole.

6 But more so, the water is detained. So that's
7 the purpose. The water is detained. The top of that
8 inlet is elevated about half a foot. So the water is
9 detained within the grass swale system, allowing
10 pollutants to drop out, allowing for uptake of those
11 pollutants, again, delaying your first flush and all the
12 nutrient reductions that go along with that. The small
13 hole allows the water to gradually bleed down slowly
14 over time so that when it rains again, they're ready to
15 do the same thing again. So...

16 THE COURT: And what's the relationship --
17 physical relationship between these catch basin drains
18 and the South Spreader Waterway?

19 MR. HENNESSY: I don't think she's asking
20 me.

21 THE WITNESS: Okay. Sure. Sure.

22 THE COURT: I'm sorry.

23 THE WITNESS: No, no. That's great.

24 THE COURT: I keep looking over here because
25 I'm having to let people in.

1 THE WITNESS: No problem.

2 So as -- the city offered, as part of this
3 project, to do 83 catch basins that would be changed out
4 from that style to this style.

5 And your question, again, is how is that --
6 BY MR. HENNESSY:

7 Q. No. I guess to put a fine point on this, those
8 83 catch basins, are they located in the watershed that
9 drains to the South Spreader--

10 A. Yes, they are. Yes, they are. And there's a map
11 that shows that.

12 THE COURT: Thank you.

13 THE WITNESS: There's a map that those that
14 in there. So they are in the South Spreader watershed.
15 They --

16 MR. HENNESSY: Perhaps we can direct your
17 attention to the map.

18 A. That's what you're looking for.

19 THE COURT: I didn't want to assume. I
20 wanted to ask.

21 THE WITNESS: No, no. That's a great
22 question.

23 THE COURT: And I'm sure that if I sat down
24 and read this whole thing -- but, you know, this is --
25 I'm allowed to read proposed evidence before it's

1 admitted.

2 THE WITNESS: Gotcha.

3 THE COURT: So it's not like I have the
4 leave to read through all this, so I'm asking the
5 questions as the evidence comes in. Okay ?

6 THE WITNESS: Yeah. So -- yes. In the
7 South Spreader watershed, that's where they are. Excuse
8 me. They -- and so prior to discharge to those canals
9 in the -- you know, to the greater canal system in the
10 South Spreader, those catch basin would be modified in
11 that way.

12 And, as it says in this report, many already
13 have been. So these are additional ones. Thousands
14 have already been modified to -- throughout the city,
15 and a number of them within the South Spreader watershed
16 have been modified to that already. These are
17 additional that would be done to further enhance water
18 quality.

19 THE COURT: Thank you.

20 BY MR. HENNESSY:

21 Q. But specific to this permit, the 80 -- how many
22 did you say, 86?

23 A. I believe it's 83.

24 Q. 83?

25 A. Yeah.

1 Q. The 83, they're all located with the South
2 Spreader Waterway watershed, correct?

3 A. Yes. Yes. There we are. Thank you.

4 Q. So perhaps you can explain the -- what the map
5 defines --

6 A. Yeah. I sure can. So --

7 Q. Where are we at? What is the --

8 MR. HENNESSY: Can you scroll up a little
9 bit so we can make reference to the figure number on the
10 page?

11 Yes, there you go.

12 THE WITNESS: Okay. Does it help if I
13 point, Your Honor?

14 THE COURT: Yes. Go ahead.

15 THE WITNESS: Okay.

16 BY MR. HENNESSY:

17 Q. So we're looking at Figure 11 --

18 A. So --

19 Q. -- With the 83 catch basins.

20 A. All right. So there's the -- Chiquita Lock is
21 roughly here. So this is the South Spreader canal
22 itself. This is the immediate control system of the
23 South Spreader. These are weirs that discharge over
24 into the South Spreader. So they're in the watershed.
25 They are -- you know, they're -- these are freshwater

1 systems, as it's labeled, so they will get into the
2 South Spreader system.

3 So you can see there's -- the majority of them,
4 48 of them, are in the salt -- in the brackish water
5 system. The -- and you can see the other numbers in the
6 freshwater that overflow weirs to get into that --

7 THE COURT: Thank you.

8 THE WITNESS: -- system.

9 THE COURT: I apologize for interrupting
10 your questioning, Mr. Hennessy.

11 MR. HENNESSY: No, Your Honor. I very much
12 appreciate the help. This is all for you.

13 BY MR. HENNESSY:

14 Q. I know you mentioned total nitrogen, but do these
15 projects also provide other water quality benefits, such
16 reduction in movement of other detritus or other
17 dissolved contaminants?

18 A. Yes. Yes, they do.

19 Q. In response to the application, did the City
20 receive requests from FDEP for additional information?

21 A. Yes.

22 Q. Let's go ahead and turn to the Megan Mills letter
23 dated 9/24/21. So that's Joint Exhibit 1.19. So I'm
24 showing you a letter from the Florida Department of
25 Environmental Protection dated September 24th, 2021.

1 It's directed to the city of Cape Coral, attention
2 Robert Hernandez, care of Steve Neff.

3 Do you recall receiving this letter?

4 A. Yes, I do.

5 Q. Okay. And if you scroll down, you'll see that it
6 includes nine enumerated comments.

7 Do you recall reviewing those comments?

8 A. Yes.

9 Q. Can you generally explain to us what the -- what
10 the purpose of the comments were from the department?

11 A. Clarification on some of the items, requests for
12 additional information on some of the items.

13 Q. Did the -- if we scroll down past the one through
14 nine items, the letter also attached some comment
15 letters?

16 A. Yes it did.

17 Q. Okay.

18 MR. HENNESSY: Keep scrolling.

19 BY MR. HENNESSY:

20 Q. Okay. The first comment letter is from -- it's
21 to Michael Baker, and it's from Florida Fish and
22 Wildlife.

23 Did you review this comment letter?

24 A. Yes.

25 Q. Okay. What did you understand the comment letter

1 concerned?

2 A. Concerned about manatees deaths at the lock.

3 Q. All right. And did it specifically provide a
4 proposed -- or suggest solutions to the -- to address
5 those manatees deaths?

6 A. Yes. I believe there were three options laid
7 out, and the selected option was to -- one of the
8 options was to remove the lock.

9 MR. HENNESSY: Maybe scroll down a little
10 bit. Keep going. I think it's the second letter. Next
11 letter. Oh, it's lagging. Thank you. Here we go.

12 BY MR. HENNESSY:

13 Q. Is this what you're referring, to the attached --
14 attachment to the Fish and Wildlife letter that makes
15 reference to options?

16 A. Yes. Yes.

17 Q. Okay. Among those options, did it include
18 removal of the lock?

19 A. Yes.

20 Q. So from your perspective, did you have any
21 opinion as to whether or not this proposed project would
22 fulfill the -- or address the concerns of the FWC?

23 A. No.

24 Q. I'm sorry?

25 A. No, I did not. This -- they would -- this would.

1 Removal of the lock would address it. I'm sorry.

2 Q. Okay.

3 A. That was -- if I answered in the negative, I
4 apologize. Removal of the lock was clearly one the
5 options that would address some of their concerns.

6 Q. Okay. We may have gotten into a double negative
7 situation, so I'll make clear the record.

8 In your opinion, the project that you were
9 proposing and applying for with the department would
10 address the concerns with FWC with regard to manatee
11 deaths?

12 A. Yes.

13 Q. And why?

14 A. Yes.

15 Q. And why?

16 A. Because one of the options is removal of the
17 lock, which is what is recommended in our permit
18 application.

19 Q. Okay. Thank you.

20 Now, I believe there's another comment letter
21 that we got from the Department of State?

22 A. Yes.

23 MR. HENNESSY: It's attached to what we were
24 just on. There you go.

25 BY MR. HENNESSY:

1 Q. Do you recall receiving this comment letter?

2 A. I do.

3 Q. Okay. To your recollection, did the Florida
4 Department of State have any concerns with regard to
5 cultural or archeological matters of significance?

6 A. They did not.

7 Q. All right.

8 MR. HENNESSY: Finally, if you'd scroll
9 down, I believe there's some attached e-mails within the
10 Department. There you go.

11 BY MR. HENNESSY:

12 Q. Some comments from Department internal
13 hydrographic review. Do you recall receiving these
14 comments?

15 A. Yes.

16 Q. And what was done to -- well, first of all, what
17 kind of comments or -- what did you understand the
18 comments to concern?

19 MR. HANNON: Objection. Speaks for itself.

20 THE COURT: What's your response?

21 MR. HENNESSY: Well, Your Honor, he's the --
22 again, the permit engineer, the agent. He's receiving
23 these comments. He's being asked in the request for
24 additional information to respond to the comments.

25 So how did he respond, is the question.

1 THE COURT: All right. So let's ask him
2 that question, how he responded, then.

3 MR. HENNESSY: Sure.

4 BY MR. HENNESSY:

5 Q. How did you respond --

6 THE COURT: Sustained.

7 MR. HENNESSY: I'm sorry.

8 BY MR. HENNESSY:

9 Q. Rephrasing the question, Mr. Neff. You
10 received -- you did receive these comments from the
11 Department's hydrographic review -- reviewers?

12 A. Yes.

13 Q. Okay. How did you respond to these comments?

14 A. The team responded to each of those. Graphs were
15 provided.

16 MR. HANNON: Objection. The team or him?
17 He's not a modeler.

18 THE COURT: Okay. He's answering the
19 question. If you'd like to cross-exam him, that's fine.
20 Just hold it for cross-examination.

21 MR. HANNON: Yes, ma'am.

22 THE COURT: You may proceed.

23 THE WITNESS: Additional graphs were
24 prepared. Clarification on the bathymetric data was
25 provided, as was further information on the sediment

1 transportation provided.

2 And spoil material management was also
3 clarified.

4 THE REPORTER: I didn't get the last part.

5 THE WITNESS: Spoil material management was
6 also clarified, which was something that -- that I did,
7 so...

8 BY MR. HENNESSY:

9 Q. Okay. Thank you.

10 There's a lot of technical terms that sometimes
11 you use and you run them together. Take your time on
12 those sorts of statements for the court reporter's
13 benefit.

14 A. Yes, sir.

15 THE COURT: And for the judge. Thank you.

16 MR. HENNESSY: And for everyone in the room.

17 BY MR. HENNESSY:

18 Q. All right. So to your knowledge, did the work
19 done by you and your team address the concerns raised in
20 the comments that you received?

21 A. Yes.

22 Q. All right. Let's turn to Joint Exhibit 1.21.
23 It's an e-mail with attachments dated 12/27/21.

24 Do you recognize this document that's titled,
25 "Response to Request for Additional Information Number

1 1"?

2 A. Yes.

3 Q. What is it?

4 A. It is our response to FDEP's -- the Florida
5 environmental resource permit. It's our additional
6 information we're providing in response to their request
7 for additional information. So those questions that
8 were just laid out, this is our informal response to
9 those questions.

10 Q. And in this response, did you address each and
11 every one of the nine comments that the department had
12 provided?

13 A. Yes.

14 Q. All right. Let me go ahead and direct you to
15 Joint Exhibit 1.48.

16 Joint Exhibit 1.48 is entitled, "South Spreader
17 Waterway Improvement Project: The" --

18 MR. HENNESSY: Thank you.

19 BY MR. HENNESSY:

20 Q. -- "Environmental Resource Permit."

21 Do you recognize this document?

22 A. Yes.

23 Q. What is it?

24 A. It is the draft permit for this project.

25 Q. Is this the draft permit that has been challenged

1 in this case, in this administrative proceeding?

2 A. Yes.

3 Q. Does this permit include the water quality
4 projects that were proposed in your application?

5 A. It includes those that were initially proposed,
6 as well as some others as we reached the end of the
7 permitting process.

8 Q. All right.

9 A. Yes.

10 MR. HENNESSY: Let's go ahead and turn to
11 Condition 10. Okay. Can we zoom in a little bit on
12 that? All right.

13 BY MR. HENNESSY:

14 Q. The first item indicates replacement of the
15 stormwater catch basins, which drain to the waterway.
16 And by "the waterway," are we referring to the South
17 Spreader Waterway?

18 A. To that waterway in that basin, yes.

19 Q. Okay. Are we referring to the South Spreader
20 Waterway?

21 A. Yes, we are.

22 Q. Thank you.

23 A. We're referring to the South Spreader Waterway.

24 Q. Thank you.

25 And the replacement of these stormwater catch

1 basins, this is a project that you specifically
2 personally were involved in?

3 A. Yes.

4 Q. And, in fact, did you draft engineering plans
5 that are attached to and made a part of this permit
6 related to this project of replacement of the stormwater
7 catch basins?

8 A. For both the catch basins and the dog park, yes.

9 Q. All right. So you want to move right on to
10 number 2.

11 The improvements to the stormwater management
12 system associated with the dog park at Rotary Park, is
13 that -- that stormwater management system in a location
14 where that untreated stormwater -- let me state it
15 differently.

16 The Rotary Park -- perhaps you can use the
17 pointer and point out the Rotary Park on the drawing on
18 the wall.

19 Thank you.

20 A. Sorry. I'm shaking a little bit.

21 THE COURT: I know. I feel the same way.

22 THE WITNESS: There.

23 BY MR. HENNESSY:

24 Q. Currently, does the stormwater that drains off of
25 that park drain into the waters that would ultimately

1 reach the Caloosahatchee River?

2 A. Yes.

3 Q. All right. And so. What will be the effect of
4 your stormwater system on that water?

5 A. We will be reducing nitrogen and other nutrients
6 contaminates prior to them reaching the Caloosahatchee
7 River.

8 Q. So will you be treating that stormwater, in fact,
9 before it even enters an adjacent water body?

10 A. Yes.

11 Q. All right. The next project indicates the
12 implementation of an aquatic vegetation removal program.
13 Did you perform any -- or assist the City with
14 performing any calculations on that -- on that project?

15 A. I did not. I reviewed it, but just reviewed it.

16 Q. All right. The -- under that is -- the fifth
17 project is the planting of over 3,000 mangrove seedlings
18 along the waterway, as well as to install oyster reef
19 balls in an area where the seawall is being installed.

20 Did you provide engineering plans that are now an
21 exhibit attached to this proposed permit related to
22 those projects?

23 A. Yes, I did.

24 Q. Okay. Next project listed is -- the applicant is
25 negotiating with the City of Fort Myers on an interlocal

1 agreement with the City to purchase and dispose of
2 reclaimed water generated by Fort Myers, the Connect
3 project.

4 Did you assist in the analysis of that project in
5 any way as a part of this permit?

6 A. I would say I assisted with the analysis, but
7 reviewed the final product.

8 Q. Okay. Based on your experience with the City of
9 Cape Coral, can you explain for us what the City
10 would -- what the purpose of that project is?

11 A. The benefit, of course, is -- to remove the City
12 of Fort Myers' discharge from the river is the benefit
13 to this -- the environment. And also that treated --
14 that wastewater will go to Cape Coral, where there will
15 be a beneficial reuse.

16 Q. Okay. So are you familiar with the City's reuse
17 system?

18 A. Yes.

19 Q. To your understanding, what -- if Fort Myers
20 water is taken and connected into the City of Cape Coral
21 system, where will that water end up?

22 A. So the City of Cape Coral has -- I think -- we'd
23 like to think -- and the City of Cape Coral may be the
24 world's largest, but it has a very large residential
25 irrigation program -- reuse program. So the City hasn't

1 discharged wastewater to the river for 15 years.

2 The City has a 3-pipe system. So they have a
3 reuse system/irrigation system that is installed as part
4 of the City's ongoing water and sewer installation
5 throughout the City of Cape Coral. So that would be a
6 product used -- treated to be used as irrigation water
7 throughout this -- the city system.

8 THE COURT: To make sure I understand what
9 you're talking about, would this be something I
10 sometimes hear -- like a gray water reuse, or gray water
11 irrigation?

12 THE WITNESS: It's similar. It's similar.
13 So it's -- the City of Cape Coral's is a common -- it's
14 treated wastewater. It's advanced wastewater treatment
15 plants that the city has. So those are one of the
16 primary products. St. Petersburg is another city that
17 has a similar system.

18 And then it's also canals -- freshwater
19 canals that supplement. The two work together. So this
20 would go into that system, and there is -- it's piped
21 throughout the City of Cape Coral's utility system,
22 which is virtually everything south of Pine Island Road,
23 which you saw earlier, and now growing into north of
24 Pine Island Road. So it's your irrigation for -- for
25 your yards, whether it's commercial, residential,

1 whatever.

2 So it's a beneficial reuse system.

3 BY MR. HENNESSY:

4 Q. Well, is the distinction of the Cape Coral system
5 from one that the judge may be familiar with which is a
6 pure gray water system there a mixing then of this canal
7 water and freshwater canal?

8 A. Yes.

9 Q. Water with the treated wastewater so to I guess
10 further improve the water that's being used for
11 irrigation purposes?

12 A. It's in order to meet the demand, you use both.

13 Q. Okay.

14 A. Treated wastewater and freshwater canals in your
15 system.

16 THE COURT: And irrigation, the only reuse
17 is it irrigation or were there other?

18 THE WITNESS: Irrigation is -- there are
19 some fire hydrants, I think that might be in the report.
20 There is some fire hydrants that are on the reuse
21 system, but by and large, I think -- by and large, it's
22 for irrigation.

23 THE COURT: Okay.

24 THE WITNESS: Residential and commercial
25 irrigation. Yard irrigation. Landscaping irrigation.

1 THE COURT: Thank you.

2 BY MR. HENNESSY:

3 Q. Does this permit -- draft permit contain specific
4 conditions to address environmental concerns and ensure
5 compliance with applicable regulatory criteria?

6 A. Yes.

7 Q. Okay. And let's look at conditions 2 through 9.
8 Are these the specific conditions beginning with
9 condition 2?

10 A. Yes.

11 Q. That --

12 A. Sorry. Sorry.

13 Q. I'm sorry. Okay. Beginning with 2 and
14 continuing through 9, are these the conditions placed on
15 methods of construction including removal of the lock to
16 address potential environmental impacts?

17 A. Yes.

18 Q. Okay. And then moving to conditions 11 to 12,
19 under monitoring reporting requirements are these also
20 conditions being imposed on the permittee to address
21 potential environmental concerns through monitoring?

22 A. Yes.

23 Q. All right. And then looking at conditions 14
24 through 19. Are these the manatee protection conditions
25 we looked at earlier that are now identified as

1 specific -- or special conditions 14 through 19?

2 A. Can we scroll up just --

3 Q. Get to 1718 and 19?

4 A. 19, yeah. Yes.

5 Q. All right. Does the permit also include a
6 condition addressing the calculation of total nitrogen
7 reduction upon which the determination of the net
8 improvement to water quality was determined?

9 A. Yes.

10 Q. Okay. When we look at special condition 13 and
11 can you explain for us your understanding of this
12 condition. Can you scroll down a little bit so you can
13 get the entirety of 13 covered under two pages. Now
14 you're scrolling too far down. Okay. What is being
15 what is your understanding of this condition that's
16 being placed on this permit with regard to addressing
17 net improvement to water quality?

18 MR. HANNON: Objection. His understanding
19 is irrelevant.

20 THE COURT: What's your response?

21 MR. HENNESSY: Your Honor, he still remains
22 the project manager, the permitting agent, and he is the
23 individual that's going to be responsible for ensuring
24 that the city understands the conditions that have been
25 imposed upon the permittee going forward.

1 THE COURT: Do you have -- is the city going
2 to be offering an environmental expert as opposed to
3 engineering expert to also testify?

4 MR. HENNESSY: Yes, Your Honor we will.

5 THE COURT: Then I'm going to sustain the
6 objection and I would rather hear from the person who's
7 a little more knowledgeable.

8 MR. HENNESSY: All right.

9 THE COURT: Thank you. No offense, Mr.
10 Neff.

11 THE WITNESS: No, none taken.

12 BY MR. HENNESSY:

13 Q. Are there detailed plans for each of construction
14 activities required as part of this permit?

15 A. Yes.

16 Q. Could we turn to 1.50, the permit drawings. Are
17 these -- do you recognize this document?

18 MR. HANNON: Your Honor, may I have a brief
19 pause to get my computer going again ?

20 THE COURT: Yes, certainly. In fact, I hate
21 to interrupt the flow but I actually would like a
22 comfort break myself. We'll take five minutes.

23 THE COURT DEPUTY: All rise. This court
24 will be in recess.

25 (Recess)

1 THE COURT: You may proceed.

2 MR. HENNESSY: Your Honor, I previously
3 identified and the witness identified Exhibit C-50, his
4 resume, I don't believe I moved that into evidence.

5 THE COURT: You did not.

6 MR. HENNESSY: I'd like it move that into
7 evidence.

8 THE COURT: Is there any objection?

9 MR. HOENSTINE: No objection from the
10 department.

11 THE COURT: All right. And I did hear from
12 Petitioners no objection. Just give me a minute because
13 there's so many exhibits on the portal now. Give me a
14 minute so I can admit it now. 5? Did you say Exhibit
15 5?

16 MR. HENNESSY: 50, Your Honor.

17 THE COURT: 50.

18 MR. HENNESSY: 50.

19 (***) Exhibit No. 50 marked for identification)

20 THE COURT: Thank you. Go ahead.

21 MR. HENNESSY: Thank you, Your Honor.

22 BY MR. HENNESSY:

23 Q. Mr. Neff, you have in front of you Joint Exhibit
24 1.50. Are these the permit drawings for the subject
25 permit?

1 A. Yes.

2 Q. Okay. And are these engineering plans that you
3 prepared for this specific project associated with this
4 permit?

5 A. Yes.

6 Q. To your knowledge, does the permit specifically
7 incorporate these engineered drawings by reference as
8 part of the permit and essentially conditions of the
9 permit?

10 A. Yes.

11 Q. Okay. Scrolling through the exhibits, can you
12 just identify for us what these permit plans are for
13 beginning with the -- keep going. This. Here you go.
14 Stop. Is this the permit drawings related to removal of
15 the lock?

16 A. Yes. The first set of, I think, 6 sheets if I
17 remember right are related to the removal of the lock.

18 Q. Thank you. Scroll down. This is part of removal
19 of the lock?

20 A. Yes.

21 Q. Okay. Continue. Part of the removal of the
22 lock?

23 A. Yes.

24 Q. Continue. What is the next set of permit
25 drawings for?

1 A. Mangrove plantings, upland plantings and reef
2 ball improvements.

3 Q. And if you'll go to the next sheet. Do these
4 sheets associated with the mangrove planting and reef
5 ball placement and upland plantings are the locations
6 for these plantings identified on the next engineering
7 sheets?

8 A. Yes.

9 Q. Let's move to the next sheet, please. Is this
10 the -- is this the -- indicate the upland planting work
11 that would be done on the -- as part of the permit?

12 A. Yes, it does.

13 Q. Okay.

14 A. As well as the reef balls.

15 Q. Thank you.

16 MR. HANNON: I'm sorry. May I have a page?

17 MR. HENNESSY: We're on Joint Exhibit 1.50.
18 The permit drawings and the page number that we're on
19 right now is Bates page 651.

20 MR. HANNON: Thank you. Going on to.

21 THE COURT: I'm not sure the court reporter
22 got the last statement. It was the plantings and you
23 said as well as --

24 MR. HENNESSY: Reef balls. Is that right.

25 THE WITNESS: As well as the reef ball

1 placement location.

2 BY MR. HENNESSY:

3 Q. Okay. Let's go to the next sheet of drawings or
4 set of drawings. What do we have there? Is that
5 actually a depiction of the reef ball?

6 A. Yes.

7 Q. All right. Continue. What is the next set of
8 drawings relate to?

9 A. Rotary dog park improvements.

10 Q. There are an actually a number of sheets related
11 to this dog park, isn't there?

12 A. Yes, there are.

13 Q. You're essentially designing a stormwater
14 management system for a park?

15 A. Yes, we are.

16 Q. Okay. Is there any kind of system that exists
17 there today?

18 A. There is. This is a significant improvement to
19 that system.

20 Q. Okay. Can we scroll down, please. Let's go to
21 the next set of drawings. Sorry, Your Honor. There
22 seems to be a considerable lag.

23 What is the next set of drawings relate to?

24 A. These are the stormwater catch basin improvements
25 catch basin replacements.

1 Q. So will these plans depict that all of these
2 catch basins are within the watershed that drain to the
3 South Spreader Waterway?

4 A. Yes.

5 Q. Continue. Is this the individual sheets then
6 start to show us the exact locations of all of the
7 inlets that will be improved as part of the permit?

8 A. That's correct.

9 Q. Okay. And they're identified both on the map in
10 a grid format of identifying the locations?

11 A. Yes.

12 Q. All right. Then you have some like construction
13 typical drawings of the catch basin replacement?

14 A. Yes.

15 Q. All right. Continue. And that's the last of our
16 construction drawings, sir?

17 A. Yes.

18 Q. All right. Thank you.

19 Q. When you visited the -- the area, the project
20 area recently, did you visit the location of the
21 Chiquita Lock?

22 A. Yes, I did.

23 Q. And did you observe the current condition of the
24 lock?

25 A. I did.

1 Q. And what is your understanding of that condition?

2 A. It confirmed -- it confirmed visually the
3 concerns over navigation with the gates open without
4 gates, the velocities through the channel are extreme.
5 The boaters are using it at their own risk, but it's
6 challenging, particularly those boaters that are going
7 with the flow. It's a challenge for them to navigate
8 that.

9 Q. So did you personally observe some dangerous
10 boating conditions and -- at the time you were observing
11 the lock?

12 A. Yes.

13 Q. Did you personally observe any boaters trying to
14 navigate the lock?

15 A. Yes.

16 Q. Did you see whether or not they were having any
17 difficulty with that?

18 A. They had -- they had difficult. Fortunately, the
19 ones I saw did it successfully, but they had difficulty,
20 yes.

21 Q. Okay. In performing your engineering
22 investigation, did you look at the potential impact on
23 the projects on the property of others?

24 A. Yes.

25 Q. What was your determination?

1 A. There would be no negative impacts and navigation
2 would be improved.

3 Q. Okay. So is that -- is the unrestricted marine
4 access, then, a benefit or a detriment to landowners
5 within the South Spreader Waterway?

6 A. It's an improvement.

7 Q. Okay. In your investigation, did you determine
8 whether the project will cause any harmful shoaling or
9 erosion?

10 A. None. It will not.

11 Q. Okay. And finally, is this project the same as
12 the prior project that was designed by the prior
13 engineer?

14 A. No.

15 Q. Is the permit that was issued the same or
16 different from the prior permit that was issued?

17 A. It is different.

18 MR. HENNESSY: I have no further questions,
19 Your Honor.

20 THE COURT: Thank you.

21 Mr. Hoenstine, do you have questions for
22 this witness?

23 MR. HOENSTINE: No questions.

24 THE COURT: Excuse me.

25 All right. Mr. Hannon, cross-examination?

1 MR. HANNON: Yes, Your Honor. Thank you.

2 CROSS-EXAMINATION

3 BY MR. HANNON:

4 Q. I'm sharing my screen with you, Mr. Neff, and
5 what I have up here is Joint Exhibit 1.05.

6 THE REPORTER: Can you move the microphone
7 closer to you?

8 MR. HANNON: I'm sorry? I didn't hear the
9 Court [sic].

10 THE REPORTER: Move the microphone closer to
11 you.

12 MR. HANNON: Yes, ma'am.

13 THE REPORTER: Thank you.

14 MR. HANNON: All right. Thank you.

15 BY MR. HANNON:

16 Q. I've scrolled down to -- it's page 4 in the
17 right-hand column, and it's also JNT 0040.

18 MR. HANNON: Give me one moment, Your Honor.
19 I want to change hearing modalities.

20 THE COURT: Certainly.

21 And if it's the squeaking that you're
22 hearing, we're all hearing that. I think it's the
23 air-conditioning system.

24 MR. HANNON: No.

25 THE COURT: Okay.

1 MR. HANNON: I've been using the Zoom to
2 hear.

3 THE COURT: Oh, okay. Okay.

4 MR. HANNON: It reminds me of an expression,
5 "I can't hear myself think."

6 MR. HENNESSY: Your Honor, I have an
7 objection to the exhibit being utilized. This is not
8 Joint Exhibit 1.05. Joint Exhibit 1.05 does not have
9 any highlighting on it, nor does it have the red text
10 that appears to be added.

11 THE COURT: Okay. I don't know if he heard
12 that. Let's wait.

13 MR. HANNON: I did.

14 THE COURT: Okay. Can you respond to the
15 objection?

16 MR. HANNON: Yes.

17 Mr. Neff, it's the same exhibit. I've
18 highlighted some sections to try to expedite my
19 questions of you, and I've also put in some red, which
20 are some questions that I'll ask.

21 And I was hoping that this might be more
22 efficacious to proceed through this document than have
23 to read stuff.

24 THE COURT: Okay. So what -- what's the
25 specific objection, Mr. Hennessy, that it is not the

1 document that's in evidence?

2 MR. HENNESSY: Yes, Your Honor. It's not
3 the document that's in evidence.

4 THE COURT: Okay.

5 MR. HENNESSY: And it's -- it will be
6 confusing both to the witness and to the record.

7 You know, we went through this on
8 deposition, and I asked him to make these part of his
9 depositions and he refused, stating that they were
10 work-product privilege.

11 Now -- for him now to try to utilize them in
12 this trial, I think, is, you know, doubly inappropriate.

13 Thank you.

14 MR. HANNON: Your Honor, I don't know if you
15 need me to respond, but everybody here knows exactly
16 what the exhibit is and everybody here knows exactly
17 what I put in here. And my purpose in doing this is to
18 facilitate not just my questioning, but his answers and
19 everybody's understanding.

20 I am happy to put it into the record, but
21 it's simply much like a chart or -- I could illuminate
22 these things and highlight them --

23 THE COURT: Okay. All right. I understand.

24 So I don't want you to put them into the
25 record, because I don't like multiple copies of the same

1 exhibits. Absolutely. That is very confusing when I'm
2 preparing a recommended order. It's also confusing if
3 it goes up on appeal and there are multiple copies of
4 the same exhibit.

5 So I don't have a problem with you
6 questioning this witness -- as far as I'm concerned, you
7 put anything in front of a witness and ask him a
8 question. Just know that it's not coming into evidence
9 with these markings on it. I don't see the red on this
10 page, because, you know, the --

11 MR. HANNON: Yes, Your Honor.

12 THE COURT: My question -- my concern might
13 be whether there's in red that's, you know, in some way
14 leading a witness to answer from something other than
15 their own personal knowledge.

16 But it sounds like these are notes to you
17 about questions you want to ask?

18 MR. HANNON: Yes.

19 THE COURT: Okay.

20 MR. HANNON: That I'll read.

21 MR. HENNESSY: Your Honor.

22 THE COURT: Yes.

23 MR. HENNESSY: If I may, the additional
24 objection would be he's referencing it as 1.05. That's
25 not the case, and the record should not reflect that

1 he's showing him Exhibit -- Joint Exhibit 1.05.

2 THE COURT: Okay. Let's just --

3 MR. HENNESSY: I'm sorry. My statement.

4 It's 1.04.

5 THE COURT: Well, I think that the objection
6 is going to be the same because it is not the 1.04 that
7 is in evidence -- been admitted in evidence.

8 MR. HENNESSY: Exactly.

9 THE COURT: So if you want to refer to it as
10 an annotated version thereof, that's fine. Let's go
11 with that.

12 MR. HANNON: I understand.

13 THE COURT: Thank you.

14 MR. HANNON: So --

15 MR. HENNESSY: Your Honor, the final point I
16 have is I don't have this document, and I can -- I can't
17 read the words. So if he's going to be showing him and
18 being allowed to use this document, either I need to be
19 provided my own copy, or I'm going to need to stand next
20 to the witness so I can read.

21 MR. HANNON: It's on Zoom. Everybody has on
22 it on Zoom.

23 MR. HENNESSY: I don't have Zoom on because
24 I have Zoom up front when I'm asking the questions. I
25 can put Zoom on.

1 THE COURT: Fair enough.

2 If you're going to be using a document
3 that's -- other than one that's being admitted into
4 evidence, certainly provide a copy to opposing counsel.
5 It sounds like it's only Mr. Hennessy that's not looking
6 at it.

7 MR. HANNON: I will e-mail it to him.

8 THE COURT: Okay.

9 MR. HENNESSY: If I walk away for two
10 minutes, my computer shuts down. So I've now got to
11 redo and get through...

12 MR. HANNON: I've got to bring up my e-mail,
13 which just verified that it's me.

14 THE COURT: Okay. This is slowing down us
15 getting through this today, so let's try to do it
16 quickly.

17 SPEAKER: Your Honor, if you'll let me into
18 the Zoom, I think --

19 THE COURT: Let you into the Zoom?

20 MR. HENNESSY: Yeah, we haven't been
21 admitted.

22 THE COURT: Okay.

23 MR. HENNESSY: We're prepared, Your Honor,
24 if he wants to proceed.

25 THE COURT: Thank you.

1 MR. HANNON: Thank you, Your Honor.

2 BY MR. HANNON:

3 Q. So on page 40, that's JNT 40 with my mockup here.
4 This contains the background section. Did you write
5 this?

6 A. Yes.

7 Q. And you go all the way back to the early 1970s,
8 correct?

9 A. The report does, yes.

10 Q. And there were documents available to you both
11 from the department and Cape Coral's files showing you
12 the history of these spreader canals that you reviewed,
13 correct?

14 A. I reviewed some documents that were available,
15 yes.

16 Q. For example, you talked about efforts to repair
17 it in the '90s, correct?

18 A. Yes, sir.

19 Q. Correct?

20 A. Yes, sir.

21 Q. And then second paragraph here, you talk about --
22 in 1977, you talk about the GAC's bankruptcy, correct?

23 A. Yes.

24 Q. And there's a sentence here that says, in the
25 yellow, quote, "Historically, GAC and their engineers

1 expressed their concerns that" --

2 THE COURT: I'm going to interrupt you.
3 Especially since it's already highlighted on the
4 document we're all looking at, if you would refrain from
5 rereading it in full.

6 MR. HENNESSY: Right.

7 BY MR. HANNON:

8 Q. So if you take a look at that, Mr. Neff, I'll ask
9 you questions once you're comfortable.

10 So where did you get that information?

11 A. Previous reports and interactions with engineers
12 historically in my career with the City of Cape Coral.

13 Q. For Figure Number 2, the overhead of the lock,
14 are there plans to plant any of the mangrove seedlings
15 anywhere in this photo?

16 A. I don't believe they're immediately in that
17 photo, no.

18 Q. And then the next paragraph talks about the
19 history of erosions and breaches, and that information
20 came from the same source that you described earlier?

21 A. Yes, sir.

22 Q. And when did the City of Cape Coral obtain
23 ownership of the boat lock?

24 A. I don't remember the exact date. I'm -- maybe
25 late '80s. I'm not sure exactly the date. I

1 remember -- I was with the City of Cape Coral when it
2 happened, but I don't remember the exact date.

3 Q. And when the repairs were made that you've
4 discussed, the City of Cape Coral owned it?

5 A. Yes.

6 Q. And those repairs, some of them at least, were
7 not completed based upon your historical overview?

8 A. That -- you're talking -- could I back up? I'm
9 sorry. I didn't understand your question.

10 Q. Certainly.

11 A. The repairs to the spreader?

12 Q. Yes, sir.

13 A. I'm looking at the picture of the lock -- of the
14 lock. I'm sorry.

15 Q. You're right. You're right.

16 So I'm talking about the repairs to the spreader
17 that you talked about earlier, I think, in the '90s.
18 And some of those, or all of them, were not completed?

19 A. They were not completed by the City. That is
20 correct.

21 Q. Now, I assume, and please correct me if I'm
22 wrong, does the City of Cape Coral own the canal?

23 A. Yes.

24 Q. And does the City of Cape Coral own the land on
25 the west of the South Spreader canal?

1 A. I don't believe so.

2 Q. Who owns that now?

3 A. State, I believe.

4 Q. And what's that belief based on?

5 A. It's -- I haven't researched that. Historical
6 knowledge working at the City.

7 Q. The next page, page 40, has a section describing
8 the current South Spreader Waterway and the boat lock
9 condition and, again, did you write that?

10 A. Yes.

11 Q. And how did you learn that by 1998, the boat lock
12 gauge had deteriorated, required a total rebuild?

13 A. Personal -- personally literally hands-on
14 knowledge.

15 Q. And did there come a time specifically in 2003,
16 where the City of Cape Coral considered a new parallel
17 boat lock?

18 A. I don't remember the exact date. But the city
19 did consider a parallel boat lock, yes.

20 Q. And isn't it a fact that based upon your
21 historical review in approximately 2005, 2006, the city
22 actually applied for an ERP, an environmental resource
23 permit, to build a dual lock?

24 MR. HENNESSY: Objection, Your Honor.

25 THE COURT: Yes.

1 MR. HENNESSY: Multiple grounds, beyond the
2 scope of direct, number 1. Number 2, relevance. We're
3 here on a permitted issue which is removal of the boat
4 lock. The fact that there main other permits or other
5 plans or other projects at other times is irrelevant to
6 the -- to what Your Honor has evaluated and decided.

7 THE COURT: Okay. Mr. Hannon, what's your
8 response?

9 MR. HANNON: In opening statement,
10 Mr. Hennessy talked about how the benefit of removing
11 the lock would be to increase the value of the land
12 north of the lock for folks that wanted to build and
13 have easy access out to the water. And that's an
14 economic issue. And then Mr. Neff was also asked about
15 the options that were available and none of the three
16 options included building a new parallel boat lock. And
17 finally Mr. Neff was asked to testify about who made the
18 decision to go with which removal option. And I'm going
19 to inquire of him about that also. So the alternatives
20 are not all that he says that they are. And the fact is
21 that in 2005 and 2006, the City of Cape Coral received
22 authorization and a permit to build a dual lock. They
23 received a permit to dredge to accomplish that and they
24 asked for that permit to be extended for 5 years. And
25 we're talking about the history of this area. And so I

1 can't imagine it's not.

2 THE COURT: I guess the question is on
3 relevance, though. How does knowledge that there was
4 another option that might not have been considered in
5 this permit for rebuilding a new lock help me determine
6 whether this ERP meets the public interest balancing
7 test? That's the question.

8 MR. HANNON: Certainly. Well, if I were to
9 go through this with Mr. Neff, I assume he has knowledge
10 of it. What the city also achieved, Your Honor, is they
11 obtained authorization from the Florida State Fish and
12 Wildlife Service to put in a dual lock because they were
13 going to include a state-of-the-art manatee protection
14 system and what you're being told today is because of
15 manatee deaths, they're contributing to the lock, they
16 have to remove the lock. Well that's not true.

17 THE COURT: Okay. I'm going to -- I'm going
18 to sustain the objection. I don't see the relevance of
19 that. If you would move on.

20 MR. HANNON: Well, if you don't mind, it
21 goes directly to the public interest test. The -- what
22 they're -- what we're going to eventually learn is that
23 they simply want to remove the lock because it would
24 cost less.

25 THE COURT: That's my ruling. If you want

1 to take it up with the appellate court you can. We
2 don't have time for you to argue with me about my
3 rulings.

4 MR. HANNON: I'm going to suggest it would
5 take less time to go through the evidence than argue
6 about it and risk not having an appropriate record.

7 THE COURT: I appreciate that, but I've made
8 my ruling so move on.

9 MR. HANNON: Okay.

10 BY MR. HANNON:

11 Q. I'm now down to page 42 of my example. And,
12 again, the paragraph at the top you're talking about the
13 history and Breach 20. Is that also something that you
14 learned about in your historical review?

15 A. Yes, as well as personal experience, yes.

16 Q. And I wrote this?

17 A. Yes.

18 Q. And then you have a section about the backup for
19 passage of boats as shown in figure 9. Do you know who
20 took this photograph?

21 A. I do not know.

22 Q. And this is a wider view of the canal so you see
23 more of the mangroves. Do you know -- do you know
24 anything about the health of the mangroves in your
25 expertise?

1 A. It's not my expertise, no.

2 Q. And are any of the locations for planting
3 additional mangroves visible in this picture?

4 A. It would be difficult, Mr. Hannon, without
5 overlaying the plans.

6 Q. Okay.

7 A. On top, you might catch one. I don't know. It's
8 hard to be -- hard to do that.

9 Q. We'll get to see it. And I notice that there's
10 construction across on the north -- Northeast -- excuse
11 me in the top right-hand corner there's construction
12 underway over there. Isn't that construction that's
13 been completed and a whole number of homes have been
14 built right around there?

15 A. A lot of it has been completed, yes.

16 Q. And additional construction adds additional load
17 of runoff of nutrients to the canal, correct?

18 A. It can. In the case of the Cape Harbour, they
19 have a permitted stormwater system so their stormwater
20 it is treated in their system before being discharged
21 into the canals.

22 Q. That's excellent. And I have the question in
23 here. Do you know why when these repairs were required
24 back in the '90s, the department didn't require the city
25 to make the repairs?

1 A. I believe that I'd have to do some more research.
2 I believe -- I'd have to do some research. I was
3 involved in this one personally. I don't know think it
4 was a require. It was more the city initially pursued
5 that option to do this thing to help plug the breaches
6 and when it became clear that it was going to not really
7 work because you're going to continue to have erosion
8 around this thing, this device that we design, then the
9 city would be then perpetually responsible for
10 maintaining erosion caused by it. Then the city backed
11 out. I don't know. I'm not sure how many, several
12 years later, FDEP picked it up themselves did the
13 design. I mean, they hired a consultant, FDEP picked up
14 the project themselves and moved forward.

15 Q. And they didn't complete it either?

16 A. They did what they designed. I mean, largely
17 it's not exactly what's designed. It's close to what
18 was designed by FDEP engineer.

19 Q. In your study you learned that the design of the
20 South Spreader was established in the late 1970s,
21 correct?

22 A. Yes, sir.

23 Q. And that the design of the South Spreader was
24 contained in consent order number 15 correct?

25 MR. HENNESSY: Objection, Your Honor.

1 THE COURT: Yes.

2 MR. HENNESSY: I'll withdraw the objection
3 if we're just talking background.

4 THE COURT: Thank you.

5 THE WITNESS: Yes.

6 BY MR. HANNON:

7 Q. The question was that the design of the South
8 Spreader was described in consent order number 15?

9 A. Yes.

10 Q. And you read that consent order?

11 A. Yes.

12 Q. And would I be refreshing your recollection if I
13 told you that the warranty deed that's referred to in
14 consent order number 90 required the original developer
15 of Cape Coral to deed all of the mangroves over to the
16 State of Florida?

17 MR. HENNESSY: Objection, Your Honor. Now
18 we're getting to the details of the requirement. This
19 is the beyond the scope of background for purpose of
20 understanding.

21 THE COURT: I'm going to overrule and allow
22 just for background and then move on, please.

23 MR. HANNON: Of course.

24 BY MR. HANNON:

25 Q. Did my question refresh that all of the mangroves

1 now belong to the people of the state of Florida?

2 A. I don't know. I believe it's the -- it's an
3 aquatic preserve. I believe it's state ownership so I
4 think we're all on the same page.

5 Q. And your reading of the content order number 15
6 indicated that the berm -- well, let me -- before I ask
7 the question, do you understand what's the berm is
8 that's described in consent order number 15?

9 A. I believe so.

10 Q. And what is your understanding of what the berm
11 is?

12 A. The intention of the spread was -- it appeared
13 the intention of the spreader was to do -- as it's name
14 says, is to capture water, uniformly spread it to the
15 west -- over the west and to the south through the
16 mangrove fringe to either the river or the Matlacha
17 Pass, depending on its location.

18 Q. And the purpose of the berm was to provide a
19 place where the water when it grows as it would could
20 then roll over the berm?

21 A. Yes, sir.

22 Q. And do you know -- do you use the term "legacy
23 nutrients"?

24 A. I've heard the term "legacy nutrients."

25 Q. What do you understand that to mean?

1 A. Nutrients that come prior to development prior to
2 something else.

3 Q. And do you understand that some water quality
4 specialists would say that because the spread canal is
5 60, 70 years old, that there is nitrogen and phosphorus
6 and perhaps other pollutants on the bottom?

7 MR. HENNESSY: Objection, Your Honor.
8 That's improper hypothetical or it's assuming facts not
9 in evidence.

10 THE COURT: I'm going to allow him to answer
11 to his knowledge. Otherwise, it's sort of a throw away
12 question here.

13 MR. HANNON: I won't want to hear what you
14 know.

15 THE WITNESS: Not my area of expertise.

16 BY MR. HANNON:

17 Q. You did talk about the areas of the canals that
18 need dredging periodically, correct?

19 A. Yes, I did.

20 Q. And would it be correct in assuming that the
21 areas of the canal that you showed the judge in red,
22 which are the shallowest, need dredging more frequently
23 than the rest of the canal?

24 A. Not necessarily, no. I wouldn't think so, no.

25 Q. Well, would you agree that they become shallower

1 sooner?

2 A. No.

3 Q. Would you agree that sediment in the runoff
4 requires this dredging process?

5 MR. HENNESSY: Objection, Your Honor.

6 Vague. What sediment? What runoff? Where -- what are
7 we talking about?

8 THE COURT: Sustained.

9 BY MR. HANNON:

10 Q. I think you told us earlier that all the runoff
11 from the roads and streets and the like go into sewers
12 that go into the canal, correct?

13 A. It -- in much of Cape Coral, there are areas that
14 as Cape Harbour -- we're looking -- still looking at
15 this page that have permitted stormwater systems, where
16 the water drains to, typically, stormwater ponds or
17 other stormwater treatment devices before being
18 discharged.

19 Q. I'm sorry. I'm going to exclude those private
20 entities that create their own stormwater cleaning. I
21 want to talk strictly about residential commercial areas
22 that don't do that.

23 Isn't it fair to say that the majority -- the
24 large majority of surface water that comes off the
25 roads, the roofs, the sidewalks, the streets, and the

1 lawns go into a sewer system that goes into the spreader
2 canal?

3 A. I think it's probably short-changing the things
4 that have happened in Cape Coral over the last 30, 40
5 years. So --

6 Q. Okay. What's the percentage? What's the
7 percentage --

8 A. I don't -- let me --

9 MR. HENNESSY: Objection, Your Honor. He's
10 not allowing the witness to finish his answer.

11 THE COURT: Okay. So I know everybody's
12 excited. I need you to listen to each other. Please
13 let the witness finish their answer before you ask the
14 next question. And the same thing -- if you would, let
15 the attorney finish their question completely before you
16 answer.

17 Thank you.

18 MR. HANNON: Who starts, me?

19 THE COURT: I think he was trying to finish
20 his answer to your last question, so let's pick up with
21 that.

22 THE WITNESS: So since DEP has come into
23 being and the water magistrates have come into being,
24 all the commercial development, any new, larger
25 residential development. So a lot of projects within

1 the South Spreader system do have stormwater treatment
2 systems before discharging to the canals.

3 So I don't know the percentage off the top
4 of my head, but there are quite -- it's quite a bit.
5 For the typical residential lots in Cape Coral, they --
6 they go through grass swales to inlets, many of which
7 have been modified as part of the installation of water
8 and sewer and irrigation lines in these new area. A lot
9 of inlets have already been modified raised, with --
10 much like we showed earlier.

11 But, yes, then those -- then it drains
12 through the swales and into these -- into storm drainage
13 pipes and into the canals.

14 BY MR. HANNON:

15 Q. Okay. I got it.

16 And in your study of the history of the lock,
17 isn't it correct that the amount of detained nitrogen
18 behind the lock has increased in the last four years
19 from 30,000 pounds per year to 58,000 pounds per year?

20 A. I don't think so.

21 Q. Do you know?

22 A. I reviewed Brown and Caldwell's report. That is
23 not my expertise, but that's not what I recall. That's
24 not what I remember, so...

25 Q. When you reviewed -- you reviewed the Avalon

1 Engineering report from the first application, correct?

2 A. Yes.

3 Q. And I think you said that you -- in designing
4 this new application, you went through all of that?

5 A. Yes, sir.

6 Q. Okay. I'm going to take a moment to talk a bit
7 about that, which I've successfully placed on the screen
8 without too much harm.

9 So what I have on the screen now is Petitioners'
10 Exhibit 177, which is described as Joint Exhibit No. 1
11 from the previous application. Let me scroll down a
12 little bit so that you can make sure that this is a
13 document -- this is the document that you reviewed.

14 MR. HANNON: And I have to interrupt and
15 acknowledge that there are red lines in there that I put
16 in, very similar formatting.

17 BY MR. HANNON:

18 Q. And then you mentioned, I think, an Avalon
19 Engineering report?

20 THE COURT: All right. First, let's find
21 out if he can identify this document.

22 THE WITNESS: I'm sorry. Am I ready? Okay.

23 Yeah, it looks -- with those minor
24 modifications, Mr. Hannon, you mentioned, it looks like
25 the document that I reviewed.

1 BY MR. HANNON:

2 Q. Okay. I'm going to see if we can move it along.
3 And one moment. Let me check my notes.

4 So I'm at page 44 of Petitioners' 177. So is
5 this the Avalon Engineering report that you referred to
6 earlier?

7 A. It appears to be.

8 Q. And that is prepared by Anthony Janicki?

9 A. For portions of the report.

10 Q. I'm looking now at page 46. It says,
11 "Introduction." And here, the writer says that, "The
12 purpose of the removal is to resolve a public safety
13 issue due to increased boat traffic," correct?

14 A. Yes.

15 Q. That's the same purpose in this case, right?

16 A. It is one of the same purposes, yes.

17 Q. And we see photos of the lock, and then we have
18 page 48 that says, "Background."

19 Are you with me?

20 A. Yes, sir. I believe so.

21 Q. Didn't you lift all that --

22 THE REPORTER: I didn't hear what you said.
23 I'm sorry.

24 THE COURT: You need to get closer to your
25 microphone. When you lean back, we can't hear you.

1 BY MR. HANNON:

2 Q. Mr. Neff, didn't you lift all this from this
3 report and put it in your own?

4 A. No, sir, and I take great offense at that.
5 That -- I did not lift this. I used this as a
6 reference, and I talk about using this as a reference.
7 But I did my due diligence on this project, as you know,
8 read many, many files, many, many documents in preparing
9 what I prepared.

10 Q. So it's -- your -- yours is not word-for-word the
11 same?

12 A. No, it's not word-for-word. I used this as one
13 of my primary references, and that is stated in my
14 application.

15 Q. And then we come down to another section called,
16 "Current lock conditions," and it starts off, "The boat
17 lock has been in operation since 1984," end quote.

18 Didn't you say the exact same thing?

19 A. Well, yes, I did. And I think that's okay when
20 it's the truth.

21 Q. I see.

22 MR. HANNON: Your Honor, I'd move -- I'll
23 make it a clean version. I move Petitioners' Exhibit
24 No. 177, which is the joint exhibit from the previous
25 proceeding that Mr. Neff reviewed, into evidence.

1 THE COURT: All right. Is the version of
2 Petitioners' 177 that you filed in the exhibit portal a
3 clean one, doesn't have these red lines, or does it have
4 the red lines?

5 MR. HANNON: It's not. Correct, no.

6 THE COURT: All right. Is there an
7 objection?

8 MR. HENNESSY: Yes, Your Honor, multiple
9 objections. Object to relevance. Object to the fact
10 that this is cross-examination and he's seeking to
11 introduce a document. Object to the fact that he's
12 showing him a document with all this red and
13 highlighting, and now we're, I guess, purportedly going
14 to introduce a different document. I don't understand
15 why we're not just working off the document that --
16 that's going to be put into evidence instead of, I
17 guess, potential misleading or confusing the witness
18 with all of these additional documents.

19 But, you know, fundamentally, it comes down
20 to relevance as well. It's one thing in terms of
21 background information. It's another to try to, I
22 guess -- to critique the current application in the
23 permit based on the prior application and permit. I
24 don't understand the relevance.

25 THE COURT: Well, it seems like part of the

1 relevance is attacking -- are you intending to somewhat
2 attack the credibility of this witness with this
3 document? You seem to do that during your questioning.

4 MR. HANNON: A little bit.

5 THE COURT: Okay.

6 MR. HANNON: But the more important part is
7 that Mr. Hennessy asked him multiple times if this is
8 the same application, and he said, "No, it's different."
9 Well, that's for you to decide, and they haven't tried
10 to prove it. But I can certainly try to prove it.

11 And the other aspect of this is the legal
12 issue that we've raised about -- so it's -- in my view
13 of this.

14 THE COURT: Okay.

15 MR. HENNESSY: The final point, Your Honor,
16 I'd make is that he's showing a couple of pages out of
17 this document. This is not just, you know, the
18 application or an engineering report attached to the
19 application. It apparently represents the entire
20 permitting file that was introduced in the prior
21 proceeding.

22 MR. HANNON: Exactly, and that's what should
23 be compared by you to determine whether what Mr.
24 Hennessy and Mr. Neff had said was true.

25 THE COURT: Okay. But I think, if I

1 understand, the objection is that what you have shown
2 this witness is just the environmental portion -- what
3 is it called?

4 MR. HENNESSY: Actually, the engineer's
5 report.

6 THE COURT: Engineer's report.

7 But what you're moving in is the entire
8 application file?

9 MR. HANNON: Yes.

10 THE COURT: Okay. So we don't have any
11 authentication by this witness of this complete
12 document.

13 Would DEP care to chime in, please?

14 MR. HOENSTINE: Yes, Your Honor. We would
15 join Mr. Hennessy's objections. If anything, I guess
16 you could admit the pages that he's familiar with. But
17 then again, you've got all these red lines on it, so it
18 really doesn't represent the -- the correct document.
19 So it's just something that he made, and I think that
20 therein lies the problem. He should have submitted a
21 correct version instead of his marked-up version that
22 we've all seen.

23 MR. HANNON: Well, I thought we've already
24 dealt with that issue.

25 Let me do this. I'll give them the full

1 one. You could actually take judicial notice. It comes
2 right out of the file, and FDEP would know. And it is
3 absolutely grist for the mill as to whether this is a
4 different application or not.

5 THE COURT: Okay. So I am -- I am willing
6 to overrule all of the objections other than this is not
7 an unadulterated document. So you've indicated you can
8 present a clean one, so when you have a clean on that
9 everybody can look at, you can offer it that time.

10 MR. HANNON: Thank you.

11 THE COURT: Okay.

12 MR. HENNESSY: I'm sorry, Your Honor. Are
13 you talking about, then, the entire permit file?
14 Because I thought you agreed that there were foundation
15 or authentication issues.

16 THE COURT: Well, if he has a complete
17 document that he wants to move in, you know, we'll need
18 authentication or arguments that authentication is not
19 needed, you know, at that time.

20 So I'm not -- I'm not admitting this
21 document at this time, Petitioners' 177. When you have
22 a clean copy, you know, we have a few more days. If you
23 want to present it, then we will do so.

24 MR. HANNON: Thank you.

25 BY MR. HANNON:

1 Q. So going back now to Joint Exhibit 1.04, which is
2 your report.

3 THE COURT: For the record, it's an
4 annotated version of Joint 1.04.

5 MR. HANNON: Yes. I'll try to make that
6 clear in my questions.

7 BY MR. HANNON:

8 Q. You -- as a professional engineer, you sign and
9 seal plans, right?

10 A. Yes, sir.

11 Q. And you signed and seal plans and that means that
12 anyone who reviews those plans looks at them, another
13 engineer knows that he meet accepted engineering
14 standards is that right?

15 A. They should. Yes, they do.

16 Q. And permitting authorities, like FDEP, rely upon
17 your professionalism, when you seal plans, that they
18 are -- to the best of your knowledge, meet all the
19 engineering standards for plans for that particular
20 project, correct?

21 A. I'm sure they do.

22 Q. And I want to go back up to the top of 1.04, page
23 JNT 0037. And ask you I mean I represented professional
24 engineers you seal the narrative part of this, correct?

25 A. I seal attachment A the engineering report which

1 is what basically what you're looking at.

2 Q. Well it's not -- it's not all engineering
3 drawings it contains pages of narrative discussions
4 about manatees. It talks -- has lists of figures that
5 have nothing to do with engineering. It puts out
6 explanations for why the city is doing something?

7 THE COURT: All right let's get to a
8 question.

9 BY MR. HANNON:

10 Q. The question becomes I mean why did you sell that
11 what are you saying that everything in there meets a
12 professional engineering standard what does it mean?

13 A. To the best of my knowledge this is accurate
14 information that I as an engineering sign and seal.

15 Q. I understand sir. But part of this is a history
16 lesson. And you're not an historian, and it doesn't --
17 and so that's what perplexes me.

18 MR. HENNESSY: Objection, Your Honor. Is
19 there a question here? It seems to be, you know, a
20 narrative, multiple questions, and argumentative, if not
21 asked and answered.

22 MR. HOENSTINE: Asked and answered.

23 THE COURT: Sustained. Asked and answered.
24 Sustained.

25 BY MR. HANNON:

1 Q. So -- all right.

2 So here we have a photograph of boats, I think,
3 that you were asked about this, and you gave an opinion
4 about navigation. And I think you referred to this as a
5 queue of boats?

6 A. Yes, sir.

7 Q. And is -- in your opinion as a navigator, is
8 there some problem with this queue?

9 A. Well, a queue can cause safety issues with the
10 one way operation of the lock you can see you have back
11 ups here having delays having to figure out what they're
12 going to do with those delays to be safe while they're
13 under very low power there can be safety issues
14 associated with the accuse.

15 Q. Of course. Anything can happen. Prove it. Have
16 you proven it have you proven your opinion that there
17 are navigation safety issues associated with the lock
18 and the condition that it's in now?

19 MR. HENNESSY: Objection compound and
20 argumentative.

21 THE COURT: Sustained. If you would like
22 town require as to the basis of his opinions you can do
23 so but don't argue with him about it has he proven his
24 opinion.

25 MR. HANNON: I don't mean to argue with the

1 witness and I guess I am. So what -- you are a
2 professional in water science and preparation of
3 applications like this, correct.

4 THE WITNESS: I'm a professional engineer
5 civil engineering with experience in stormwater dredging
6 projects similar projects.

7 BY MR. HANNON:

8 Q. And you also that when you present an application
9 to the department and you assert that it meets certain
10 standards you have an obligation to prove it to the
11 department correct?

12 MR. HENNESSY: Objection. Asked and
13 answered argumentative.

14 MR. ASCHAUER: Relevance.

15 THE COURT: Sustained.

16 BY MR. HANNON:

17 Q. Do you understand that even after the department
18 accepts your opinion that it meets certain criteria that
19 DOAH still has to determine whether it's proven to meet
20 the criteria?

21 MR. HENNESSY: Objection calls for a legal
22 conclusion.

23 MR. HOENSTINE: Badgering the witness.

24 MR. HANNON: He's a professional in this
25 field.

1 THE COURT: Sustained that that calls for a
2 legal conclusion. I've indicated that if you want to
3 inquire as to the bases scientific otherwise for his
4 opinions, then you may do so otherwise your just
5 badgering him. I agree.

6 MR. HANNON: And.

7 BY MR. HANNON:

8 Q. Now, under city watershed improvements, you
9 mention here that the City has invested hundreds of
10 millions of dollars in several major programs that are
11 beneficial to water quality. Do you know, in your field
12 of expertise, whether financial circumstances have
13 anything to do with the grant or denial of an ERP?

14 A. I do not, and we discussed -- you discussed
15 that -- three removal options, and just -- and we have
16 them here in front of you just to recast this for my
17 questioning.

18 Option one is removed the lock gates an equipment
19 only. Option two is remove the boat lock and restore it
20 to its full 200-foot width. And option 3 is leave the
21 south upland and boat lock concrete floor bottom in
22 place.

23 So who was it that picked those as the only
24 options?

25 A. I looked at it those seem sore for removal that

1 seemed like an adequate number of options if you scroll
2 up the options are looking at boat dock removal. So
3 those are 3. One is the low cost -- low cost option
4 which is frequently looked at in engineering. So that's
5 a low cost option. Unfortunately, doesn't work.

6 The second one is another option that's
7 frequently looked at, which is the most expansive
8 option, but that has a downside -- some environmental
9 downsides to that option. So then we looked at what
10 became the optimum option, which minimizes any negative
11 damage and provides a useful open area for boaters.

12 Those are the three that were developed.

13 Q. So are you telling the judge that you're the only
14 one who selected these three options?

15 MR. HENNESSY: Objection, Your Honor
16 argumentative.

17 THE COURT: I'll overrule. Let him answer
18 this question.

19 THE WITNESS: These options were -- I worked
20 with my team members of course on this issue. So we had
21 several team members including the city of cape oral as
22 these options are important for them to consider also so
23 I would say this is my sign and seal but there would be
24 input and thoughts by other members on the team
25 including the owner the city of cape Carl.

1 BY MR. HANNON:

2 Q. Thank you.

3 So isn't it true then that the final decision
4 maker on what option to pursue was the City of Cape
5 Coral?

6 A. I don't know.

7 Q. Well, do you understand that the City of Cape
8 Coral -- you worked there for quite some time -- is run
9 by a city council, correct?

10 A. Yes.

11 Q. And isn't it your experience that before an a
12 project like this reaches fruition it has to be approved
13 by the city council?

14 MR. HENNESSY: Objection, Your Honor.
15 Relevance.

16 THE COURT: I have the same question what is
17 the response. What is the relevance of this line as to
18 who made the decision which option to go with.

19 MR. HANNON: Well, because the option on the
20 dual boat lock is not considered anywhere and I'm trying
21 to find out and explore why that wasn't considered and
22 the reason why approximate it wasn't considered and if
23 it he's testifying about the options and his
24 recommendations and what should be chosen or not then I
25 ought to be able to ask that question.

1 THE COURT: Then ask that question. So he's
2 already told you that he's -- he -- suggested options
3 for removal not reconstruction and these were the three
4 options you based on sounds like sound engineering
5 principles you start with the least cost most impactful
6 and lay them all out.

7 MR. HANNON: Right.

8 THE COURT: You want to know why wasn't
9 rebuilding an option, ask him that question.

10 MR. HANNON: Sure.

11 BY MR. HANNON:

12 Q. Mr. Neff?

13 A. So the guidance direction, the scope, the project
14 that we are pursuing is removal.

15 Q. The purpose of removal, as I understand it, is to
16 prevent manatee deaths and allow more rapid navigation
17 for boats inside the lock am I missing anything?

18 A. Could you restate that? I'm sorry.

19 Q. Right. You indicated in your report that the
20 concern the goal that this project seeks to achieve is
21 to protect manatees and increase navigation, correct?

22 A. Those were two of them, yes.

23 Q. So wouldn't a dual boat lock system with manatee
24 protections, which are available, solve those two
25 problems?

1 MR. HOENSTINE: Objection, Your Honor.
2 That's not part of the public interest test. There is
3 no factor that goes to weighing alternatives. So he's
4 going outside the bounds of what this proceeding is.

5 MR. HENNESSY: I join in with that,
6 Your Honor, and also state that you're never here to
7 determine the wisdom come of this project versus any
8 myriad of other projects. You're here to determine the
9 compliance of the project that's in front of you.

10 THE COURT: I understand, and I actually had
11 previously ruled on the relevance of this question, but
12 then I invited it. So I was hoping that you would let
13 me gracefully get out of that, but no, you did not. All
14 right. So maybe it's just the late hour.

15 So I had invited it. It's been asked. I
16 think it's been answered that they were not looking at
17 options other than removal. So let's just move on.

18 BY MR. HANNON:

19 Q. Okay. Who's "they" --

20 THE COURT: And --

21 BY MR. HANNON:

22 Q. Who's "they"?

23 MR. HENNESSY: Again, Your Honor, relevance
24 and asked and answered.

25 MR. HANNON: Well, he's working for someone.

1 BY MR. HANNON:

2 Q. Who's the client?

3 A. The City of Cape Coral.

4 Q. Thank you.

5 So can we infer that the City of Cape Coral did
6 not consider a dual boat lock with manatee protections?

7 MR. HENNESSY: Same objection, Your Honor
8 relevance.

9 THE COURT: Sustained. All right.

10 MR. HANNON: Your Honor, the relevance is
11 that -- and I think that this will -- it's only
12 logical -- is that the manatee story and the boat
13 story --

14 MR. ASCHAUER: Objection. He's testifying,
15 Your Honor.

16 THE COURT: I appreciate that. However,
17 there is no jury here to mislead. So if we could -- I
18 mean, technically correct, yes. But I'm going to -- I'm
19 going to reiterate this one more time.

20 So what is before me in this case is to
21 determine whether this ERP, not on ERP that would
22 consider other options, meets the public interest test.
23 Okay? So I've allowed you to explore that. The answer
24 is, no, it wasn't being considered.

25 And let's move on, please.

1 MR. HANNON: Okay. Thank you.

2 BY MR. HANNON:

3 Q. So, currently, the lock is permanently open and
4 is a danger, in your opinion, to boaters?

5 A. It's dangerous to navigate as it is, yes.

6 Q. But the city continues to operate that way,
7 correct?

8 A. With warning signs, yes.

9 Q. Do you think warning signs are adequate to solve
10 the danger that that the city is creating?

11 MR. HOENSTINE: Objection, relevance.

12 THE COURT: Sustained.

13 BY MR. HANNON:

14 Q. Well, let's talk about manatees. The City owns
15 the lock, correct?

16 A. Yes.

17 Q. And do you happen to recall when the City first
18 learned of what Mr. Hennessy says is the death of a
19 manatee in the lock?

20 A. No. I -- no, I don't remember the exact date.
21 There's some communication, I think, that we were
22 looking at. But, no, I don't remember the first date
23 that we learned.

24 Q. Didn't the City have an absolute duty to make
25 certain that manatees were not harmed by operation of

1 the lock?

2 MR. HENNESSY: Objection, Your Honor. Calls
3 for a legal conclusion, asking about the duty of the
4 City.

5 THE COURT: And perhaps beyond the expertise
6 of this witness.

7 So, sustained.

8 MR. HANNON: Your Honor, he talked earlier
9 about the Florida Fish and Wildlife approving this, so
10 he has some knowledge about this.

11 BY MR. HANNON:

12 Q. Do you --

13 MR. HANNON: May I ask that?

14 THE COURT: Yes. I mean, you're
15 cross-examining and he testified to comments that were
16 made by the FWC during the permitting process and how he
17 believes the permit addresses the issues raised.

18 So, yes, you can ask that.

19 MR. HANNON: Thank you.

20 THE COURT: That's a different question from
21 didn't the City have an absolute duty to not harm
22 manatees.

23 MR. HANNON: You're right, of course.

24 BY MR. HANNON:

25 Q. The problem that -- well, so do you know whether

1 the Florida Fish and Wildlife folks would take the
2 position that because the City owns the lock, the City
3 had to take actions to prevent injuries to manatees?

4 MR. HOENSTINE: Objection. Speculation as
5 to what FWC would think.

6 MR. HENNESSY: Same objection.

7 MR. HANNON: I'm just asking him what he
8 knows.

9 THE COURT: Okay. Sustained because what
10 you asked him was whether the FWC would take the
11 possession that X. Okay? That's not the same as the
12 question: What were their concerns raised during
13 permitting?

14 MR. HANNON: All right.

15 BY MR. HANNON:

16 Q. At page 44, when you talk about the proposed
17 removal option, you talk about how it would prevent
18 harmful erosion and sediment transfer and damage to
19 wetlands.

20 Could you explain that again?

21 A. If you have damage to the lock, it's possible
22 that then with that damage could come erosion associated
23 with the damage of the lock. So if the device is
24 removed, and if it's safe, if looks like the photo that
25 you're almost on, you won't have a lock that can fail

1 with potential erosion that could come along with that
2 failure of that structure of those seawalls and things
3 like that.

4 Q. I know -- I see the part about the ongoing
5 maintenance hardships. What I'm referring to is what
6 what I thought had to do with the wetlands. Harmful
7 erosion of the berm, sediment transport, and damage to
8 the wetlands.

9 How would removal of the lock prevent that from
10 occurring?

11 MR. HENNESSY: Objection. Asked and
12 answered.

13 THE COURT: I'm sorry. I'm going to have to
14 hear it again. I'm going to overrule.

15 THE WITNESS: I'll try again.

16 THE COURT: Thank you.

17 THE WITNESS: So with the failure of the
18 lock, these items are a risk. So if the lock begins to
19 fall apart, if you have structural damage where the lock
20 is actually falling apart, the seawalls are falling
21 down, you can have these things happen that would create
22 erosion, that creates sediment transportation, and then,
23 of course, could damage the wetlands that are nearby.

24 BY MR. HANNON:

25 Q. Mr. Neff, you told us that you learned from

1 studying the history of the South Spreader that the berm
2 was badly eroded, had breaches, and that there were
3 efforts to try to repair those.

4 And the lock was in place for that, correct?

5 A. The lock is in place, yes.

6 Q. When all of that damage occurred, correct?

7 MR. HENNESSY: Objection, Your Honor. It's
8 a mischaracterization of the prior testimony.

9 THE COURT: Overruled. I'm going to allow
10 him to try it again.

11 THE WITNESS: Can you ask that again,
12 please, Mr. Hannon?

13 BY MR. HANNON:

14 Q. Sure.

15 Earlier in your report, you said that there was
16 damage caused to the berm in the '90s, right?

17 A. No.

18 Q. What period of time was it?

19 A. Can we scroll back to that place that you're
20 talking about? That would be helpful to me.

21 Q. You mean you want to read it?

22 A. That would be helpful to me, to see what you're
23 referring to.

24 Q. Here's one location at page 42, and there are
25 others. Read the paragraph that begins, "The SSW west

1 bank."

2 THE COURT: We're not seeing that on the
3 screen.

4 THE WITNESS: It's not there yet.

5 MR. HANNON: There you go. The first
6 paragraph.

7 THE WITNESS: Yes. That's -- so it -- what
8 it says is those breaches have existed since
9 construction was completed. So it doesn't say -- it
10 says they've been there for a long, long time. That's
11 what it says. So those have been there -- from my
12 research, those have been there -- you know, maybe since
13 day one, those breaches have been there.

14 So those breaches have been there a long,
15 long time, it says that, and existed since construction
16 was completed. So those have been there since that day,
17 and they have not been successfully repaired, is what it
18 says. So they're not fully plugged.

19 Again -- I think I answered this. We've
20 been through this. So they -- Breach 20, they have
21 done -- FDEP has done some projects. You asked me
22 questions about that. They have done some projects to
23 provide -- I don't know -- a more managed interchange in
24 those locations and those breaches.

25 BY MR. HANNON:

1 Q. Mr. Neff, this says that the -- these damages
2 have existed since construction was completed. Are you
3 saying that these damages that they attempted to repair
4 occurred before construction of the lock?

5 A. I'm saying it says they've been -- that's what
6 I'm saying, is the breaches have been there since
7 construction was completed.

8 Q. Right. Okay.

9 A. Yeah.

10 Q. So my question of you is: If the damage has
11 occurred despite the lock being in place, how can you
12 say that removal of the lock will prevent further
13 damage?

14 MR. HENNESSY: Objection. I mean, I find
15 that question confusing, Your Honor, if not compound.

16 MR. HANNON: I just think he doesn't want to
17 answer it.

18 THE COURT: Excuse me. Please don't impugn
19 the character of the witness.

20 The -- I think what's wrong with that
21 question is that it assumes that they're not mutually
22 exclusive. So there may -- I assume -- let me just ask
23 the witness a couple of questions. Y'all may give me
24 too much credit.

25 Tell me what material the South Spreader

1 Waterway is actually constructed from, particularly the
2 western boundary. What is it?

3 THE WITNESS: So -- sorry.

4 THE COURT: Go ahead.

5 THE WITNESS: The western boundary, which I
6 know we have some photos here, is dirt.

7 THE COURT: Okay.

8 THE WITNESS: It's mostly soil with
9 mangroves winding most of it. That's what you'll see.
10 And then you'll have these breaches, and we're focusing
11 on the three major breaches and --

12 THE COURT: And I'm going to interrupt you.

13 THE WITNESS: Yes.

14 THE COURT: So I assume that this took some
15 time to construct, the entire perimeter of it.

16 THE WITNESS: Yes. It's largely a wide
17 canal. It's a -- that's like -- it's a line -- it's a
18 line --

19 THE COURT: How long? Do you know how long
20 it took to construct the entire South Spreader Waterway?

21 THE WITNESS: Oh, I do not. That would have
22 been in the -- that would have been predated me, you
23 know, timing with the consent order time frame.

24 I would be guessing. I don't really know.

25 THE COURT: It wasn't done in a couple week?

1 THE WITNESS: It was not done in a couple of
2 weeks, no.

3 THE COURT: All right. So I'm going to
4 sustain the objection as to compound, and ask you,
5 Mr. Hannon, to try to rephrase.

6 MR. HANNON: I'm actually going to try to
7 answer Your Honor's inquiry --

8 THE COURT: Okay.

9 MR. HANNON: -- by moving to another
10 exhibit, which is Petitioner's Exhibit 143, which is up
11 on the screen. And it's described as -- let me reduce
12 it so we can see it.

13 It's described as the "City of Cape Coral
14 Spreader Waterway Breach Area Improvements Design Report
15 of May of 1993" by Aidens and Emerson, Inc.

16 BY MR. HANNON:

17 Q. Mr. Neff, was this part of the historical
18 material that you reviewed for your work on this
19 application?

20 A. No.

21 Q. Have you seen it before?

22 A. I believe I have, but --

23 Q. And does this?

24 THE REPORTER: I'm sorry?

25 THE WITNESS: But it's been a while.

1 BY MR. HANNON:

2 Q. Okay. Do you recall whether this shows what the
3 berm looks like on the west side of the canal and the
4 breaches that you've talked about?

5 A. I don't remember.

6 Q. May I show you some of the photos and see if it
7 refreshes your recollection?

8 A. Sure.

9 Q. First we have -- at page 13, we have a drawing of
10 a portion of the South Spreader that has indications of
11 where a number of breaches have occurred.

12 Do you remember seeing that?

13 A. I'm just seeing the North Spreader right now.

14 Q. I'm sorry. The south. You think this is the
15 north?

16 A. It's labeled "north."

17 Q. I'm sorry. Forgive me.

18 But do you remember seeing this one, in any
19 event?

20 A. It's -- may have been since 1993 that I saw this
21 document.

22 Q. All right. Let's move on. This may be --

23 MR. HENNESSY: Objection, Your Honor.

24 What's the relevance of this inquiry?

25 THE COURT: I thought that counsel was going

1 to help get an answer to my question, although I -- my
2 question was what materials it constructed of. That's
3 been answered, and I guess my follow-up question was how
4 long did it take.

5 I'm not really sure where we're going with
6 this.

7 BY MR. HANNON:

8 Q. On page 17, do you recognize this as being a
9 breach?

10 MR. HANNON: Objection. Relevance,
11 Your Honor. We're -- he's not identifying the breach,
12 and what he has identified is the breaches in the
13 Northern Spreader Waterway, which I think, per your
14 previous ruling, would have very limited relevance in
15 this proceeding.

16 THE COURT: Does this document contain the
17 South Spreader Waterway breaches?

18 THE WITNESS: Yes.

19 THE COURT: Okay.

20 THE COURT: Let's try to get to those then
21 and ask the question.

22 MR. HANNON: All right.

23 BY MR. HANNON:

24 Q. Do you recognize the photo that's marked 9 and 10
25 as being the South Spreader?

1 A. No.

2 MR. HENNESSY: Again --

3 THE COURT: Let him answer. He said no.
4 Okay. Go ahead.

5 BY MR. HANNON:

6 Q. Do you recognize the photos that are called
7 Breach 11 on page 24 as being in the South Spreader?

8 A. Mr. Hannon, if you could go back to like --
9 they're numbered. I'm an engineer. Maybe -- I'm
10 trying --

11 Q. I understand what you're asking.

12 A. I -- if you go back -- I think you'll help
13 yourself to get to the right -- if you're trying to get
14 to the South Spreader, if you use the overall map, it
15 might speed things along. Everything you're showing
16 there is in the North Spreader.

17 Q. Fair enough.

18 A. Now go down to the next one.

19 Q. You're right.

20 A. You're all on the North Spreader there.

21 Q. So you do remember this. So this is the South
22 Spreader?

23 A. There we go, yes.

24 Q. Okay. And the numbered breaches here begin at 14
25 and go to 19. Did I read that right? 20. Yes, 20,

1 right?

2 A. Yes.

3 Q. Okay. So this one is is marked as. 14 so is
4 that --

5 MR. HENNESSY: Your Honor, if he could show
6 the witness the entire document so we can actually see
7 those references to the numbers. Otherwise we're just
8 looking at a mangrove.

9 MR. HANNON: I'm just doing what he's asked.
10 So this is -- this is labeled Breach 14 which was on the
11 South Spreader chart. Do you recognize that as Breach
12 14 in the South Spreader.

13 THE WITNESS: I -- this is a 1993 document.
14 So it's -- things have changed since 1993. So I don't
15 know that I recognize that as that breach.

16 BY MR. HANNON:

17 Q. Okay. If the engineers did their job right, this
18 would have been a picture of Breach 14 that was on the
19 map, right?

20 A. I would assume that Aiden and Emerson did a good
21 job and those are the right pictures at the right
22 location. I haven't read that document probably since
23 '93 or '94, something like that.

24 Q. Of course. I understand. So let's see if maybe
25 some of them haven't changed that much and you can

1 recognize them.

2 MR. HENNESSY: Your Honor, I have to object
3 as relevance here. Originally, it sounded like he was
4 just showing him to refresh his recollection as to some
5 specific point. But it seems like we're going through
6 entire report from 1939 that the witness says he hasn't
7 looked at once 1993 and that it doesn't reflect current
8 conditions. So that's my objection. Relevance.

9 THE COURT: Thank you. So do you
10 understand, Mr. Hannon? You've asked him if you can
11 identify the document. He says he hasn't looked at it
12 since, you know, the early '90s. He doesn't recognize
13 the particular pictures of breaches because conditions
14 have changed. So what is the relevance of asking him
15 continued question based on this document?

16 MR. HANNON: Well, because he doesn't
17 remember it, I guess none.

18 THE COURT: Okay thank you.

19 MR. HANNON: Let's go back to the report.
20 So we're at page 45 and this is in a section called
21 maximum dredging and canal depth permit limitations and
22 I've highlighted the last sentence and ask you if you
23 wrote that.

24 MR. HENNESSY: Your Honor, I'm -- I just
25 need to have this better pointed out to me. He said the

1 last sentence he's highlighted. Which last sentence are
2 we talking about? Give a word that it starts with.

3 MR. HANNON: In this section as is.

4 MR. HENNESSY: Thank you, Your Honor. I
5 object again to the use of this document with these
6 suggestive statements in red. That's clearly putting
7 evidence in front of Your Honor that's -- or comments
8 and statements that are not in evidence and it's just
9 inappropriate.

10 THE COURT: I appreciate that. I already
11 indicated I'm not accepting this into evidence itself
12 and, you know, give me a little credit for being able to
13 dismiss certain things that I know shouldn't be
14 presented to me and let's just try to get through this.
15 Are we almost finished with your questioning of this
16 witness based on this document?

17 MR. HANNON: No. I mean Mr. Hennessy went
18 through more documents than this one.

19 THE COURT: I'm not criticizing. I was
20 asking a question. It's 5:35. We have to be out of
21 here at 6. We have permission until 6. We're keeping,
22 you know, these guys have to be paid extra when we make
23 them stay late. So this is you know, this is not like
24 just staying at DOAH. We're able to do that, you know,
25 easily. So I want to make sure that everybody is heard

1 but I was trying to -- just trying it gauge where you
2 are.

3 MR. HANNON: I will be happy to go to 6. I
4 won't finish.

5 THE COURT: I gather you won't finish by 6.
6 The question is when he should we actually stop the
7 questioning in order to get out of here.

8 MR. HENNESSY: Your Honor, if I may as well,
9 we had had our fire chief here waiting all afternoon as
10 well to testify. He's got 20 minutes of testimony max
11 and he is -- I don't know that he's available next week.
12 So if he's not going to finish with Mr. Neff and we're
13 at a breaking point before he starts could we take the
14 chief out of -- you in the middle of this and just get a
15 quick witness on and off so he doesn't have to come
16 back.

17 MR. HANNON: Happy to if Your Honor is.

18 THE COURT: If the Petitioners' are all
19 right with that, that's fine with me. I don't normally
20 like to take one witness before we've completed a
21 witness's testimony.

22 MR. HENNESSY: And I've never requested it
23 before, but he has to recertify his entire department
24 next week.

25 MR. HANNON: I won't take any more time than

1 they do on direct, probably less.

2 THE COURT: We are suspending the
3 cross-examination of Mr. Neff at this point. And we'll
4 note that for the record, Madam Court Reporter, and we
5 will take the fire chief's testimony next. I hope you
6 were in it for the long haul.

7 THEREUPON,

8 CHIEF RYAN LAMB,

9 Being by me first duly sworn to tell the truth testifies
10 as follows:

11 DIRECT EXAMINATION

12 THE WITNESS: I do.

13 BY MR. ASCHAUER:

14 Q. For the record, we're calling Chief Ryan Lamb to
15 the stand, Your Honor.

16 Sir, if you could please state and spell your
17 name for the record?

18 A. Sure. Ryan Lamb. R-Y-A-N L-A-M-B.

19 Q. And by whom are you employed Chief Lamb?

20 A. The City of Cape Coral.

21 Q. And in what position are you employed by the city
22 of Cape Coral?

23 A. I serve as the fire chief and emergency
24 management director for the city.

25 Q. How long have you been the fire chief for the

1 city of Cape Coral?

2 A. Been the fire chief for over five years.

3 Q. How long have you been with the City of Cape
4 Coral fire department?

5 A. Started in 2005 so over 18 years.

6 Q. Okay. And as the fire chief for the city of Cape
7 Coral, what are your responsibilities, sir?

8 A. I'm charged first and foremost of the health,
9 safety, and well-being of the residents and visitors of
10 City of Cape Coral, in addition to preventing and
11 responding to emergencies and reducing risk to life and
12 property including the environment of Cape Coral.

13 Q. And, Chief Lamb, are you familiar with the
14 Chiquita Lock?

15 A. I am.

16 Q. And are you familiar with the city of Cape
17 Coral's permit application for the South Spreader
18 Waterway Environmental Improvement Program?

19 A. Yes.

20 Q. Chief Lamb, does the City of Cape Coral fire
21 department have any marine units?

22 A. Yes. We have three marine units that service our
23 area.

24 Q. Are any of them assigned to the South Spreader
25 Waterway, sir?

1 A. Yes, Marine 9.

2 Q. And where is Marine Unit 9 stationed, sir?

3 A. Marine Unit 9 is stationed at Tarpon Marina.

4 Q. And why is Marine 9 stationed at the Tarpon Point
5 Marina, sir?

6 A. It's strategically located in that area because
7 it serves that portion of the City of Cape Coral and
8 surrounding waterways including the South Spreader.

9 (Reporter clarification.)

10 A. Marine 9 covers -- it's strategically located to
11 cover the south of southern area of Cape Coral. I
12 believe it's south of Spread Canal.

13 Q. Thank you, sir. Is there a land unit that is
14 responsible for South Spreader Waterway, sir?

15 A. That area is covered by Fire Station 6 and Ladder
16 6 and Rescue 6 respond to that area.

17 Q. And were you ever a part of Ladder Unit 6?

18 A. Yes, sir. I served on Ladder 6 for a number of
19 years.

20 Q. Did you -- do you recall when you gave your
21 service on Ladder Number 6?

22 A. 2008.

23 Q. Can we pull up Joint Exhibit 1.07, Mr. Pair. And
24 let's go to page 2, which is Bates No. JNT 155. Chief
25 Lamb, do you recognize this letter that we are showing

1 you on the screen that's been marked as Joint Exhibit
2 1.07 for the record?

3 A. I do.

4 A. Are you the author of this letter, sir.

5 A. I am.

6 Q. Why did you write this letter, chief Lamb?

7 A. To express my opinion and the stance of our
8 department that this lock should be removed for health
9 safety concerns that we've noted within.

10 Q. Why does the department has the concerns that
11 lock represented health safety and welfare to the city
12 of Cape Coral?

13 A. We strategically analyzed this area and working
14 through a community risk assessment. This is an area
15 that we identified as an area that we would have trouble
16 responding to because of the lock, if the lock is closed
17 that we do not have access to get behind the lock.
18 There is not public boat ramps or private boat ramps
19 behind the lock area.

20 So there's a number of areas that we have a
21 concern for. So if there's a boat collision, fire,
22 drowning, any of those areas could pose a risk to our
23 residents and also to our firefighters there's a couple
24 of keys areas, if I can point out those, that we
25 specifically had a concern on in addition to hazardous

1 material response and in a couple of those areas as
2 well.

3 Q. Chief, I would actually like you to, if you
4 wouldn't mind, go to the map and point out the areas but
5 while you're there, just simply point to the areas and
6 these I'm going to ask you to return so when you
7 actually speak your testimony is into the mic.

8 A. Okay.

9 Q. If you could go over and point to areas and I'll
10 call out an area and that's the bump out, correct?

11 A. Yes.

12 Q. And the marina?

13 A. Yes.

14 Q. Okay you can return. So since you do have the
15 laser pointer. Thank you for bringing that to my
16 attention. Would you go ahead and point out the first
17 area with the laser pointer that we identify as the bump
18 out? Where is that and why is that an area of concern
19 to you, Chief Lamb?

20 A. When we looked at this area, this is at an area
21 that doesn't have residential properties or accessible
22 properties nearby. So if there was a boat collision, a
23 boat fire, drowning, something in that area, I am
24 putting a firefighter in the water to swim over a
25 thousand feet back into that area without a vessel to

1 support that rescue effort.

2 Q. Are there any portions of the bump out that are
3 obstructed from the view of the street?

4 A. That area is as well. So they'd be, essentially,
5 out there on their own. There'd be no supervisor being
6 able to watch them, a backup swimmer, limited
7 communications. It's beyond the length of our
8 communication lines.

9 Q. And then can you point out to the area we
10 identified as the marina? And why do you have concerns
11 about that area?

12 A. So behind the lock is also the Cape Harbour
13 Marina, and there are a good number of large vessels
14 within that marina. And if they -- there's a -- if one
15 of vessels were to catch on fire, one of the first
16 things they do is burn through the dock lines, and
17 then -- now you have a giant boat that's on fire that
18 would be bouncing around within that marina, potentially
19 causing additional damage by fire and additional
20 pollutants by the diesel and the burning fiberglass.

21 So with the vessel in there, we'd be able to help
22 control that boat fire.

23 Q. And would that create what you reference as a
24 hazmat situation?

25 A. Yes.

1 Q. And what is hazmat, for the record?

2 A. "Hazmat" is shorthand for us for hazardous
3 materials.

4 Q. And to your marine units respond to hazmat
5 emergencies?

6 A. Yes.

7 Q. And would the removal of the lock improve your
8 department's ability to respond to potential hazmat
9 situations in the waters of the South Spreader Waterway?

10 A. Yes, because, again, after hours or when the lock
11 is inoperable, we're unable to get a vessel behind that
12 lock into that south waterway.

13 Q. And Chief Lamb, how long have you held these
14 concerns about the Chiquita Lock?

15 A. So this has been a concern since my time on -- as
16 a firefighter on Rescue 6 and Ladder 6, and then that
17 has been heightened in 2015 when I was promoted to
18 division chief, which included overseeing special
19 operations. And then now, since as the fire chief we
20 work on our community risk assessment, this is an area
21 of keen interest for us.

22 Q. Okay. And you mentioned the community risk
23 assessment in your testimony a couple times. What is
24 that, sir?

25 A. This is something that we work through as an

1 agency that's working towards accreditation that we have
2 to identify the risks that are across our community and
3 how we plan to respond to them. So it's a community
4 risk assessment and our standard of cover.

5 So this is an area that we've been identified --
6 have identified as a challenge for us to provide
7 response to.

8 Q. And when you say "this area," do you mean the
9 Chiquita Lock?

10 A. The Chiquita Lock and the full south waterway.
11 Again, looking at all those houses, vessels, and those
12 particular waterways that are only accessible through
13 that lock area.

14 Q. Okay. So have you and your department
15 specifically identified the Chiquita Lock as part of
16 your community risk assessment?

17 A. Yes.

18 Q. And Chief Lamb, do the concerns you've expressed
19 today -- well, let me start that over.

20 The letter that we're showing that's been marked
21 as Joint Exhibit 1.07, does that letter also summarize
22 some of your concerns about the Chiquita Lock? Yes,
23 sir. In addition to not only just those emergencies
24 instances that we can respond to, we do have concerns.
25 We do -- sometimes we get calls. The City of Cape Coral

1 participates as -- we call it the MER team, the Marine
2 Emergency Response team, in conjunction with other local
3 fire departments and the Coast Guard. So we get calls
4 for vessels in distress.

5 Oftentimes, we'll -- we can get a call to that
6 area as vessels are cueing to go through the lock if
7 there's inclement weather, lightning and such, that they
8 concerns in that area for injuries out on the waterway.

9 Q. And so for all of those reasons and the reasons
10 we discussed today, do you support the removal the
11 Chiquita Lock?

12 A. Yes, sir.

13 MR. ASCHAUER: Not that I'm timing myself,
14 but that was six minutes, Your Honor.

15 THE COURT: Thank you.

16 All right. Cross-examination, or does the
17 DEP have questions for this witness?

18 MR. HOENSTINE: No questions, Your Honor.

19 THE COURT: All right.

20 CROSS-EXAMINATION

21 BY MR. HANNON:

22 Q. Chief, pleased to meet you.

23 How did you learn about the opportunity to
24 present this letter in this proceeding?

25 A. I don't specifically recall.

1 Q. Is it fair to say that someone brought it to your
2 attention?

3 A. I do understand that the City was proceeding
4 forward with an application to have the lock removed.

5 Q. Did someone, perhaps you can't remember who,
6 bring this to your attention to consider writing this
7 letter?

8 MR. ASCHAUER: Objection, Your Honor.
9 Relevance.

10 MR. HOENSTINE: Asked and answered.

11 THE COURT: I will sustain on asked and
12 answered.

13 MR. HANNON: May I share my screen?

14 THE COURT: Yes.

15 BY MR. HANNON:

16 Q. So we have your letter up on the screen --

17 THE COURT: Not yet. Let's see. There we
18 go.

19 MR. HANNON: There we go.

20 BY MR. HANNON:

21 Q. So Chief, did anybody ask you to collect data on
22 any of the types of incidents that you list here having
23 occurred behind the South Spreader?

24 A. Yes.

25 Q. And did you collect that data?

1 A. We attempted to. There's a number of issues with
2 trying to collect data in that area, based off of the
3 addresses that are potentially listed, if it's a land
4 response versus a marine response.

5 Q. So you assume there would be some data that would
6 support your opinion?

7 A. We're able to collect some portions of data, yes.

8 Q. And did you provide it to someone?

9 A. Yes.

10 Q. Who did you provide it to?

11 MR. ASCHAUER: Objection, Your Honor.
12 Relevance.

13 THE COURT: I'll overrule.
14 Go ahead.

15 THE WITNESS: The city council.

16 BY MR. HANNON:

17 Q. Okay. And the -- the Matlacha Pine Island
18 Independent Fire District has a number of different kind
19 of boats.

20 Do you?

21 MR. ASCHAUER: Objection. Assumes facts not
22 in evidence. It's also argumentative.

23 THE COURT: I'll sustain on assumes facts
24 not in evidence. You might need to lay a little
25 groundwork there.

1 BY MR. HANNON:

2 Q. Do you know that the Matlacha Pine Island Fire
3 District has boats for water rescue?

4 A. Yes. I know Pine Island Matlacha has boats for
5 water rescue.

6 Q. And do you have boats for water rescue?

7 A. Yes, sir. We have three boats.

8 Q. And where are they kept?

9 A. We have three vessels currently. One is on a
10 lift at Burnt Store Marina. One is on a lift at Tarpon
11 Point Marina. And one is currently on a trailer at Fire
12 Station 3, which is at Veterans and Del Prado.

13 Q. And I want to go up to Chief Sizemore's letter.
14 You know Chief Sizemore, I assume?

15 MR. ASCHAUER: Your Honor, outside the
16 scope.

17 THE COURT: Sustained.

18 MR. HANNON: If I may, Your Honor.

19 BY MR. HANNON:

20 Q. Have you read Chief Sizemore's letter?

21 MR. ASCHAUER: Objection.

22 THE COURT: Sustained. He wasn't asked
23 about Chief Sizemore's letter or any concerns that the
24 police department has raised, so...

25 MR. HANNON: I just want to raise the point

1 that first and last paragraphs of both letters are
2 identical.

3 THE COURT: Okay. That's something that you
4 can do in your argument.

5 MR. ASCHAUER: I'd say the documents are in
6 evidence. They speak for themselves.

7 MR. HANNON: Thank you.

8 THE COURT: Okay. That's it?

9 MR. HANNON: Well, I can't ask him if he
10 knows that -- knows why that is, but that's okay.

11 THE COURT: Okay. Any redirect?

12 MR. ASCHAUER: I do not, Your Honor.

13 THE COURT: Okay. Mr. Aschauer, I'm going
14 to ask you not to deal with this right now, but I want
15 you to make a note that my recollection, which is
16 probably completely inaccurate, when looking at maps
17 earlier was that that marina was south of the lock, and
18 not north.

19 So at an appropriate -- with an appropriate
20 witness, if you would address that for me on Monday,
21 okay?

22 MR. HANNON: Tarpon Point.

23 MR. ASCHAUER: If the question is where is
24 Tarpon Point, I can have the chief point that out while
25 we're here with the use of a map.

1 THE COURT: Great. I would appreciate that.

2 REDIRECT EXAMINATION

3 BY MR. ASCHAUER:

4 Q. Chief Lamb, there were a number of questions
5 about where your boat was kept during cross-examination.

6 Do you recall that?

7 A. Yes.

8 Q. And, in fact, during direct we identified Tarpon
9 Point. Do you --

10 THE COURT: No, no, no. I'm talking about
11 the Cape Harbour Marina. Cape Harbour Marina is one of
12 two areas of special concern.

13 MR. HANNON: That is inside the lock,
14 Your Honor.

15 MR. ASCHAUER: I'll let the witness --

16 THE COURT: Okay.

17 BY MR. ASCHAUER:

18 Q. Chief, is Cape Harbour Marina inside the lock?

19 A. Yes. It's -- the lock is here, and then around
20 and north of that is the Carp Harbour Marina. The only
21 access to that marina -- there is a boat ramp there, but
22 you have to go through the lock to be able to access
23 that part of the marina.

24 THE COURT: Okay. Thank you.

25 I thought my recollection was probably

1 wrong, but I wanted to get that straight in my head.

2 Thank you.

3 All right. It sounds like you are
4 dismissed. Thank you.

5 All right. We have ten minutes. Before we
6 adjourn, I have a housekeeping matter of how early can
7 we start on Monday. Looks like the doors to the
8 courthouse open downstairs at 7:30.

9 Can we get started at 8:30 on Monday
10 morning?

11 MR. HENNESSY: Absolutely, Your Honor. I
12 understand, actually, this courtroom will open up at
13 8:00. Is that right, Deputy?

14 THE BAILIFF: I can be here at 8:00 and open
15 it, if you guys want to get here that early.

16 THE COURT: Okay. That would be great if we
17 could -- and then if we could be ready to go on the
18 record at 8:30, fantastic.

19 Okay. Not seeing any objection. I'm seeing
20 assenting, nodding heads.

21 MR. HANNON: Well, I do object because we
22 have lots of people who are going to be driving at least
23 an hour and a half to get there that morning.

24 THE COURT: Okay. Because your clients were
25 behind you nodding their heads that it was okay.

1 MR. HANNON: Well, plus, we have --

2 MR. HENNESSY: I highly recommend that they
3 go early anyway. They'll beat the traffic that way.

4 MR. HANNON: We also expect experts that --

5 THE COURT: Well, obviously, we will not
6 take expert witness testimony before they're here unless
7 they're appearing via Zoom. I believe Mr. Hennessy has
8 not concluded his case, correct?

9 MR. HENNESSY: We're going to start, I
10 imagine, with the completion of the cross-examination of
11 Neff. Then we will call Mya Rober, and we will also
12 call the representative from FWC.

13 THE COURT: And Ms. Rober is an expert,
14 correct?

15 MR. HENNESSY: I'm sorry. I should say
16 Dr. Rober.

17 THE COURT: Dr. Rober is an expert?

18 MR. HENNESSY: Yes, ma'am.

19 THE COURT: So I think maybe what you were
20 saying, Mr. Hannon, is you want to make sure your
21 experts are here, present, during expert witness
22 testimony?

23 MR. HANNON: Yes.

24 THE COURT: All right. So --

25 MR. HANNON: May I inquire through the Court

1 that -- if Mr. Hennessy anticipates that, completing his
2 prima facie case?

3 THE COURT: I assume that's what you meant.

4 Is that what you mean? After those two
5 witnesses, you'll be completed with your prima facie
6 case?

7 MR. HENNESSY: Unless things change,
8 Your Honor. Then, of course, we would join in the
9 testimony of the Department witness.

10 THE COURT: Sure. And the Department's
11 planning to offer one witness?

12 MR. HOENSTINE: That's correct, Your Honor.

13 THE COURT: All right. I would ask that you
14 do the best you can to get folks here you know, by 8:30.
15 I want to get rolling. Okay?

16 MR. HANNON: Yes, Your Honor.

17 MR. HENNESSY: Your Honor, yeah. I mean,
18 I'm sure, at the rate we're going, we won't be done with
19 Mr. Neff by 9:00.

20 THE COURT: Okay. Thank you.

21 All right. We're adjourned.

22

23

24

25

WORD INDEX

| | | | |
|--|--|---|---|
| < 0 > | 14 166:23 167:1 225:24 226:3, 10, 12, 18 | 2003 10:6 88:9 185:15 | 146:8 |
| 0037 204:23 | 14,000 57:16 90:9 | 2005 48:12 185:21 186:21 231:5 | 373.016 12:22 15:4 |
| 0040 176:17 | 143 222:10 | 2006 72:19 185:21 186:21 | 373.413 27:1 |
| 0101 70:12 | 148 51:5 | 2008 232:22 | 373.414 12:21 15:4 21:5, 22 22:20, 25 23:2, 5, 11 26:8 29:7, 20 |
| 07-4834 18:10 | 149 51:2, 6 | 200-foot 208:20 | 373414 26:10 |
| < 1 > | 15 164:1 190:24 191:8 192:5, 8 | 2010 18:10 | 373426(1) 20:4 |
| 1 44:8 61:19, 24 64:3 88:11 89:2 91:14 99:3 159:1 186:2 197:10 | 1531 10:16 | 2015 91:18 92:11 236:17 | 3-pipe 164:2 |
| 1.004 113:16 | 155 232:24 | 2018 86:12, 20 88:9 136:15 | < 4 > |
| 1.01 111:21 112:10 | 16 10:16 105:19 107:20 108:8 | 2019 57:7, 25 58:12 | 4 176:16 |
| 1.04 180:4, 6 204:1, 4, 22 | 17 16:7 105:19 107:20 224:8 | 2020 53:3 | 40 182:3 185:7 195:4 |
| 1.05 70:12 91:22 139:19 176:5 177:8 179:24 180:1 | 1718 167:3 | 2021 106:16, 17 113:1, 10, 11, 22 152:25 | 400 65:4 |
| 1.06 145:22, 25 | 177 197:10 198:4 199:24 200:2 203:21 | 2023 18:2 19:24 27:21 | 404 111:23 |
| 1.07 64:3, 8 232:23 233:2 237:21 | 18 231:5 | 20-foot 122:18, 21, 22 126:14 | 41,000 53:4 |
| 1.19 152:23 | 1820.003 20:20 | 20-some 119:15 | 41,965 91:9 |
| 1.21 158:22 | 19 86:25 166:24 167:1, 3, 4 225:25 | 22-1564 18:2 20:15 | 42 188:11 218:24 |
| 1.48 51:5 52:5 89:2 159:15, 16 | 1939 227:6 | 23 16:7 30:2 | 42,000 53:4 |
| 1.49 51:3 | 1970s 59:6 182:7 190:20 | 23-1786 1:19 | 422 24:1 |
| 1.50 168:16 169:24 171:17 | 1977 182:22 | 24 30:2 225:7 | 44 198:4 216:16 |
| 10 44:19 60:19 103:17 105:14 160:11 224:24 | 1980 85:6 | 24th 152:25 | 45 96:3 227:20 |
| 10th 16:6 | 1981 16:4 | 25 30:2 | 458 24:7 |
| 11 137:5 151:17 166:18 225:7 | 1982 24:2 | 25-foot 122:16 | 46 198:10 |
| 12 57:16 91:25 166:18 | 1983 18:20 99:6 | 26 30:2 | 48 10:17 44:8 152:4 198:18 |
| 12/27/21 158:23 | 1984 24:8 51:12 199:17 | 27 27:22 30:2 | 4-D 110:15 |
| 120 25:17 | 1987 17:9 | 27th 19:24 28:21 113:22 | 4th 10:6 |
| 120.54 17:24 | 1990s 103:3, 5 | 280 93:15 | < 5 > |
| 120.545(b) 17:20 | 1993 222:15 223:20 226:13, 14 227:7 | 2d 10:5 | 5 120:12 133:13 135:24 169:14, 15 186:24 |
| 120.569(2)(c) 17:22 | 1998 185:11 | < 3 > | 5:35 228:20 |
| 12-1-2023 1:2 | < 2 > | 3 143:7 208:20 209:3 241:12 | 50 169:16, 17, 18, 19 |
| 125-foot-width 126:12, 18 | 2 103:18 105:13 108:8 113:2 161:10 166:7, 9, 13 183:13 186:2 232:24 | 3,000 162:17 | 50s 79:11 |
| 13 52:6 53:3 89:17 167:10, 13 223:9 | 2:15 96:6 | 30 146:8 195:4 | 57 15:3 |
| 139 88:11 | 20 35:24 36:2 79:20 90:21 91:4 93:8 105:2, 8, 21 107:1, 4, 7, 23 122:21 125:21 188:13 219:20 225:25 229:10 | 30,000 196:19 | 57.105 8:17 |
| | | 300 50:11 | 58 15:3 |
| | | 301 21:5 | 58,000 91:15 196:19 |
| | | 302 21:8 | 58,632 89:17, 22 |
| | | 303 92:12 | 58.062 89:17 |
| | | 30th 6:14 | < 6 > |
| | | 32 99:24 102:7 | 6 120:10 170:16 228:21 229:3, 5 232:15, 16, 17, 18, 21 |

| | | | |
|------------------------------|-----------------------------|------------------------------|-------------------------------|
| 236:16 | 9/24/21 152:23 | accused 24:5 32:13 | adequate 209:1 |
| 6.4 135:25 | 9:00 246:19 | achieve 211:20 | 214:9 |
| 6:00 94:14 | 90 191:14 | achieved 187:10 | adequately 12:11 |
| 60 10:12, 13, 15 | 90s 59:13 103:4 | acknowledge 197:15 | 29:3 |
| 193:5 | 182:17 184:17 | acoustic 45:25 | adjacent 10:24 |
| 60s 79:11 | 189:24 218:16 | acquiescence 8:3 | 21:12 80:14, 20 |
| 62.330 21:21 | 227:12 | acted 82:25 | 105:11 110:16 |
| 62.330.302 22:11, 23 | 93 226:23 | action 8:16 81:16 | 125:22 128:10 |
| 622 44:20 | 938 24:1 | 91:11 | 137:19 143:16, 17 |
| 623 51:5 52:6 89:5 | 94 226:23 | actions 144:7 145:21 | 162:9 |
| 62-330.302 20:4 21:4 | 97.2 134:13 | 216:3 | adjoining 68:21 |
| 634 51:3, 6 | | active 75:15 | adjourn 96:6 244:6 |
| 651 171:19 | | activities 54:24 55:7 | adjourned 246:21 |
| < 7 > | < A > | 137:15 168:14 | Administration 10:5 |
| 7 119:17 125:4 | abandon 69:8, 13 | activity 103:2 | Administrative 6:1, 9, |
| 7.2 131:10, 11 | abandoned 74:16, 17 | acts 24:13 | 12 7:12 8:15 10:18 |
| 134:10, 15, 21 135:12, | 76:7, 10, 16 | actual 4:8 16:25 | 11:18 15:20 17:14, |
| 14, 21 | abdomen 26:12 | 31:25 34:6 45:22 | 17, 18, 25 18:10, 20 |
| 7.22 131:20 134:19, | ability 48:19 69:4 | 48:20 51:3, 4 84:22 | 20:3 23:20 24:4, 11 |
| 24 136:18 | 236:8 | 125:9 133:16, 18 | 65:2 160:1 |
| 7:30 244:8 | able 66:14, 16, 18 | 134:4, 6 | administrator 94:13 |
| 70 193:5 | 72:5 73:11 80:10 | adamant 76:10 | admit 42:10 169:14 |
| 70,000 57:20 | 107:13 116:13 130:4 | add 11:13 21:15 | 202:16 |
| 70s 35:21 81:5 | 210:25 228:12, 24 | added 14:25 177:10 | admitted 64:7 |
| 75 80:7 | 235:6, 21 240:7 | addition 20:14 21:9 | 141:10 150:1 180:7 |
| 77 91:22 | 243:22 | 36:14 44:14 89:18 | 181:3, 21 |
| 7th 27:21 | Ablong 102:19 | 137:6, 16 231:10 | admittedly 91:15 |
| < 8 > | absolute 214:24 | 233:25 237:23 | admitting 92:8 |
| 8 20:1 143:7 | 215:21 | additional 29:24 | 96:10 203:20 |
| 8:00 244:13, 14 | Absolutely 98:11 | 140:25 145:4 150:13, | adopted 15:25 17:24 |
| 8:30 244:9, 18 246:14 | 129:11 141:21 179:1 | 17 152:20 153:12 | 83:9 |
| 80 150:21 | 203:3 244:11 | 156:24 157:23 | advance 25:8 |
| 80s 35:21 81:5 | accelerated 41:5 | 158:25 159:5, 7 | advanced 47:13, 16 |
| 183:25 | acceptable 126:17 | 179:23 189:3, 16 | 164:14 |
| 83 149:3, 8 150:23, | accepted 8:12 90:6 | 200:18 235:19 | aerial 60:2 70:14 |
| 24 151:1, 19 | 91:20 98:21 204:13 | address 6:19 26:18 | aerials 58:21 |
| 83-2134 18:20 | accepting 87:19 | 27:10, 12 39:8 154:4, | affect 54:21 74:23 |
| 834 10:6 | 228:11 | 22 155:1, 5, 10 | afraid 130:15 134:1 |
| 842 24:8 | accepts 207:18 | 158:19 159:10 166:4, | afternoon 97:9, 10 |
| 86 150:22 | access 49:1, 4 88:13 | 16, 20 242:20 | 229:9 |
| 870 10:5 | 175:4 186:13 233:17 | addressed 6:13 7:14 | agencies 11:21 |
| 89 43:25 | 243:21, 22 | 9:16 25:11 27:22 | Agency 10:5 48:17, |
| < 9 > | accessible 234:21 | 41:1 46:21 136:22, | 18 237:1 |
| 9 166:7, 14 188:19 | 237:12 | 24 137:2 143:12 | agent 109:20 140:21 |
| 224:24 232:1, 2, 3, 4, | accomplish 52:18 | addresses 215:17 | 156:22 167:22 |
| 10 | 90:11 186:23 | 240:3 | aggressive 52:11 |
| | accountable 63:10 | addressing 39:14 | ago 20:16 33:4 93:8 |
| | accreditation 237:1 | 47:25 167:6, 16 | 112:17 119:15 |
| | accurate 205:13 | adds 69:10 189:16 | AgraCo 16:9 |
| | accuse 206:14 | | |

| | | | |
|--|---|---|---|
| <p>agree 16:8 26:9 61:8 88:1 89:22 144:10 145:7, 13 193:25 194:3 208:5 agreeable 61:16 agreed 13:21 15:13 26:10 52:21 61:5 203:14 agreeing 47:22 agreement 13:23 90:19 163:1 ahead 5:7 61:19 66:10 68:8 72:24 77:12 132:5 139:16 143:7 144:23 151:14 152:22 159:14 160:10 169:20 221:4 225:4 234:16 240:14 Aiden 226:20 Aidens 222:15 AIM 97:13 102:8 109:5 110:11, 13 air-conditioning 176:23 airing 26:13 alerted 19:4, 6 20:13 Alex 2:13 algae 86:20 ALJ 18:2, 10 23:17 allegation 8:16, 17 11:3 allegations 7:6 10:14 11:1 26:18, 23 28:2, 10 30:10 allege 12:20 16:21 17:1 27:1 alleged 7:9 16:24 19:9 20:6 54:12 59:17 allegedly 59:25 alleges 4:15 26:6 alleging 8:7 allocated 52:17 allow 20:19 24:14 31:15 50:20 61:5 67:23 72:23 82:17 87:21 103:24 104:5 123:2, 8 126:20 191:21 193:10 211:16 218:9</p> | <p>allowed 7:8 9:11, 22 19:1 83:14 149:25 180:18 213:23 allowing 55:20 148:9, 10 195:10 allows 37:1 40:21 80:21 125:23 148:13 alternate 69:9 76:12 alternative 121:13 124:9 Alternatively 9:2 alternatives 54:2 186:19 212:3 altogether 27:6 amend 9:1, 11, 25 10:9 19:6, 10, 18 20:13 amended 9:23 America 85:12 American 99:9 amicus 16:9 amount 53:22 88:17 93:9 121:3 196:17 analysis 22:1, 3, 7 57:24 163:4, 6 analyzed 233:13 Andy 18:1 Anglers 86:4 annotated 180:10 204:4 annually 57:21 answer 55:18 67:23 72:24 75:23, 24, 25 76:1, 19 126:17 131:5 179:14 193:10 195:10, 13, 16, 20 209:17 213:23 220:17 222:7 224:1 225:3 answered 155:3 205:21, 22, 23 207:13 212:16, 24 217:12 219:19 224:3 239:10, 12 answering 157:18 answers 178:18 Anthony 62:7, 10, 21 198:8 A-N-T-H-O-N-Y</p> | <p>62:21 anticipated 108:7 anticipates 246:1 anxious 84:17 anybody 239:21 Anyway 40:10 41:4 83:10 91:6 121:10 126:10 245:3 apart 217:19, 20 apologize 134:8 152:9 155:4 apparent 36:1 apparently 201:19 Appeal 16:4 17:9 179:3 Appeals 24:2, 8 appearances 1:22 appeared 192:12 appearing 245:7 appears 30:10 177:10 198:7 appellate 188:1 applicable 53:24 56:7 166:5 applicant 11:16 12:4 16:11 17:2, 4 140:21 162:24 applicants 20:20 application 16:12 24:25 25:1 53:16, 18 54:14 57:9 89:5 91:13 92:1 106:16, 19 110:6, 8 111:21 112:3, 6, 10, 16, 22, 25 113:24 115:13, 16 139:17, 23 152:19 155:18 160:4 197:1, 4, 11 199:14 200:22, 23 201:8, 18, 19 202:8 203:4 207:8 222:19 231:17 239:4 applications 207:3 applied 112:16 113:5 185:22 apply 11:25 12:16 applying 155:9 appraiser 87:4 appreciate 27:3 101:11 152:12 188:7</p> | <p>213:16 228:10 243:1 apprised 8:11 approach 14:5 104:16 approaching 110:2 appropriate 54:5 137:19 188:6 242:19 appropriately 125:23 Approval 111:22 approved 210:12 approving 215:9 approximate 105:1 210:22 approximately 103:17 113:23 131:10 185:21 aquatic 46:6, 7, 10 79:8 81:25 84:12 86:8 88:23 90:8 92:7, 10, 17, 18 94:4 115:3 162:12 192:3 archeological 156:5 area 33:19, 25 34:15, 22 35:2, 3, 4 40:11, 17 42:2 43:8, 13, 25 44:1 45:16, 17, 20, 21, 23 71:1, 10 78:6 82:9 83:2 84:20 85:7 88:10, 12, 20 104:10 110:15 115:14 120:19 121:1, 3 131:12 132:1 137:9 138:17 162:19 173:19, 20 186:25 193:15 196:8 209:11 222:14 231:23 232:6, 11, 15, 16 233:13, 14, 15, 19 234:10, 17, 18, 20, 23, 25 235:4, 9, 11 236:20 237:5, 8, 13 238:6, 8 240:2 areas 33:11 45:8 46:1, 5, 16 47:24 55:6 71:21 79:24 84:15 97:22 99:21 103:5 139:5 193:17, 21 194:13, 21 233:20, 22, 24 234:1, 4, 5, 9 243:12</p> |
|--|---|---|---|

| | | | |
|--|---|--|--|
| <p>argue 12:1, 24 20:19 50:15 188:2, 5 206:23, 25</p> <p>argued 6:18 15:11 58:19</p> <p>arguing 10:3 19:8</p> <p>argument 4:9, 12 20:18 22:25 23:5 24:21 26:14 27:14, 22 37:20 242:4</p> <p>argumentative 205:20 206:20 207:13 209:16 240:22</p> <p>arguments 25:4 30:18 50:25 203:18</p> <p>arrival 73:13</p> <p>Aschauer 2:8 14:5, 8 35:22 61:12 62:5, 15, 16, 18 64:2, 5 67:20 68:6 70:2 72:8, 21 74:2, 7, 10 76:3, 22, 25 79:25 207:14 213:14 230:13 238:13 239:8 240:11, 21 241:15, 21 242:5, 12, 13, 23 243:3, 15, 17</p> <p>asked 3:7 9:25 27:11, 16 74:12 75:1 76:4 83:7 94:16 156:23 178:8 186:14, 17, 24 201:7 205:21, 22, 23 206:3 207:12 212:15, 24 216:10 217:11 219:21 226:9 227:10 239:10, 11 241:22</p> <p>asking 19:1 26:21 148:19 150:4 180:24 215:3 216:7 225:11 227:14 228:20</p> <p>aspect 16:17 201:11</p> <p>aspects 114:8</p> <p>aspersions 9:9</p> <p>assembling 109:23</p> <p>assenting 244:20</p> <p>assert 6:19 207:9</p> <p>asserted 17:6</p> <p>assertion 87:2</p> | <p>assessment 110:22 111:1, 6 233:14 236:20, 23 237:4, 16</p> <p>assessments 49:17</p> <p>assigned 231:24</p> <p>assist 146:12 162:13 163:4</p> <p>assistance 109:23 112:13 139:21 146:7</p> <p>assistant 94:15</p> <p>assisted 163:6</p> <p>associated 43:25 45:15 49:2 110:23 115:9 119:5 122:16 161:12 170:3 171:4 206:14, 17 216:22</p> <p>Association 99:9, 10</p> <p>associations 99:8</p> <p>assume 73:19 101:13 149:19 184:21 187:9 220:22 221:14 226:20 240:5 241:14 246:3</p> <p>assumes 220:21 240:21, 23</p> <p>assuming 193:8, 20</p> <p>assumption 90:24</p> <p>assumptions 90:6</p> <p>assurance 22:6, 16 56:25</p> <p>assurances 7:10 11:4 17:3 93:18</p> <p>assure 49:6</p> <p>asterisk 53:5</p> <p>Atlantic 41:2</p> <p>attached 53:20 58:23 153:14 154:13 155:23 156:9 161:5 162:21 201:18</p> <p>attachment 113:14, 15 114:5 139:16, 23 141:20, 25 145:20 146:2, 3, 4, 11, 14, 25 147:3, 4 154:14 204:25</p> <p>attachments 7:6 10:24 25:10 53:18 113:13 158:23</p> <p>attack 201:2</p> | <p>attacking 201:1</p> <p>attempt 18:22 84:19</p> <p>attempted 220:3 240:1</p> <p>attention 3:13 16:5 18:1 44:7 48:5 51:11 91:22 101:11 149:17 153:1 234:16 239:2, 6</p> <p>attorney 2:13, 17 20:18 195:15</p> <p>attorneys 3:6</p> <p>attract 132:13</p> <p>attributable 52:22</p> <p>attributed 48:15</p> <p>August 113:1, 22</p> <p>authentication 202:11 203:15, 18</p> <p>author 64:11 83:19 141:25 146:4 233:4</p> <p>authored 65:23</p> <p>authorities 204:16</p> <p>authority 6:21 9:5 69:7</p> <p>Authorization 111:24 186:22 187:11</p> <p>autopsied 48:14</p> <p>availability 94:20, 24</p> <p>available 94:22 95:3 124:24 126:10 182:10, 14 186:15 211:24 229:11</p> <p>Avalon 196:25 197:18 198:5</p> <p>avenue 74:21</p> <p>average 73:15</p> <p>aware 8:6 24:22 72:19 73:1 76:9 102:11</p> <p>< B ></p> <p>bachelor's 98:25</p> <p>back 3:18, 20 14:18 29:13 35:21 50:3 52:5 59:13 62:2 70:19 86:15 96:2, 14, 19 98:17 100:21 117:11 120:10 122:1 125:4 182:7 184:8 189:24 198:25 204:1,</p> | <p>22 206:10 218:19 225:8, 12 227:19 229:16 234:25</p> <p>backed 69:10 190:10</p> <p>background 51:8 142:9 182:4 191:3, 19, 22 198:18 200:21</p> <p>backs 125:24</p> <p>backup 188:18 235:6</p> <p>backwards 131:7</p> <p>bad 49:11 50:16, 17</p> <p>Badgering 207:23 208:5</p> <p>badly 218:2</p> <p>bags 105:10, 13, 14 107:10, 12</p> <p>bailiff 94:10 95:15, 17 244:14</p> <p>Baker 153:21</p> <p>balanced 22:19</p> <p>balancing 21:20 22:10 56:8 187:6</p> <p>ball 46:13, 23 146:21 171:2, 5, 25 172:5</p> <p>balls 46:23 147:9 162:19 171:14, 24</p> <p>Baltimore 79:10</p> <p>bank 38:6 219:1</p> <p>bankruptcy 81:18, 19 182:22</p> <p>bans 39:10</p> <p>barely 133:2</p> <p>barnacles 46:25 108:15, 17</p> <p>barrier 40:20 84:23 86:11 138:15</p> <p>barriers 137:16, 17, 25 138:19</p> <p>based 46:1 54:12 76:13 90:10 93:7 102:23 110:17 124:23 126:10 134:7, 24 146:11 163:8 184:7 185:4, 20 200:23 211:4 227:15 228:16 240:2</p> <p>bases 208:3</p> <p>basic 25:17 27:8</p> |
|--|---|--|--|

| | | | |
|--|---|--|--|
| basically 26:4 34:1 45:18 51:10 101:4 105:9, 11 205:1 | beneficial 163:15 165:2 208:11 | Board 23:25 24:10 110:25 | boils 27:9 |
| basin 45:4 91:11 93:15, 16 146:20 147:5, 11, 19 148:17 150:10 160:18 172:24, 25 173:13 | benefit 46:12, 17, 18 54:19, 20 57:2, 3 82:23 90:23 158:13 163:11, 12 175:4 186:10 | boat 39:24, 25 40:2, 12, 17, 18 41:6, 7, 8, 9, 15, 17, 20, 21 43:13, 14, 17, 20 44:3 50:20 60:1 72:6, 20 80:21 82:12 83:5 84:8, 10, 20, 23 85:8 86:11, 16 87:6 106:22 123:7, 16 124:18 126:8 135:6 183:23 185:8, 11, 17, 19 186:3, 16 198:13 199:16 208:19, 21 209:2 210:20 211:23 213:6, 12 233:18, 21 234:22, 23 235:17, 22 243:5, 21 | Boksner 2:13 |
| basins 39:11 91:5 146:17 147:14, 15 149:3, 8 151:19 160:15 161:1, 7, 8 173:2 | benefited 54:24 55:4, 7 100:11 | boater 49:2 68:10, 11 69:12 122:8 126:24 127:2 129:6 | bonus 52:24 |
| basis 16:22, 23, 24 17:1 20:1 38:10 40:23 51:9 85:17 206:22 | benefits 46:14 58:11 140:10 152:15 | boaters 65:8 67:7, 9, 14 68:3, 4 80:23 116:12 122:23 132:16, 19 135:4 137:8 174:5, 6, 13 209:11 214:4 | booted 11:2 |
| Bates 44:20 64:3 171:19 232:24 | berm 82:21 83:4 105:12 192:6, 7, 10, 18, 20 217:7 218:1, 16 223:3 | boating 49:1 68:14 131:24 174:10 | bottom 80:11 82:19 112:7 124:17, 18 125:16 131:9 133:19 134:10, 14 135:2 147:23 148:2 193:6 208:21 |
| bathtub 92:25 | best 3:11 12:7 39:5, 7 136:24 138:11, 12 204:18 205:13 246:14 | boater 49:2 68:10, 11 69:12 122:8 126:24 127:2 129:6 | bottom-dwelling 35:9 |
| bathymetric 128:19, 21 131:16 135:18 157:24 | better 22:24 23:5 76:19 78:1 95:23 134:19 227:25 | boaters 65:8 67:7, 9, 14 68:3, 4 80:23 116:12 122:23 132:16, 19 135:4 137:8 174:5, 6, 13 209:11 214:4 | bottoming 129:7 |
| bay 86:10 | beyond 42:8 50:12 70:4 186:1 191:19 215:5 235:7 | boating 49:1 68:14 131:24 174:10 | bought 81:23 84:7 |
| Beach 79:16 | big 57:13 101:18 106:2 107:5, 6 124:6 | boats 40:19, 21 41:10 67:6 70:24 71:21, 24 72:5, 14, 16 80:18, 20, 22 84:18 120:19 122:24 123:3 124:5 126:20 132:14 188:19 206:2, 5 211:17 240:19 241:3, 4, 6, 7 | bouncing 235:18 |
| beaches 79:18 | bigger 108:6 132:14 | Boca 79:18 | boundary 221:2, 5 |
| beat 245:3 | Bight 35:3 45:17 80:12 91:7, 8 | bodies 37:9 39:8 48:13 54:6, 8 | bounders 123:13 |
| began 51:12 59:6 79:11 | bit 6:24, 25 9:10 47:17 83:21 84:4 105:20 116:17 117:11 119:20, 21 125:6 127:19 132:6 141:16, 19 151:9 154:10 160:11 161:20 167:12 196:4 197:6, 12 201:4 | body 36:23, 24 37:13, 25 39:13 45:11 46:9, 11 47:14 51:24 105:4, 15 107:6 162:9 | bounds 212:4 |
| beginning 31:5 114:21 137:5 166:8, 13 170:13 | black-blue 34:11 | Boilermakers 99:2 | brackish 37:15 109:10, 11 116:6 152:4 |
| begins 10:15 34:20 217:18 218:25 | blame 39:23 | Boilers 99:3 | breach 35:23, 24 36:2 46:5 105:2, 8, 15, 18, 19, 21 107:1, 4, 7, 14, 23 108:23 188:13 219:20 222:14 224:9, 11 225:7 226:10, 11, 15, 18 |
| begun 19:17 | bleed 148:13 | | breaches 35:18, 20 36:21 46:3 59:3, 4, 5, 6 88:21 92:6 102:17 103:1, 7, 10, 14 104:24 106:1, 5, 9, 24 183:19 190:5 218:2 219:8, 13, 14, 24 220:6 221:10, 11 223:4, 11 224:12, 17 225:24 227:13 |
| belief 185:4 | bleeder 148:3, 5 | | break 3:17, 23 30:7, 15 60:17, 19 94:8 130:14 168:22 |
| believe 13:4 15:6 28:12 36:12 47:11 66:15 70:9, 25 72:8 75:12 88:2 113:23 138:23 150:23 154:6 155:20 156:9 169:4 183:16 185:1, 3 190:1, 2 192:2, 3, 9 198:20 222:22 232:12 245:7 | block 95:21 | | breaking 229:13 |
| believes 215:17 | blowups 35:25 | | breaks 59:1 |
| belong 192:1 | blue 131:19, 21, 25 132:9, 11 133:10 | | breezeway 95:19 |
| belt 138:5, 7, 10 | BMAP 52:11, 13, 16, 24 53:3, 8, 9, 12 91:9, 20 93:7, 17, 22 | | bridge 33:15 80:6 85:12, 13 86:9 87:8 88:15 |
| bends 35:2 | | | bridges 79:6 |
| | | | brief 19:23 56:22 61:6 168:18 |

| | | | |
|--|---|---|--|
| <p>briefly 14:21 98:23 110:1</p> <p>bring 9:18 29:13 35:10 44:9 48:5 91:21 92:17 100:19 181:12 239:6</p> <p>bringing 101:11 234:15</p> <p>brings 12:9 85:16</p> <p>broaden 29:17</p> <p>broader 13:19</p> <p>Brookwood 27:24</p> <p>Brookwood-Extended 10:4</p> <p>brothers 79:10</p> <p>brought 11:1 13:18 21:2 25:5 28:20 80:23 136:9 239:1</p> <p>Brown 110:24 126:15 139:24 141:17, 24 196:22</p> <p>buffer 80:6 88:16</p> <p>build 91:18 124:21, 24 185:23 186:12, 22</p> <p>building 95:13, 14 120:17 121:21 137:23 186:16</p> <p>built 81:4 83:22 90:17 108:1 189:14</p> <p>bulk 75:16</p> <p>bump 234:10, 17 235:2</p> <p>burden 17:3, 4</p> <p>burden-shifting 15:24</p> <p>burn 235:16</p> <p>burning 235:20</p> <p>Burnt 241:10</p> <p>butt 84:10</p> <p>buy 90:3</p> <p>< C ></p> <p>C50 97:19</p> <p>C-50 169:3</p> <p>Cafe 95:19</p> <p>calculation 167:6</p> <p>calculations 162:14</p> <p>Caldwell 110:25 126:15 139:25 141:17, 25</p> | <p>Caldwell's 196:22</p> <p>calendar 94:22 95:7</p> <p>call 3:25 48:14 61:16 62:4, 6 65:15 72:4 73:12 76:16 80:9 82:20 88:21 92:2, 15 96:8, 21, 24 139:4 147:20 234:10 238:1, 5 245:11, 12</p> <p>called 35:2 39:25 80:4, 8 81:10 83:6 85:12 86:4 199:15 202:3 225:6 227:20</p> <p>calling 131:18 230:14</p> <p>calls 65:19 74:15 75:10 207:21 208:1 215:2 237:25 238:3</p> <p>Caloosahatchee 33:10 34:25 35:1 45:9, 12 47:18 52:12, 13 54:8 57:4, 12, 23 59:20 71:18 79:7 80:3, 13, 24 82:1 83:16 88:14 89:11, 19 90:11 91:16 93:3 94:4 162:1, 6</p> <p>Calusa 47:5 57:10</p> <p>camera 14:14</p> <p>canal 36:3 38:20 40:22 41:3 49:24 58:22 72:15 82:4, 11, 17, 20, 21 86:5 87:7 88:13 92:5 109:2 120:23 121:17, 21, 24 126:12, 18 131:17 132:10, 13 143:23 150:9 151:21 165:6, 7 184:22, 25 188:22 189:17 193:4, 21, 23 194:12 195:2 221:17 223:3 227:21 232:12</p> <p>canal-dredging 102:2</p> <p>canals 38:25 42:5, 6 60:11, 14 65:4 69:22 73:15 79:11, 12 81:9, 14 84:7, 18 86:17, 19, 22 101:25 102:5 103:6 127:11 128:20, 21 131:22, 23 133:10 137:17 150:8 164:18,</p> | <p>19 165:14 182:12 189:21 193:17 196:2, 13</p> <p>capacity 50:12</p> <p>CAPE 1:1 2:8 20:6 32:19, 23 33:10 34:4, 22 36:4 42:9 43:10 47:8, 9, 10, 15 51:15, 20 57:18 62:6, 25 63:3, 5, 8, 16, 24 64:13 70:21 71:11 72:2 75:6 78:25 79:2, 3, 6 81:9, 14, 23, 24 82:9 83:9 84:6 86:18, 23 88:17 90:18 91:11, 19 99:21, 23 100:2, 6 101:22, 25 102:4, 7 103:2 104:25 109:5, 20 127:11 131:22, 23 133:13 134:23 135:23, 24 140:22 142:9 147:19, 24 153:1 163:9, 14, 20, 22, 23 164:5, 13, 21 165:4 182:11 183:12, 22 184:1, 4, 22, 24 185:16 186:21 189:18 191:15 194:13, 14 195:4 196:5 209:21, 25 210:4, 7 213:3, 5 222:13 230:20, 22 231:1, 3, 6, 10, 12, 16, 20 232:7, 11 233:12 235:12 237:25 243:11, 18</p> <p>Captiva 79:17</p> <p>capture 22:22 38:24 192:14</p> <p>Care 10:4, 5 27:24 153:2 202:13</p> <p>career 64:22, 25 69:18 99:18, 25 183:12</p> <p>careful 107:16</p> <p>Carl 85:25 209:25</p> <p>Carp 243:20</p> <p>Carpenter 2:20</p> | <p>case 1:19 5:25 6:11 8:8 9:24 10:1, 6, 7, 8 11:10, 12 12:19 15:19, 25 16:2 17:3, 7, 9, 11 18:2, 9, 12, 20 19:8 20:14, 15, 16, 17 23:15, 25 24:7, 24 25:2, 8, 13 27:25 28:1, 3 29:18 35:12 39:19 40:23 45:2 50:14, 21, 24 56:10 58:3 89:9, 20 160:1 179:25 189:18 198:15 213:20 245:8 246:2, 6</p> <p>cases 6:1 7:20 10:8 11:14 13:17 14:9, 11 17:19, 25 25:6 32:14 33:2 85:21</p> <p>Casey 85:10, 11, 13</p> <p>cast 9:9</p> <p>catch 39:11 45:4 78:11 91:5 146:17, 20 147:5, 11, 14, 15, 18 148:17 149:3, 8 150:10 151:19 160:15, 25 161:7, 8 172:24, 25 173:2, 13 189:7 235:15</p> <p>cause 21:10, 16 41:20, 21 48:10, 15 50:3 89:10, 11 175:8 206:9</p> <p>caused 41:5 87:3 190:10 218:16</p> <p>causes 8:15 120:25</p> <p>causing 235:19</p> <p>Cayo 79:17</p> <p>cease 81:15</p> <p>ceased 36:4</p> <p>Ceitus 39:25 40:2, 12 60:1 84:20, 23 85:8 86:10</p> <p>Center 10:4</p> <p>central 57:18</p> <p>certain 39:19 103:19 107:17 112:14 207:9, 18 214:25 228:13</p> <p>Certainly 74:4 87:16 94:14 101:18 102:15</p> |
|--|---|---|--|

| | | | |
|--|---|---|---|
| 114:15 128:22 168:20 176:20 181:4 184:10 187:8 201:10 certainty 24:5 certified 1:14 cetera 25:15 65:8 chain 64:23 challenge 15:22 20:2 32:20 122:19, 20 124:6, 7, 23 174:7 237:6 challenged 33:3 45:2 54:11 56:8 115:5 159:25 challenges 122:22 challenging 174:6 chamber 120:24 chance 24:14 50:15 change 25:2 29:2 39:11 41:1 42:16 43:4 51:19 111:13 127:7 135:17 136:5 143:22 176:19 246:7 changed 85:7 107:24 110:17 149:3 226:14, 25 227:14 change-out 147:14 changes 29:12 135:15 136:4 143:19, 22 changing 43:1 channel 71:17 122:16, 18, 19, 22 125:1 126:14 174:4 channelized 36:22 38:8 channels 132:24 135:10 chapter 25:17 character 220:19 charge 24:6 charged 231:8 Charlie 87:4 Charlotte 84:5 chart 129:10, 20, 24 131:4 132:25 133:7, 14, 16 134:17 178:21 226:11 charts 134:2 | chat 130:21 chats 130:8, 10, 12 check 130:13 132:19 198:3 chief 61:5, 16 62:7, 19, 23, 25 63:3, 8, 13, 16, 23 64:6, 9, 13, 20 65:16 66:11, 18 67:18 74:11 75:12, 17 77:2 229:9, 14 230:8, 14, 19, 23, 25 231:2, 6, 13, 20 232:24 233:6 234:3, 19 236:13, 18, 19 237:18 238:22 239:21 241:13, 14, 20, 23 242:24 243:4, 18 chief's 230:5 chime 202:13 Chiquita 34:15 44:3 51:12 63:14, 20 64:16 65:22 70:18 73:20 75:18, 21 80:16 81:1, 3 82:12 83:5 86:16 88:12, 20 131:13 132:22 151:20 173:21 231:14 236:14 237:9, 10, 15, 22 238:11 chosen 124:10 210:24 Chris 2:10 circled 34:15 circumstances 208:12 citation 20:3 citations 6:21 cite 10:1, 7 12:1, 2, 3 21:23 24:19 25:6 cited 7:20 21:18, 24 22:14 24:6 cites 28:5 cities 42:4 citing 27:24 citizenry 11:21 CITY 1:1 2:5, 7, 12 14:2, 3 20:6 27:23 32:19, 22 38:1 39:3 42:9 43:11 47:22 48:24 49:8 51:14 52:11, 18 53:8, 9, 12, | 19, 22 56:15, 25 62:6, 25 63:3, 5, 8, 12, 16, 24 64:13 69:12 72:2, 19 83:8 86:22 88:17, 20, 22 89:7, 9, 20, 23 90:7, 18 96:23 99:21, 23 100:2, 5, 6 101:17, 22, 25 102:4, 8 103:1, 11, 12 104:25 109:4, 20 112:20 115:24 135:23 140:22 142:9 145:21 146:8 149:2 150:14 152:19 153:1 162:13, 25 163:1, 8, 9, 11, 20, 22, 23, 25 164:2, 5, 7, 13, 15, 16, 21 167:24 168:1 183:12, 22 184:1, 4, 19, 22, 24 185:6, 16, 18, 21 186:21 187:10 189:24 190:4, 9, 10 205:6 208:8, 9 209:21, 25 210:4, 7, 9, 13 213:3, 5 214:6, 10, 14, 17, 24 215:4, 21 216:2 222:13 230:20, 21, 24 231:1, 3, 6, 10, 16, 20 232:7 233:11 237:25 239:3 240:15 City's 27:18 52:4 97:19 100:3 124:24 133:22 163:16 164:4 citywide 100:15 civil 17:12 98:25 110:8 207:5 claim 8:16, 18 12:20 27:20 claims 6:15 8:14, 21, 22 9:3, 13 12:13, 14, 20 29:10 49:22 clarification 25:22 85:15 153:11 157:24 232:9 clarified 158:3, 6 clarify 76:4 Class 21:13 45:11 54:7 clean 30:16 199:23 200:3 203:8, 22 cleaned 83:1 90:20 | cleaning 83:3, 13 194:20 cleanse 47:3 clear 7:3, 4 11:9 15:25 17:7, 17 19:9 36:13 103:21 155:7 190:6 204:6 clearer 135:9 clearly 7:2, 18, 23 10:8, 10 12:10 13:22, 24 14:24 15:17, 21 18:5 23:10 25:12 40:13, 15 41:7, 25 42:1 51:1 56:11 60:3 87:13, 15 117:6 142:20 155:4 228:6 client 32:22 33:11 213:2 clients 244:24 close 21:13 67:6 91:8 124:15 190:17 closed 68:19, 24, 25 69:3 86:17, 23 233:16 closely 35:24 closer 88:19 100:20 117:10 176:7, 10 198:24 closes 40:21 Coast 85:22 86:12 238:3 co-counsel 2:19 Code 23:20 colleagues 78:4 collect 239:21, 25 240:2, 7 colliding 67:7 collision 233:21 234:22 colors 129:10 column 30:13 176:17 combinations 1:9 come 37:1 59:7 65:13 75:15 77:21 79:4 80:22 83:12 85:19 88:21 93:3 110:25 141:5 185:15 193:1 195:22, 23 199:15 212:7 216:22 217:1 229:15 |
|--|---|---|---|

| | | | |
|--|--|---|---|
| <p>comes 10:3 14:23 34:21 80:13 86:5 87:7 91:18 150:5 194:24 200:19 203:1</p> <p>comfort 60:17, 19 168:22</p> <p>comfortable 101:14 183:9</p> <p>coming 3:15, 17 16:23 38:9 67:6 80:7 91:3 105:6 130:7 141:8 179:8</p> <p>comment 146:5 153:14, 20, 23, 25 155:20 156:1</p> <p>comments 142:5 153:6, 7, 10 156:12, 14, 17, 18, 23, 24 157:10, 13 158:20 159:11 215:15 228:7</p> <p>commercial 85:10, 14 164:25 165:24 194:21 195:24</p> <p>commercially 83:23</p> <p>commission 116:12</p> <p>Commissioners 24:1</p> <p>commitment 61:4</p> <p>committed 49:8</p> <p>common 93:21 104:14 164:13</p> <p>communicate 137:8</p> <p>communication 214:21 235:8</p> <p>communications 235:7</p> <p>community 86:6 233:14 236:20, 22 237:2, 3, 16</p> <p>Company 16:3</p> <p>comparable 41:23</p> <p>compare 42:12</p> <p>compared 201:23</p> <p>comparing 134:10</p> <p>comparison 41:19 43:19, 21</p> <p>competent 144:18</p> <p>compiling 140:23</p> <p>complained 24:14</p> <p>complaint 24:4, 12, 13</p> | <p>complaints 67:6, 9 68:2</p> <p>complete 15:13 123:11 190:15 202:11 203:16</p> <p>completed 184:7, 18, 19 189:13, 15 219:9, 16 220:2, 7 229:20 246:5</p> <p>completely 16:11 55:14 83:22 195:15 242:16</p> <p>completing 246:1</p> <p>completion 102:21 245:10</p> <p>complex 11:13</p> <p>complexity 12:6</p> <p>compliance 8:25 12:8 20:19 26:1 166:5 212:9</p> <p>complied 12:5 22:6</p> <p>comply 21:22</p> <p>component 116:24</p> <p>components 116:5 117:2</p> <p>compound 206:19 220:15 222:4</p> <p>compromise 81:22</p> <p>computer 3:18 168:19 181:10</p> <p>computer-generated 1:7</p> <p>concede 23:6</p> <p>concept 38:23</p> <p>Conceptual 111:22</p> <p>concern 33:12 45:8 47:24 65:7 132:2 156:18 179:12 211:20 233:21, 25 234:18 236:15 243:12</p> <p>concerned 117:22 134:22 154:1, 2 179:6</p> <p>concerning 49:19 109:18</p> <p>concerns 4:7 55:16 56:17 64:14, 19 65:1, 21 110:7, 9 129:6, 9 136:22, 25 138:25</p> | <p>143:8, 11 154:22 155:5, 10 156:4 158:19 166:4, 21 174:3 183:1 216:12 233:9, 10 235:10 236:14 237:18, 22, 24 238:8 241:23</p> <p>conclude 90:22</p> <p>concluded 245:8</p> <p>conclusion 144:4 207:22 208:2 215:3</p> <p>conclusions 11:8 128:17 144:2, 6, 8, 10, 14 145:7, 13</p> <p>concrete 105:9, 10, 13, 14 107:10, 12 124:16, 18 125:15 131:9 133:19 134:11, 14 135:2, 6, 21 208:21</p> <p>condition 33:23 44:17, 18, 19 49:9 52:6, 7, 23, 25 53:2, 3 55:5, 9, 10 61:11 89:15 160:11 166:9 167:6, 10, 12, 15 173:23 174:1 185:9 206:18</p> <p>conditions 42:23 55:8 56:2 89:6 106:6 107:4 128:3, 9 133:8, 17, 18 134:4, 7 138:24 139:4, 13, 14 145:2 166:4, 7, 8, 14, 18, 20, 23, 24 167:1, 24 170:8 174:10 199:16 227:8, 13</p> <p>conducted 81:9</p> <p>confident 8:5</p> <p>configurations 79:23</p> <p>confines 138:1</p> <p>confirmation 94:13</p> <p>confirmed 174:2</p> <p>conflating 15:6</p> <p>conflict 89:8</p> <p>conform 8:24</p> <p>confused 87:25</p> <p>confusing 15:7 134:8 178:6 179:1, 2 200:17 220:15</p> | <p>confusion 4:14</p> <p>conjunction 238:2</p> <p>Conklin 17:8, 16</p> <p>Connect 47:5, 20 57:10 90:11 163:2</p> <p>connected 35:24 163:20</p> <p>connecting 36:5</p> <p>connection 36:2 47:7, 18 105:16 107:6</p> <p>connections 107:18</p> <p>consent 18:4, 5 19:2, 3, 16 20:22 26:14 190:24 191:8, 10, 14 192:8 221:23</p> <p>consequence 81:16</p> <p>conservation 54:21</p> <p>consider 22:3 25:1 185:19 209:22 213:6, 22 239:6</p> <p>considerable 172:22</p> <p>consideration 21:3 55:10</p> <p>considerations 137:6, 14</p> <p>considered 20:7 43:10 44:24 103:7 185:16 187:4 210:20, 21, 22 213:24</p> <p>consisted 82:3</p> <p>consistency 38:7 142:10</p> <p>consistent 121:24 127:10 145:16</p> <p>constrained 32:8</p> <p>constraint 68:23 135:1, 3</p> <p>constraints 68:22 124:19, 22</p> <p>construct 124:23 125:24 221:15, 20</p> <p>constructed 58:22 221:1 224:2</p> <p>constructing 126:9</p> <p>construction 38:20 44:6 81:8 108:6 136:23 137:1, 14 166:15 168:13 173:12, 16 189:10, 11,</p> |
|--|--|---|---|

| | | | |
|---|--|--|--|
| <p>12, 16 219:9, 15 220:2, 4, 7 consultant 112:23 190:13 consultation 81:21 contain 1:7, 10 17:21 166:3 224:16 contained 24:11 190:24 containing 83:5 contains 21:8 182:4 205:3 contaminants 47:4 contaminates 152:17 162:6 contamination 39:8 contend 7:8 14:25 contending 25:13 content 59:10, 11 192:5 contention 17:1 contents 140:7 contest 4:18 context 41:20 continue 43:16 50:6 90:17 98:18 107:5 170:21, 24 172:7 173:5, 15 190:7 continued 81:13 94:3 227:15 continues 53:13 88:16 214:6 continuing 166:14 continuous 38:10 continuously 99:6 contributing 187:15 contribution 52:16 contributions 52:16 control 102:4 105:16 137:1, 18 138:6, 15 151:22 235:22 controlled 42:3, 4 43:22 103:18 123:15 controversy 16:21 conventional 80:21 conversion 53:13 copies 178:25 179:3 copy 5:1, 3 14:9 16:6 17:8 61:23</p> | <p>130:24 131:1 180:19 181:4 203:22 CORAL 1:1 2:8 20:6 32:19, 23 33:11 34:4, 22 36:4 42:9 43:10 47:8, 9, 10, 15 51:15, 20 62:6 63:1, 3, 6, 8, 16, 24 64:14 70:21 71:11 72:2 75:7 78:25 79:2, 3, 6 81:9, 14, 23, 24 82:10 83:9 84:6 86:18, 23 88:18 90:18 91:12, 19 99:21, 23 100:2, 6 101:22, 25 102:4, 7 103:2 104:25 109:5, 20 127:11 131:22, 23 133:13 134:23 135:24 140:22 142:9 147:19, 24 153:1 163:9, 14, 20, 22, 23 164:5 165:4 183:12, 22 184:1, 4, 22, 24 185:16 186:21 191:15 194:13 195:4 196:5 210:5, 8 213:3, 5 222:13 230:20, 22 231:1, 4, 7, 10, 12, 20 232:7, 11 233:12 237:25 Coral's 57:18 135:23 164:13, 21 182:11 231:17 corner 33:8 189:11 Correct 68:13 69:18, 25 70:24 71:1, 15, 18, 22 128:7 132:10 151:2 173:8 182:8, 13, 17, 19, 22 184:20, 21 189:17 190:21, 24 193:18, 20 194:12 196:17 197:1 198:13 200:5 202:18, 21 204:20, 24 207:3, 11 210:9 211:21 213:18 214:7, 15 218:4, 6 234:10 245:8, 14 246:12 corrected 1:13</p> | <p>correctly 141:13 corroded 117:3 corrosive 116:6, 7 cost 119:5, 15, 16 187:24 209:3, 5 211:5 Costa 79:17 council 210:9, 13 240:15 counsel 1:22 4:11 25:19 61:4 89:7 181:4 223:25 County 23:25 couple 14:9, 10 34:24 74:2 79:10 124:12 201:16 220:23 221:25 222:1 233:23 234:1 236:23 course 3:13 42:13 73:4 82:6 128:18 146:19 163:11 191:23 206:15 209:20 215:23 217:23 226:24 246:8 COURT 1:17, 21 2:5, 14, 22 3:3 4:5 5:1, 5, 11, 14, 18 12:17 13:6, 12, 15 14:4, 7, 12, 15, 18 16:4, 8 17:9 18:21 19:20 20:24 22:20 23:7 24:2, 8, 9, 12, 16 25:16, 22, 23 26:5, 20 27:5, 12, 15 28:24 30:20, 22 31:3, 9, 14, 18, 20, 23 32:10, 16 34:9, 13, 16 37:12 38:11, 16 39:1 56:19 60:16, 18, 22, 23 61:1, 7, 10, 13, 17, 20, 25 62:3, 14 66:2, 6, 10, 16 67:22 68:8 70:4, 7 72:10, 23 73:18, 22, 25 74:4 75:23, 25 76:23 77:1, 8, 11, 16, 21, 25 78:3, 5, 15 85:15 87:18, 23 88:3 94:6, 13, 15, 23 95:2, 5, 8, 16, 25 96:5, 13, 17, 19 97:5, 21 98:1,</p> | <p>4, 9, 12, 17 100:19 104:3, 9, 17 105:22, 25 106:12 113:4 116:21 117:16, 19, 23, 24 118:2, 6, 8, 11 119:2 122:1, 4, 9, 13 130:13 133:23, 25 136:8, 20 140:14, 19 141:3, 6, 15, 22 142:19 143:5 144:17, 20 145:10 148:16, 22, 24 149:12, 19, 23 150:3, 19 151:14 152:7, 9 156:20 157:1, 6, 18, 22 158:12, 15 161:21 164:8 165:16, 23 166:1 167:20 168:1, 5, 9, 20, 23 169:1, 5, 8, 11, 17, 20 171:21 175:20, 24 176:9, 20, 25 177:3, 11, 14, 24 178:4, 23 179:12, 19, 22 180:2, 5, 9, 13 181:1, 8, 14, 19, 22, 25 183:2 185:25 186:7 187:2, 17, 25 188:1, 7 191:1, 4, 21 193:10 194:8 195:11, 19 197:20 198:24 200:1, 6, 25 201:5, 14, 25 202:6, 10 203:5, 11, 16 204:3 205:7, 23 206:21 207:15 208:1 209:17 210:16 211:1, 8 212:10, 20 213:9, 16 214:12 215:5, 14, 20 216:9 217:13, 16 218:9 219:2 220:18 221:4, 7, 12, 14, 19, 25 222:3, 8 223:25 224:16, 19, 20 225:3 227:9, 18 228:10, 19 229:5, 18 230:2, 4 238:15, 19 239:11, 14, 17 240:13, 23 241:17, 22 242:3, 8, 11, 13 243:1, 10, 16, 24 244:16, 24 245:5, 13,</p> |
|---|--|--|--|

| | | | |
|--|---|--|--|
| <p>17, 19, 24, 25 246:3, 10, 13, 20 courthouse 244:8 courtroom 2:11 32:4 244:12 Court's 48:5 cover 7:6 232:11 237:4 covered 11:23 56:22 88:7 167:13 232:15 covers 232:10 crashes 65:7 create 6:25 36:18 38:6 41:15 46:23, 24, 25 79:12 124:16 194:20 217:21 235:23 created 35:20 40:25 41:8 43:12 52:20 81:20 82:7 93:8, 17 creates 34:22 86:16 89:4 122:22 217:22 creating 37:8 52:2 83:5 123:20 126:9 214:10 creation 19:13 37:4 credibility 201:2 credit 47:21, 22 53:6 90:9 91:19 220:24 228:12 credits 53:8, 11 90:3, 22 91:10 93:21 creek 36:6 105:3, 7 Creeks 10:7 36:6, 25 37:1, 2 58:23 criminal 17:13 criteria 18:17 23:14 45:1 53:25 54:13, 15 56:7 57:1 140:24 145:16, 17 166:5 207:18, 20 criticizing 228:19 critique 200:22 Cross 10:7 90:20 cross-exam 142:21 157:19 cross-examination 157:20 175:25 176:2 200:10 230:3 238:16, 20 243:5 245:10</p> | <p>cross-examining 215:15 crossing 90:12 crushing 48:13 crux 50:14 cryptic 6:22 9:19 cue 51:2 cueing 238:6 cultural 156:5 cumulative 21:11 22:1, 3, 6 23:13 cure 9:22 curiae 16:9 current 55:5, 8, 10 87:13 97:11 106:9 173:23 185:8 199:16 200:22 227:7 currently 47:16 57:11 58:6 99:4 123:6 127:4 128:14 161:24 214:3 241:9, 11 currents 55:9 111:13 cursor 70:23 71:17 80:17 86:4 curtail 98:22 curtains 138:8 cut-and-paste 23:4 cyanotoxins 86:21</p> <p>< D > damage 39:21, 22, 23 115:10 209:11 216:18, 21, 22, 23 217:7, 19, 23 218:6, 16 220:10, 13 235:19 damages 220:1, 3 danger 48:9 214:4, 10 dangerous 86:21 174:9 214:5 dark 34:9, 10, 11 darker 132:9, 11 darkest 133:9 darkness 131:21 data 128:20, 21 131:10 133:1 142:6 157:24 239:21, 25 240:2, 5, 7</p> | <p>date 6:19 9:19 113:5, 18, 19, 21, 24 183:24, 25 184:2 185:18 214:20, 22 dated 152:23, 25 158:23 day 75:9 95:10 135:4 219:13, 16 days 50:11 83:1 203:22 DCA 10:6 dead 88:10 deal 40:24 45:5 57:13 67:16 68:4 91:4 138:25 242:14 dealing 45:1 67:19 dealt 140:16 202:24 death 48:15 50:18 214:18 deaths 48:11, 22 154:2, 5 155:11 187:15 211:16 decade 47:11 decades 47:10 92:10 decaying 50:18 decent 96:1 decide 16:17 201:9 decided 123:15 186:6 deciphered 1:10 decision 18:10, 21 24:9 25:20, 21 33:21 186:18 210:3, 18 declaration 12:22 15:4 decrease 58:8, 10 deed 191:13, 15 deep 49:4 51:21 134:20 deeper 131:19, 20, 21, 23 132:10, 11, 13, 14 134:19 deepest 132:23 defense 24:15 deficiencies 9:22 20:8 58:2 deficient 27:24 28:12 defies 93:21 defined 4:16 41:25 42:2, 3 defines 151:5</p> | <p>definitely 7:17 95:9 106:10 112:19 degradation 90:1 93:23 degree 105:17 Del 241:12 delay 65:14, 15 69:10, 14 74:23 delayed 74:19 delaying 148:11 delays 147:21 206:11, 12 deliver 36:11 49:24 delivered 33:23 37:25 delivering 38:9 88:22 delivery 80:21 demand 165:12 demarcation 79:2 80:7 demonstrate 54:17 56:16, 24 59:12 demonstrated 91:14 demonstrates 10:20 117:6 demonstrative 78:18 87:15 denial 10:19 20:9 208:13 denials 28:1 denied 57:7 112:18 DEP 30:1 195:22 202:13 238:17 Department 2:15, 18 6:7 7:25 14:2 16:3 19:24 20:17, 22 22:15 24:7 32:21 37:8 44:16 51:11 52:20 53:24 56:15, 16, 24 57:24 63:6, 17, 24 66:4 69:25 73:4 74:13 81:7, 11, 16 87:2 89:8, 15, 16, 20 91:20 98:7 99:17 107:24 109:24 113:1 152:24 153:10 155:9, 21 156:4, 10, 12 159:11 169:10 182:11 189:24 207:9, 11, 17 229:23 231:4,</p> |
|--|---|--|--|

| | | | |
|--|--|---|---|
| <p>21 233:8, 10 237:14 241:24 246:9 departments 238:3 Department's 27:18 64:14 157:11 236:8 246:10 depended 83:4 depending 35:11 65:14 107:8 192:17 depict 173:1 depicted 47:6 119:25 depiction 125:10 172:5 deposition 178:8 depositions 178:9 depth 73:15 129:2 132:22, 23 133:22 135:24 227:21 depths 108:3 136:10, 12 Deputy 95:13 98:12 168:23 244:13 describe 82:15 89:3 107:3 110:1 described 44:17 73:5 83:6 84:3 183:20 191:8 192:8 197:10 222:11, 13 describes 44:16 describing 185:7 design 36:10, 17 49:20 51:13, 20 54:4 99:15 103:13 105:9 108:5, 7 110:9, 10, 11 126:1 190:8, 13, 19, 23 191:7 222:14 designated 37:6, 7, 13 designed 34:4 103:15, 21 108:3 175:12 190:16, 17, 18 designer 105:5 designing 110:2 172:13 197:3 designs 110:20 desired 120:1 despite 23:18 43:17 220:11 destroying 86:13 detail 16:13 54:14 80:10 142:1 147:3</p> | <p>detailed 11:17 49:16 168:13 details 125:7 191:18 detained 82:12 92:19 148:6, 7, 9 196:17 detention 50:12 82:7, 13 deteriorated 185:12 deteriorating 116:8 deterioration 108:4, 10 determination 24:10 29:9 167:7 174:25 determinations 28:6 determine 26:14 30:7 58:18 65:10 106:5 175:7 187:5 201:23 207:19 212:7, 8 213:21 determined 124:5 167:8 detriment 175:4 detrimental 43:4 65:15, 16 detritus 39:12 152:16 devastatingly 93:13 develop 53:11 developed 5:24 34:22 102:2 209:12 developer 36:3 81:10 147:19 191:14 development 36:15, 16 38:21, 24 43:13, 22 81:13 142:1 193:1 195:24, 25 device 3:18 39:4 105:11, 17, 19 106:2 190:8 216:23 devices 194:17 diagram 135:15, 16 die 46:8 diesel 235:20 difference 42:11 88:8 134:2 different 6:5 21:6 22:9 23:22 53:16 57:6 64:23 69:16 75:11 76:14 83:21 104:20 107:17 108:3</p> | <p>113:8 119:16 120:3, 5, 16 126:17 133:14 175:16, 17 200:14 201:8 203:4 215:20 240:18 differently 58:16 161:15 Difficult 108:1, 12 174:18 189:4 difficulties 89:4 difficulty 174:17, 19 dig 79:11 digging 79:12 81:9, 14 Dikert 85:25 86:3, 7 diligence 110:14 199:7 direct 16:4 17:25 44:6 62:17 70:5 97:7 147:22 149:16 159:14 186:2 230:1, 11 243:8 directed 153:1 direction 108:21 123:7, 10, 16, 24, 25 211:13 directions 2:23 108:22 123:3, 5, 9, 25 124:1 126:20 directly 104:12 187:21 director 2:20 99:25 100:2 116:11 230:24 dirt 137:23 221:6 discharge 51:23 57:11 103:18 138:17 150:8 151:23 163:12 discharged 164:1 189:20 194:18 discharges 47:17 103:20 discharging 196:2 discovery 5:24 8:3, 12 discrepancies 1:12 discrete 22:3 discuss 49:10, 13 54:3 114:10</p> | <p>discussed 45:13 57:5 146:14 147:3 184:4 208:14 238:10 discussing 49:7 discussion 36:8, 9 61:4 discussions 102:23 205:3 dismiss 6:14 8:14, 21, 23 9:16, 17 15:9 19:25 26:3 27:17, 19 28:15, 19, 22 228:13 dismissal 10:9 dismissed 12:13 15:10 244:4 dispel 50:1, 23 dispelled 56:12 dispose 163:1 dispositive 21:7 dispute 4:9 49:21 disputed 7:7 30:14 disputes 13:24 disregarded 18:2 dissolved 152:17 distance 84:4 distinction 40:18 165:4 distress 238:4 district 2:20, 21 16:4 17:9 18:9 23:16 24:2, 8 240:18 241:3 districting 3:8 divide 138:3 Division 6:1, 9, 12 11:18 236:18 DOAH 1:19 12:24 13:16 14:11 18:21 20:14, 15 27:4 207:19 228:24 dock 68:15 71:1 209:2 235:16 docked 71:21, 24 docket 5:6 docking 71:20 75:2 doctor 48:20 document 66:21 109:21, 22 111:25 112:9 113:8 135:20 141:8, 9, 12 142:4, 5, 6, 13 158:24 159:21</p> |
|--|--|---|---|

| | | | |
|--|---|---|--|
| 168:17 177:22 178:1, 3 180:16, 18 181:2 183:4 197:13, 21, 25 200:11, 12, 14, 15 201:3, 17 202:12, 18 203:7, 17, 21 223:21 224:16 226:6, 13, 22 227:11, 15 228:5, 16 documents 25:4 182:10, 14 199:8 200:18 228:18 242:5 dog 45:15, 18 91:6 146:21 147:5 161:8, 12 172:9, 11 doing 13:10 19:13 28:14 47:15 59:15 90:23 123:4 126:5 138:1 145:3 178:17 205:6 226:9 dollars 119:10, 13 208:10 door 95:18 doors 244:7 dot 57:11 double 155:6 doubled 52:19 doubly 178:12 downside 120:20 209:8 downsides 209:9 downstairs 244:8 downstream 41:13 45:20 55:25 127:4, 25 128:2, 15, 19, 21, 22, 24 129:2, 4, 7, 9 132:21 133:2, 9 Dr 245:16, 17 draft 159:24, 25 161:4 166:3 drain 160:15 161:25 173:2 drainage 196:12 drains 148:17 149:9 161:24 194:16 196:11 drastic 59:18 draw 132:14 drawing 161:17 223:9 | drawings 108:5 146:13 168:16 169:24 170:7, 14, 25 171:18 172:3, 4, 8, 21, 23 173:13, 16 205:3 dredge 132:4 186:23 dredged 58:22 dredges 135:24 dredging 101:24 133:13, 22 134:23 135:23 193:18, 22 194:4 207:5 227:21 dressed 24:25 dress 25:2 drive 62:1 84:18 driving 244:22 drop 47:12 105:13 148:10 drowning 233:22 234:23 drunken 67:14 dry 70:24 80:19, 23 dual 51:24 123:8 185:23 186:22 187:12 210:20 211:23 213:6 due 9:11 15:12, 15, 17 17:15 24:3 32:20 50:19 56:4 68:25 74:16 76:7 110:14 144:22 198:13 199:7 dug 36:3, 4 131:22 duly 62:11 97:2 230:9 dumping 57:14 90:14 duty 214:24 215:3, 21 dying 50:18 < E > earlier 29:15, 16 32:14 52:1 69:15 126:14 164:23 166:25 183:20 184:17 194:10 196:10 198:6 215:8 218:15 242:17 early 37:4 59:13 81:5 108:9 182:7 | 227:12 244:6, 15 245:3 Earth 78:13 87:14 earthen 121:22 easier 107:21 130:25 easily 21:18 228:25 east 33:18 34:1 78:25 126:8 136:16 eastbound 123:11 eastbounders 123:13 easy 186:13 ecological 58:15 ecologists 81:6 economic 186:14 ecosystem 43:4 46:18, 24 47:2 Edison 90:15 editorial 141:2 142:5 146:5 educate 39:9 educational 98:24 effect 7:13, 14 121:5 162:3 effective 39:4, 5 Effects 143:21 efficacious 177:22 efficiency 115:1 effluent 57:12, 14 effort 235:1 efforts 100:13 182:16 218:3 eight 48:10, 11 119:18 either 8:20 20:4, 7 40:9 127:7 136:11 180:18 190:15 192:16 elementary 17:10, 12 elements 28:5 elevated 148:8 elevation 41:1 133:21 134:11 elevations 107:9 128:23, 24, 25 135:17 eliminate 48:23 49:1 eliminated 51:23 e-mail 5:4 113:7 158:23 181:7, 12 e-mails 156:9 | emergencies 63:20 75:14 231:11 236:5 237:23 emergency 65:10, 11 74:21 230:23 238:2 Emerson 222:15 226:20 employ 138:13 employed 62:24 230:19, 21 employment 97:12 empty 58:23 encapsulate 4:13 encountered 69:18 endangered 54:22 115:8 143:24 endeavor 13:3 endeavored 11:24 ends 35:12 engage 90:7 engaged 45:23 52:4 engineer 2:11 96:24 98:3, 5, 22 99:5 100:4, 5 102:18, 23 140:21 144:19 156:22 175:13 190:18 204:8, 13 207:4 225:9 engineered 170:7 engineering 44:5 53:18 97:13 98:25 99:11 102:8, 19 109:5 110:8, 12 111:18 113:14, 21 114:5, 8 117:5 120:25 125:1, 11, 12 146:13 161:4 162:20 168:3 170:2 171:6 174:21 197:1, 19 198:5 201:18 204:13, 19, 25 205:2, 5, 12, 14 207:5 209:4 211:4 engineers 81:21 182:25 183:11 204:24 226:17 engineer's 202:4, 6 enhance 150:17 enhancement 44:15 49:7 57:7, 20 145:4 |
|--|---|---|--|

| | | | |
|--|---|--|---|
| <p>enjoy 78:7 enlarge 44:10 119:20 ensure 6:8 166:4 ensuring 140:23 167:23 enter 9:5 69:8 83:14 123:14 147:21 148:4 entered 90:19 entering 39:8 147:22 enters 162:9 entire 18:15 63:11 88:10 93:6 103:20 105:18 109:22 121:17 131:17 142:4 201:19 202:7 203:13 221:15, 20 226:6 227:6 229:23 entirely 68:15 93:12 entirety 64:25 167:13 entities 194:20 entitled 7:21 17:14 111:21 159:16 entitlement 15:16, 17 entry 147:22 entryway 69:9 enumerated 153:6 environment 37:5, 7, 17, 21, 23 42:16 43:1 49:12 59:12 108:18 109:15 116:2, 6, 7 163:13 231:12 environmental 2:12, 18 6:7 11:14 32:21, 22, 25 44:15 48:3 49:7, 17, 18 53:19 54:10 57:1 81:7, 17 99:16, 17 109:17, 25 110:3, 22 111:1, 6, 22 112:4, 11 125:2 139:22 140:2, 3, 10, 11 142:25 143:8, 10, 11, 12 144:14 145:4, 14, 15 152:25 159:5, 20 166:4, 16, 21 168:2 185:22 202:2 209:8 231:18 EPA 92:12 equals 121:2</p> | <p>equipment 45:25 77:24 208:18 eroded 218:2 erosion 41:6, 11 55:1 115:9 124:16, 19 125:18, 19 126:5 137:1, 18 138:5, 15 175:9 190:7, 10 216:18, 22 217:1, 7, 22 erosions 183:19 ERP 4:15 20:2 26:7, 23 29:19 90:6 185:22 187:6 208:13 213:21 Erwin 81:5, 12, 21 82:14, 23 83:18 escort 96:4 Especially 104:9 183:3 essence 7:21 65:20 essentially 8:20 36:4 52:24 59:21 93:17 123:21 128:10 170:8 172:13 235:4 established 11:19 88:25 190:20 Estates 18:1 estoppel 7:13 estuarine 37:4, 7, 13, 15, 17 38:5 58:20 59:12, 16 108:18 estuary 43:1, 2 et 25:15 65:8 evaluated 58:13, 17 186:6 evaluation 145:14 event 223:19 events 56:4 73:5, 9 93:12 eventually 38:25 187:22 Everglades 79:14 evert 121:16 everybody 13:10 51:18 93:10 178:15, 16 180:21 203:9 228:25 everybody's 13:21 178:19 195:11</p> | <p>evidence 3:14 17:5 31:2, 10, 13 32:1 33:5 36:13, 19 37:22, 24 39:2 41:4 43:16, 23, 24 47:8 49:14 51:1, 17 54:16, 18 55:22 56:14 60:7 61:19 87:20, 24 149:25 150:5 169:4, 7 178:1, 3 179:8 180:7 181:4 188:5 193:9 199:25 200:16 228:7, 8, 11 240:22, 24 242:6 exact 24:20 173:6 183:24 184:2 185:18 199:18 214:20 exactly 6:24 25:12 35:7 73:8 108:1 134:7 135:18, 19 178:15, 16 180:8 183:25 190:17 201:22 examination 56:13 62:17 74:9 97:7 230:11 243:2 examined 132:24 140:10 example 8:17 10:13 146:16 182:16 188:11 exceed 14:25 Excellent 94:18 189:22 exception 141:10 excess 52:20, 21, 22 53:4 91:17 exchange 55:20, 21 excited 195:12 exclude 194:19 exclusive 220:22 excuse 10:13 73:3 150:7 175:24 189:10 220:18 executed 76:24 exercise 69:7 Exhibit 44:8 51:2 52:5 61:19, 24 64:3, 8 67:19 70:11 78:11, 15 86:25 87:1, 14, 16</p> | <p>88:11 89:2 91:14, 22 97:19 101:8 111:20, 21 112:9 113:15 139:19 142:2 145:25 152:23 158:22 159:15, 16 162:21 169:3, 14, 19, 23 171:17 176:5 177:7, 8, 17 178:16 179:4 180:1 197:10 199:23, 24 200:2 204:1 222:10 232:23 233:1 237:21 exhibits 169:13 170:11 179:1 exist 128:9, 14 129:14 133:8 existed 219:8, 15 220:2 existence 102:3 existing 36:5 106:5 132:21 147:14 exists 135:1 172:16 expanded 22:12 expansion 43:13 expansive 209:7 expect 245:4 expectation 128:8 expected 6:3 51:20 expecting 96:4 expedite 69:4 177:18 expedited 116:13 experience 6:3 41:19 42:25 82:18 84:23 99:11, 14, 20, 23 101:16, 24 102:13 104:14 109:4 115:19 132:17, 18, 20 163:8 188:15 207:5 210:11 experienced 115:24 experiencing 42:23 experiment 60:10 expert 35:10 46:2 79:9 87:17 97:23 98:3, 5, 21 104:5 143:3 168:2, 3 245:6, 13, 17, 21 expertise 97:22 104:10 188:25 189:1</p> |
|--|---|--|---|

| | | | |
|--|--|---|---|
| 193:15 196:23 208:12 215:5 experts 42:10 49:14, 19 54:16 83:15 91:19 245:4, 21 expired 9:17 explain 65:1 83:20 92:2 104:5, 23 106:8 116:20 118:22 119:23, 24 125:6 129:23 133:25 134:1 142:1 143:10 147:15 151:4 153:9 163:9 167:11 216:20 explains 53:5 explanation 141:19 explanations 205:6 explore 210:21 213:23 exposed 135:6 express 38:12 233:7 expressed 16:9 65:22 183:1 237:18 expression 177:4 Extended 27:24 186:24 extensive 11:16 53:22 extensively 45:10, 23 extent 87:12 137:21, 24 extra 22:16 57:24 228:22 extreme 131:25 174:4 extremely 12:12 < F > fabricator 116:15 117:4 facie 246:2, 5 facilitate 178:18 facilities 75:2 facility 70:24 80:19 121:16, 25 fact 8:10 26:18 30:9, 10, 14 37:4, 6 38:1 39:10 40:17 41:5, 22 55:18, 19 89:11 93:24 112:9, | 10 127:21 161:4 162:8 168:20 185:20 186:4, 20 200:9, 11 243:8 fact-checking 142:12 factor 212:3 factories 83:3 factors 22:3, 18 56:9 facts 7:11 17:2, 6 20:5 49:21 55:23 56:13 193:8 240:21, 23 factual 16:21, 23, 24 17:1 50:23 142:12 factually 41:18, 22 42:17 43:6 fail 216:25 failing 93:13 fails 20:5 failure 10:20 54:12 115:3, 10 217:2, 17 fair 24:14 38:11 132:21 181:1 194:23 225:17 239:1 fairly 110:11 fairly 50:1 faith 24:21 fall 17:2 30:11 82:19 125:25 217:19 falling 217:20 familiar 35:5 63:13 73:2 102:3, 6 104:14, 19 142:8 163:16 165:5 202:16 231:13, 16 familiarity 140:1 famous 84:25 fantastic 244:18 far 33:8 60:20 70:4 104:20 105:2, 8 110:9 119:20 124:12 126:4 139:2 167:14 179:6 farther 79:4 83:24 85:21, 22 fashion 37:8 43:4 faster 121:4 fate 50:22 favorable 56:2 | FDEP 102:17 103:12 105:4, 9 152:20 190:12, 13, 18 203:2 204:16 219:21 FDEP-created 93:8 FDEP's 159:4 feature 80:1 fed 42:7 federal 26:24 28:9 feeding 47:1 feel 7:16 161:21 feet 105:13 108:8 125:21 133:13 135:24 234:25 fertilizer 39:10 82:25 fiberglass 235:20 fictitious 91:9 field 11:20 207:25 208:11 Fifth 17:9 134:1 162:16 figure 90:3 91:25 93:10 119:17 120:10, 12 125:4 151:9, 17 183:13 188:19 206:11 figures 205:4 file 141:5 142:3 201:20 202:8 203:2, 13 filed 4:23 12:18 18:25 19:24 26:6 27:21 106:16 115:14, 16 200:2 files 182:11 199:8 filing 16:10 20:11 28:23 106:18 fill 107:11 filled 108:11 filter 47:1 final 1:18 13:17 108:6 163:7 180:15 201:15 210:3 finalized 1:13 finally 47:5 156:8 175:11 186:17 financial 208:12 find 5:10 9:10 52:15 69:11 74:20 | 85:23 108:4 197:20 210:21 220:14 finding 22:4 findings 7:11 10:18 11:7 fine 53:12 77:18, 22 104:13 130:21 131:2 149:7 157:19 180:10 229:19 finger 34:5, 6 finish 74:3 88:3 145:10 195:10, 13, 15, 19 229:4, 5, 12 finished 61:14 228:15 fire 75:12 165:19, 20 229:9 230:5, 23, 25 231:2, 4, 6, 20 232:15 233:21 234:23 235:15, 17, 19, 22 236:19 238:3 240:18 241:2, 11 firefighter 234:24 236:16 firefighters 233:23 First 2:23 7:3 14:21, 22 16:4 24:18 27:18 30:7, 15 43:14 62:4, 11 89:3 97:2, 16, 17 110:18, 19 113:14 120:6, 18 131:7 148:4, 11 153:20 156:16 160:14 170:16 197:1, 20 214:17, 22 219:5 223:9 230:9 231:8 234:16 235:15 242:1 fish 10:20 35:7, 9 54:21 68:15 84:14, 15 85:17, 19, 23 115:2 153:21 154:14 187:11 215:9 216:1 fisheries 46:16, 18 fisherman 85:10 fishing 55:3 85:16 fishingest 85:12 five 20:16 33:4 79:5 100:1 168:22 231:2 fix 14:16 98:14 |
|--|--|---|---|

| | | | |
|-------------------------------|------------------------------|-------------------------------|------------------------------|
| fixed 40:20 | 223:17 | frustration 49:1 | gauge 185:12 229:1 |
| flaring 67:7 68:3 | form 35:6 | fulfill 154:22 | general 5:25 28:1 |
| flat 35:7 70:23 | format 173:10 | full 15:13 17:11 | generally 18:12 |
| fleet 85:16 | formatting 197:16 | 82:15 96:2 103:15, | 22:21 65:1 115:17, |
| flip 3:22 | former 36:3 40:1, 11 | 21, 22 110:21 111:1 | 22 144:13 153:9 |
| floating 137:17 | formula 121:2 | 124:20, 25 183:5 | generated 163:2 |
| floor 208:21 | formulate 91:19 | 202:25 208:20 | gentleman 85:24 |
| Florida 2:18, 21 | Fort 16:15 33:8 | 237:10 | geography 78:21 |
| 10:6 15:3 16:2 | 47:7, 16 79:5, 16 | fully 8:6, 11 47:21 | 84:21 |
| 17:20 18:9 23:15, 20 | 90:14, 19 162:25 | 102:25 109:22 | getting 70:4 72:9 |
| 24:2, 8 45:11 48:6 | 163:2, 12, 19 | 122:19 219:18 | 118:4 119:6 124:15 |
| 58:12, 13 60:12 78:6 | forth 112:20 | function 6:4 14:14 | 126:6 181:15 191:18 |
| 81:19 83:17 85:23 | Fortunately 174:18 | 55:6 84:2 | giant 235:17 |
| 86:12 92:12 93:23 | forward 9:18 11:2 | functioned 82:13 | give 27:6 31:16 |
| 99:5, 10 109:24 | 12:9 13:18 17:5 | functioning 122:20 | 72:10 77:6, 12, 22 |
| 152:24 153:21 156:3 | 25:5 167:25 190:14 | functions 55:12, 13 | 98:13 124:21 144:22 |
| 159:4 187:11 191:16 | 239:4 | fundamentally 200:19 | 169:12, 13 176:18 |
| 192:1 215:9 216:1 | Foulks 28:6 29:5 | funding 45:22, 25 | 202:25 220:23 228:2, |
| flow 36:10, 11, 18, 22 | found 7:25 29:10 | 52:3 | 12 |
| 38:8 39:11, 12 49:24 | 58:3 91:17 110:15 | funds 48:25 | given 47:22 50:15 |
| 50:4 54:25 55:1 | foundation 203:14 | further 5:24 65:25 | 55:19 95:25 |
| 92:14 108:20, 21 | four 63:25 79:5 | 117:13 144:4 150:17 | gives 22:2 51:8 |
| 168:21 174:7 | 93:18 196:18 | 157:25 165:10 | glean 26:24 |
| flowed 82:8 | four-room 86:3 | 175:18 220:12 | Glover 35:3 45:17 |
| flowing 108:22, 25 | frame 73:12 106:12 | future 115:3, 10 | 80:12 91:7 |
| 109:1 | 221:23 | FWC 45:22 48:6, 8 | go 1:17 5:7 14:2, 15, |
| flush 148:4, 11 | frankly 16:14 | 154:22 155:10 | 18 17:5, 16 26:17, 21 |
| focus 131:6 132:6 | Fred 2:8 | 215:16 216:5, 10 | 28:24 29:21, 22 |
| focused 3:14 99:12 | free 55:21 | 245:12 | 33:16 39:12 42:8 |
| focusing 221:10 | free-for-all 123:22 | < G > | 44:12 47:19 52:5, 6 |
| folks 84:17 186:12 | frequently 139:5 | GAC 81:10, 19 | 53:15, 20 57:17 58:3, |
| 216:1 246:14 | 193:22 209:4, 7 | 182:25 | 7 61:19 66:10, 24 |
| follow 31:1, 13 70:1 | fresh 42:17 85:17 | GAC's 182:22 | 68:8 69:13 72:24 |
| 91:12 | 109:12 | Gallery 86:7 | 76:18, 19 77:11 |
| Following 71:17 | freshwater 36:12, 18 | galore 84:14, 15 | 80:15 83:12 84:11, |
| follows 62:12 97:3 | 37:16, 21, 22, 25 38:3 | gamut 11:23 | 12, 13 85:21 89:10, |
| 230:10 | 42:5 49:23 58:18 | gap 84:5 | 23 91:25 92:18, 21 |
| follow-up 224:3 | 102:5 109:6, 13 | gasoline 82:16 | 93:2 94:14 95:17, 18 |
| food 95:13 | 151:25 152:6 164:18 | Gasparilla 79:18 | 96:13, 19 98:14, 17 |
| foot 103:17, 18 | 165:7, 14 | gate 119:13 | 99:2, 3 105:14 |
| 105:14 122:21 129:4 | Friday 94:20, 25 | gates 116:4, 5, 14, 25 | 106:24 107:12 113:2, |
| 136:17, 18 148:8 | 95:4, 10 | 117:9 118:20 119:1, | 13 119:19, 21 120:4 |
| footprint 110:16 | fringe 33:19, 22 80:4 | 120:9, 18 121:11 | 121:4 123:11, 16 |
| force 67:16 73:13 | 192:16 | 123:2, 20 124:3 | 124:5 125:4 130:17 |
| forces 67:25 70:21 | front 23:2 66:19 | 135:5 174:3, 4 | 135:4 139:16 140:9 |
| Ford 90:16 | 95:18 130:25 131:4 | 208:18 | 143:7 144:23 148:12 |
| foremost 231:8 | 169:23 179:7 180:24 | gather 229:5 | 151:11, 14 152:22 |
| forest 41:12 | 208:16 212:9 228:7 | gathered 92:5 | 154:11 155:24 |
| forgive 78:20 91:23 | fruition 210:12 | | 156:10 159:14 |
| | | | 160:10 163:14 |

| | | | |
|--|--|--|---|
| <p>164:20 169:20 170:13 171:3 172:3, 20 180:10 182:7 186:18 187:9 188:5 194:11, 12 195:1 196:6 204:22 210:18 219:5 221:4 225:4, 8, 12, 18, 23, 25 227:19 229:3 232:24 234:4, 9, 16 238:6 239:18, 19 240:14 241:13 243:22 244:17 245:3 goal 211:20 goes 16:2 23:24 27:25 28:4 34:23 52:13 54:14 82:4 84:4, 5 85:18 124:13 126:14 130:22 179:3 187:21 195:1 212:3 going 1:21 3:5, 17 4:10 14:13 20:25 29:17 30:14, 22 33:17, 21 34:17 35:3, 10, 16, 18 36:8, 9, 13, 19 37:18 39:18, 19, 22 42:15, 18 43:4, 19 50:15, 19 53:17 55:17 57:1, 2, 3, 17 58:7, 8 59:10, 18 60:7, 13, 14 66:3 67:20 68:6 69:11 70:2 72:10, 11, 23 76:11, 18 77:19 85:19 87:11 89:3, 21, 23 90:22, 24 91:1, 10, 16 92:6, 14, 16, 17, 18, 23 93:3, 4 95:10 97:19 98:22 102:24, 25 120:13 121:3 122:1 130:9 131:12 137:7 154:10 167:23, 25 168:1, 5, 19 170:13 171:20 174:6 180:6, 17, 19 181:2 183:2 186:18 187:13, 17, 22 188:4 190:6, 7 191:21 193:10 194:19 197:6 198:2 200:13, 16 204:1 206:12 212:4 213:18,</p> | <p>19 217:13, 14 218:9 221:12 222:3, 6 223:25 224:5 227:5 229:12 234:6 242:13 244:22 245:9 246:18 golf 82:5 Good 1:24 2:6 3:2 24:21 32:15, 16 65:12 97:9, 10 104:20 110:11 131:19 132:19 146:9 226:20 235:13 Google 78:4, 13 79:23 87:14 Gotcha 150:2 gotten 70:12 155:6 governor 81:12 gracefully 212:13 grader 134:1 gradually 148:13 Grande 79:18 grant 28:10 102:17 208:13 granted 28:8, 20 90:2 granting 89:5 graph 135:11 Graphs 157:14, 23 grass 148:9 196:6 gray 164:10 165:6 Great 3:3 31:24 54:14 89:4 90:20 101:10 111:20 126:1, 2, 3, 6, 9 148:23 149:21 199:4 243:1 244:16 greater 136:10 150:9 greatest 137:20, 24 Green 2:9 14:13 90:13 grid 173:10 grist 203:3 ground 138:19 grounds 186:1 groundwork 240:25 growing 164:23 grows 192:19 growth 56:3 Guard 238:3 guess 16:23 35:13 43:9 59:1 72:6</p> | <p>87:12 107:25 115:5 120:16 123:21 147:13 149:7 165:9 187:2 200:13, 17, 22 202:15 207:1 224:3 227:17 guessing 6:24 221:24 guidance 211:13 Gulf 84:14 85:18, 20 guys 129:17 228:22 244:15 < H > habitat 145:2 habitats 145:1 half 105:20 129:3 136:17 148:8 244:23 halt 81:10 hand 32:14 62:8 handbook 12:4 20:20 handbooks 11:16 handle 69:17 hands 76:17 hands-on 185:13 HANNON 1:24 2:1 4:21, 22 5:3 27:10, 14, 16 30:21, 24 31:7, 11, 17, 19 33:1, 3 49:6 50:2 60:17 61:8, 9, 11 66:6, 8, 11, 14, 17, 21, 24, 25 67:24 68:9 70:6, 8, 10 72:13, 25 73:21, 23 74:5, 12 75:1 77:8, 11, 13, 19, 23 78:1, 13, 17 85:16 88:1, 6 98:8 117:18, 22 126:24 140:13, 15 141:14 143:2 144:16, 18 156:19 157:16, 21 167:18 168:18 171:16, 20 175:25 176:1, 3, 8, 12, 14, 15, 18, 24 177:1, 4, 13, 16 178:14 179:11, 18, 20 180:12, 14, 21 181:7, 12 182:1, 2 183:7 186:7, 9 187:8, 20 188:4, 9, 10 189:4 191:6, 23, 24 193:13,</p> | <p>16 194:9 195:18 196:14 197:14, 17, 24 198:1 199:1, 22 200:5 201:4, 6, 22 202:9, 23 203:10, 24, 25 204:5, 7 205:9, 25 206:25 207:7, 16, 24 208:6, 7 210:1, 19 211:7, 10, 11 212:18, 21, 25 213:1, 10 214:1, 2, 13 215:8, 11, 13, 19, 23, 24 216:7, 14, 15 217:24 218:12, 13 219:5, 25 220:16 222:5, 6, 9, 16 223:1 224:7, 10, 22, 23 225:5, 8 226:9, 16 227:10, 16, 19 228:3, 17 229:3, 17, 25 238:21 239:13, 15, 19, 20 240:16 241:1, 18, 19, 25 242:7, 9, 22 243:13 244:21 245:1, 4, 20, 23, 25 246:16 Hannon's 75:21 77:6 happen 50:6 93:19 206:15 214:17 217:21 happened 17:16 36:20 60:1 86:8 93:19 115:4, 5, 6 146:9 184:2 195:4 happening 9:9 happy 30:24 116:12 178:20 229:3, 17 Harbor 18:19 Harbour 84:6 189:18 194:14 235:12 243:11, 18, 20 hard 5:3 61:23 76:17 108:10 130:24, 25 189:8 hardships 217:5 hardy 43:17 harm 43:24 56:3, 11 197:8 215:21 harmed 40:15 214:25 harmful 49:11 55:1 115:9 175:8 216:18</p> |
|--|--|--|---|

| | | | |
|--|--|---|---|
| 217:6 harvesting 90:8, 10 hate 5:9 168:20 haul 230:6 Hayman 2:19 hazard 48:23 hazardous 233:25 236:2 hazmat 235:24 236:1, 2, 4, 8 head 16:6 48:17 76:15 80:15 83:6 118:25 196:4 244:1 headed 19:11 headquartered 71:3, 5 headquarters 71:9 heads 244:20, 25 Health 10:5 33:24 54:19 65:17 188:24 231:8 233:8, 11 healthy 42:19, 23 43:17 hear 13:13, 17 14:1 15:19 32:2 33:17, 21 34:18 35:3, 16 37:18 39:18 47:8 58:25 66:11 75:12, 24, 25 83:15 84:21 85:3, 9, 24 86:14, 16 118:12 134:12 140:24 164:10 168:6 169:11 176:8 177:2, 5 193:13 198:22, 25 217:14 heard 16:14 48:4 141:16 177:11 192:24 228:25 hearing 1:19 3:1, 6 15:13 18:22 20:3 21:16 29:5 58:19 59:24 104:3 176:19, 22 Hearings 6:1, 10, 12 11:18 hearsay 140:17 141:10 height 38:7 heightened 236:17 held 18:21 64:18, 22 236:13 | help 98:9 114:20 151:12 152:12 187:5 190:5 224:1 225:12 235:21 helpful 104:4 129:12 130:2 131:4, 24 218:20, 22 helps 76:20 Hennessey 2:7 112:5, 8 HENNESSY 2:6 4:4 5:17 14:8, 13, 20 20:14 23:8 30:19 31:21, 24 32:2, 7, 12, 17, 18 34:11, 14, 17 37:14 38:14, 18 39:2 40:4, 6, 9 56:22 57:5 60:25 61:2, 15, 18, 23 62:1 77:4, 5, 9, 14 78:10, 14 87:11, 22 88:1, 5 94:9, 18 95:1, 3, 6 96:3, 15, 21, 23 97:6, 8, 24 98:2, 11, 18, 19, 20 100:21, 24 101:2, 7 104:7, 13, 18 106:3, 15 113:6, 9 118:14, 15 119:4, 19, 22 120:12, 14 122:3, 14 127:18, 20 129:16, 19 130:11, 23 134:16 135:8 136:21 137:3, 4, 11, 12 138:21, 22 139:2, 12, 18, 20 140:6, 8, 20 141:21, 23 142:22 143:6, 9 144:3, 5 145:6, 12, 19, 23, 24 146:24 147:1, 10, 12 148:19 149:6, 16 150:20 151:8, 16 152:10, 11, 13 153:18, 19 154:9, 12 155:23, 25 156:8, 11, 21 157:3, 4, 7, 8 158:8, 16, 17 159:18, 19 160:10, 13 161:23 165:3 166:2 167:21 168:4, 8, 12 169:2, 6, 16, 18, 21, 22 171:17, 24 172:2 175:18 177:6, 25 178:2, 5 | 179:21, 23 180:3, 8, 15, 23 181:5, 9, 20, 23 183:6 185:24 186:1, 10 190:25 191:2, 17 193:7 194:5 195:9 200:8 201:7, 15, 24 202:4 203:12 205:18 206:19 207:12, 21 209:15 210:14 212:5, 23 213:7 214:18 215:2 216:6 217:11 218:7 220:14 223:23 225:2 226:5 227:2, 24 228:4, 17 229:8, 22 244:11 245:2, 7, 9, 15, 18 246:1, 7, 17 Hennessy's 202:15 Hernandez 153:2 high 117:12, 14 121:9 122:20 142:11 higher 129:1, 4 136:18 highlight 178:22 highlighted 67:3 68:17 177:18 183:3 227:22 228:1 highlighting 177:9 200:13 highly 116:6, 7 122:11 245:2 Highpoint 18:8 23:14 hilarious 32:12 Hindenach 85:4 hired 190:13 historian 205:16 historic 36:1 historical 58:20 59:10, 11 142:15, 17 145:21 146:9 184:7 185:5, 21 188:14 222:17 historically 100:10 115:25 182:25 183:12 history 49:20 81:18 98:24 182:12 183:19 186:25 188:13 196:16 205:15 218:1 HOENSTINE 2:16, 17 5:16 14:3 19:5, 8, | 21, 22 21:17 22:24 27:10, 17, 19 28:17 56:20, 21 59:4 66:5 98:6 141:4 145:22 169:9 175:21, 23 202:14 205:22 207:23 212:1 214:11 216:4 238:18 239:10 246:12 Hoenstine's 87:2 hold 50:3 67:22 99:7 117:16 129:17 157:20 holds 10:2 hole 148:3, 5, 13 homes 3:9 90:16 189:13 Homestead 10:4 Honor 1:24 2:6, 16 3:2 4:4, 22 5:4, 9, 16, 17, 19 9:4 14:6, 20 15:2, 24 17:7 18:5 19:22 20:23 23:1, 3, 8 24:18 26:16 28:8, 10, 18 30:19, 21, 24 31:21 32:12 39:18, 20 42:19 43:7 50:15 51:7 53:15 55:9 56:6, 9, 21 60:15, 25 61:15, 24 62:5, 16 65:25 66:5, 8, 15 67:20 68:6 70:3 72:8, 21 74:2, 8 76:22, 25 77:5 78:3, 10 87:11, 22 88:5 89:4, 25 90:17 94:9, 21 96:15, 23 97:24 98:8, 11, 19 104:7, 16 108:5 117:1 118:24 125:13 130:12 140:13, 20 141:14, 21 143:2 151:13 152:11 156:21 167:21 168:4, 18 169:2, 16, 21 172:21 175:19 176:1, 18 177:6 178:2, 14 179:11, 21 180:15 181:17, 23 182:1 185:24 186:6 187:10 190:25 191:17 193:7 |
|--|--|---|---|

| | | | |
|---|--|---|---|
| 194:5 195:9 199:22 200:8 201:15 202:14 203:12 205:18 209:15 210:14 212:1, 6, 23 213:7, 10, 15 215:2, 8 218:7 220:15 223:23 224:11 226:5 227:2, 24 228:4, 7 229:8, 17 230:15 238:14, 18 239:8 240:11 241:15, 18 242:12 243:14 244:11 246:8, 12, 16, 17 Honor's 14:22 51:11 222:7 hope 66:11 230:5 hopeful 4:24 hopefully 4:1 hoping 177:21 212:12 HORBLZ 42:14 horizontal 71:20 horribles 55:17 horrific 56:4 hot 95:20 hotel 86:3 hour 96:2 212:14 244:23 hours 76:11 236:10 house 85:4 87:7 housekeeping 244:6 houses 237:11 huge 51:19 hunched 101:2 hundred 47:10, 11 119:13 hundreds 50:11 60:11 93:1 119:11 208:9 Hunter 24:6, 9 Hurricane 55:13 56:5 87:3 88:18 115:6, 7, 14 hurricanes 40:16 60:4, 7 hybrid 75:14 hydrants 165:19, 20 hydrodynamic 111:7, 9 142:7, 24 | hydrographic 156:13 157:11 hydrologic 145:2 hydrology 144:25 hypothetical 193:8 < I > Ian 55:13 56:5 69:2 88:18 115:14 idea 36:16 42:18 101:12 126:6 ideal 86:2 ideas 16:21 identical 110:13 242:2 identification 37:10 169:19 identified 12:11, 12 37:9 45:20 46:4 48:10 113:15 166:25 169:3 171:6 173:9 224:12 233:15 235:10 237:5, 6, 15 243:8 identify 11:24 12:15 13:3, 4 16:20, 21 23:2 25:14 114:10 170:12 197:21 227:11 234:17 237:2 identifying 173:10 224:11 ignore 49:10 130:9 ignored 10:15 II 21:13 45:11 54:7 III 21:13 illuminate 178:21 Imaec 18:1 imagine 187:1 245:10 immediate 110:15 151:22 immediately 2:8 33:18 34:1 45:19 110:16 128:10 129:14 143:16 183:16 impact 22:1, 3, 6 54:25 58:1 91:2 126:9 128:18, 22 174:22 | impacted 36:24 42:19 74:18 impactful 211:5 impacting 47:24 impacts 10:25 21:11 23:13 44:23 45:6 59:17, 25 60:4 110:22 111:4 127:14, 22, 24 138:25 140:10 143:15, 18 144:15 166:16 175:1 impaired 92:11 impediment 114:15 impervious 82:8 implement 11:15 implementation 100:15 138:11 162:12 implemented 51:15 implementing 21:4 51:24 implements 21:3, 5 importance 147:16 important 33:6, 25 36:8 46:7, 14 55:9 59:14 69:21 84:21 134:25 135:21 142:8 143:4 201:6 209:22 importantly 21:19 imposed 89:16 166:20 167:25 impossible 38:5 85:23 improper 193:8 improve 46:15 47:25 51:15 58:4 165:10 236:7 improved 173:7 175:2 Improvement 32:25 44:13 45:19 46:16 52:3, 8 54:11 109:19 112:4, 11 147:5 159:17 167:8, 17 172:18 175:6 231:18 improvements 45:14 51:25 102:22 103:14 144:25 145:2 146:20 161:11 171:2 172:9, | 24 208:8 222:14 improving 34:19 impugn 220:18 inaccurate 242:16 inadequacies 6:15, 17 inadequate 6:20 9:19 12:2, 3 inappropriate 178:12 228:9 inches 108:8 incidentally 90:14 incidents 239:22 inclement 238:7 include 17:23 20:5 111:3, 6 114:7 128:13 154:17 160:3 167:5 187:13 included 11:3 138:24 186:16 236:18 includes 20:3 44:14 153:6 160:5 including 46:1 47:4 51:16 54:7, 22 56:7 107:1 121:19 166:15 209:21, 25 231:12 232:8 incorporate 29:23 170:7 incorporated 30:4 incorporating 7:15 incorrect 41:18 42:17 43:6 49:22 increase 122:5 186:11 211:21 increased 84:6 121:1 196:18 198:13 increasing 122:7 Independent 240:18 Indiana 118:12 indicate 2:25 171:10 indicated 44:12 48:9 54:9 55:24 132:9, 23 141:1 192:6 203:7 208:2 211:19 228:11 indicates 132:9 160:14 162:11 indicating 18:24, 25 43:9 85:5 86:5, 17 |
|---|--|---|---|

| | | | |
|---|---|---|---|
| <p>87:5 indications 223:10 indicative 108:17, 18 indirect 111:4 Individual 111:22 122:23 167:23 173:5 individually 30:5 individuals 27:6 industry 86:13 infer 213:5 influenced 128:4 inform 24:5 informal 159:8 information 22:8 133:15 136:1 140:25 152:20 153:12 156:24 157:25 158:25 159:6, 7 183:10, 19 200:21 205:14 informed 15:18, 22 initial 110:1 148:3 initially 160:5 190:4 initiation 101:21 injection 51:21 Injuries 115:8 216:3 238:8 injury 48:21, 22 inlet 148:8 inlets 147:24 173:7 196:6, 9 Inn 86:4 inoperable 236:11 input 141:2 209:24 inquire 94:20 186:19 208:3 245:25 inquired 94:24 95:1 inquiry 222:7 223:24 inside 72:2 75:2 211:17 243:13, 18 insistence 81:13 install 162:18 installation 46:13, 23 164:4 196:7 installed 42:4 105:18, 19 106:2 147:24 162:19 164:3 installing 51:18, 21 instance 76:9</p> | <p>instances 40:14 82:19 237:24 insufficiency 29:8 intended 25:20 intending 201:1 intent 51:4, 7, 8 52:10 103:24 intention 36:14 192:12, 13 interactions 183:11 interchange 219:23 interest 4:16 12:21 15:5 18:17 21:9, 19, 24, 25 22:2, 17 23:12 26:7, 10 28:5, 18, 20 29:4, 6, 19 30:3, 12 44:21, 25 45:1 46:21 54:13 56:7 187:6, 21 212:2 213:22 236:21 interested 23:11 interlocal 162:25 internal 156:12 interrupt 104:11 114:18 117:21 168:21 183:2 197:14 221:12 interrupting 152:9 introduce 200:11, 14 introduced 87:16 201:20 introduction 114:22, 23 198:11 invested 208:9 investigate 53:23 investigated 38:2 104:25 investigating 47:25 investigation 54:6 110:19 128:14 174:22 175:7 invited 212:12, 15 involved 99:19 100:9, 12, 16 102:12, 15, 16, 20 161:2 190:3 involvement 101:22 116:1 141:20 irrelevant 167:19 186:5</p> | <p>irrigation 38:3 51:24 163:25 164:6, 11, 24 165:11, 16, 17, 18, 22, 25 196:8 Irwin 79:9 80:5 Isis 7:13 Island 35:15 78:22, 23, 24 79:17, 20 84:8, 16 85:13 164:22, 24 240:17 241:2, 4 isolated 133:3 136:16, 19 issuance 51:9 issue 4:10, 12, 15 6:13 7:19 8:5 13:24 15:11, 12 16:22 18:22 21:7 24:3, 11, 19 26:11, 25 27:23 28:6, 16, 21 29:5, 18 30:2, 11 65:17 94:9, 19 100:8 117:17 122:8 126:13 142:20 186:3, 14 198:13 201:12 202:24 209:20 issued 32:21 112:17 175:15, 16 issues 4:8, 18 5:22, 23 7:7, 14, 15, 16, 22 8:2, 4, 9, 11 9:14, 15, 18, 20 10:11, 25 11:12, 24 12:9, 10, 24 13:1, 4, 17, 19, 22 14:24 15:7, 14, 18, 22 16:25 17:14 18:14 19:7, 16 21:15 22:4 23:3, 23 24:22, 24 25:3, 4, 5, 11 26:2, 9, 12, 15 29:24 30:8, 14 40:24 76:5 101:23 111:2 114:17 115:12, 20, 21, 23 116:4 122:15 124:12 139:7 203:15 206:9, 13, 17 215:17 240:1 issuing 48:18 item 146:6 160:14 items 16:12 17:23 137:2 139:10 142:14,</p> | <p>16 143:14 153:11, 12, 14 217:18 its 37:4 82:3 90:14 99:21 192:17 208:20 < J > Jacksonville 116:15 Janicki 198:8 Jennifer 2:20 jet 65:8 JNT 176:17 182:3 204:23 232:24 JNT154 64:4 job 68:13 226:17, 21 John 2:3 join 3:12 202:15 212:5 246:8 joinder 27:18 Joint 44:7 51:2 61:19, 23 64:3, 8 70:11 89:1, 2 91:13, 22 111:21 112:9 113:15 139:19 145:25 152:23 158:22 159:15, 16 169:23 171:17 176:5 177:8 180:1 197:10 199:24 204:1, 4 232:23 233:1 237:21 judge 7:12 10:19 20:16, 18 28:6, 25 29:4 65:2 104:23 106:8 118:17, 20 120:15 125:6 130:4 143:10 147:15 158:15 165:5 193:21 209:13 judgment 8:22 9:3, 6 12:14 15:9 26:3 judicial 17:13 203:1 jump 69:4 jumped 14:4 jumping 116:17 132:5 June 19:24 27:21 28:21 jurisdiction 9:5 jury 213:17 juts 125:20, 21</p> |
|---|---|---|---|

| | | | |
|--|--|--|--|
| jutting 125:14 | 196:3, 21 199:7 | 163:24 165:21 | legend 130:4, 6, 22 |
| JWC 16:3 | 200:19 201:17 203:2, 17, 19, 22 205:19 | 194:24 235:13 | legendary 85:10 |
| < K > | 208:11 210:6 211:8 | largely 190:16 | length 69:21 235:7 |
| kayak 106:23 107:13 | 215:25 217:4 219:12, 23 221:6, 19, 23, 24 | 221:16 | lengthy 4:9 |
| keen 236:21 | 226:15 227:12 | larger 84:4 195:24 | Leoma 86:6 |
| keep 3:5 25:23 | 228:12, 13, 22, 23, 24 | largest 35:23 81:18 | lesson 205:16 |
| 77:14 117:23 120:12 | 229:11 241:2, 4, 14 | 105:2, 9 163:24 | letter 64:9, 11 65:22 |
| 132:23 148:24 | 246:14 | laser 32:3 104:15 | 67:1 69:2 70:20 |
| 153:18 154:10 | knowledge 11:22 | 118:16 234:15, 17 | 152:22, 24 153:3, 14, 20, 23, 25 154:10, 11, 14 155:20 156:1 |
| 170:13 | 115:19 127:6 139:13 | late 6:19 8:20 9:19, 20, 22 19:17 59:5 | 232:25 233:4, 6 |
| keeping 228:21 | 142:10, 15, 18 146:9 | 81:5 183:25 190:20 | 237:20, 21 238:24 |
| Kenny 2:19 | 158:18 170:6 179:15 | 212:14 228:23 | 239:7, 16 241:13, 20, 23 |
| kept 241:8 243:5 | 185:6, 14 187:3, 9 | launch 69:13, 14 | letters 48:8, 16, 18 |
| Kevin 2:7 32:18 | 193:11 204:18 | 72:2, 5 | 153:15 242:1 |
| 79:9 80:5 81:5 | 205:13 215:10 | launched 72:15 | level 11:20 23:10 |
| key 143:20 | knowledgeable 168:7 | law 7:12 10:1, 3, 19 | 38:6 105:11 117:12, 14 127:22 139:25 |
| keys 233:24 | known 8:7 35:4 | 11:8 15:25 26:9, 24 | 142:11 |
| kicker 72:5, 6 | knows 1:25 178:15, 16 204:13 216:8 | 29:24 65:2 95:19, 23 | levels 92:1 103:19 |
| kind 35:7 40:22 | 242:10 | lawns 82:8 195:1 | 111:12 127:14, 24 |
| 93:22 101:2 115:23 | < L > | lay 211:6 240:24 | 143:18, 19, 23 |
| 116:17, 20 117:6 | labeled 152:1 223:16 | layered 79:22 | Lewis 2:7 |
| 119:21 156:17 | 226:10 | lead 87:4 | liability 48:24 |
| 172:16 240:18 | lack 11:10 | leader 47:9 | licensing 9:6 24:10, 12 |
| kinds 136:22 | Ladder 232:15, 17, 18, 21 236:16 | leadership 101:20 | lies 202:20 |
| know 3:20, 24 9:9 | lag 172:22 | leading 104:4 179:14 | lieu 76:7 |
| 13:17, 20 14:1 16:16 | lagging 154:11 | lean 198:25 | life 37:17 65:7 |
| 18:24 19:14 21:2 | laid 154:6 159:8 | learn 79:1, 8 83:11 | 231:11 |
| 22:25 23:6, 21, 22 | LAMB 230:8, 14, 18, 19 231:13, 20 232:25 | 89:25 110:6 185:11 | lift 39:24, 25 40:2, 12, 17, 18, 19 41:6, 7, 8, 9, 15, 17, 20, 21 |
| 25:12 27:2, 5 29:14 | 233:6 234:19 236:13 | 187:22 238:23 | 43:13, 14, 18, 20 44:3 |
| 30:11 32:3 33:22 | 237:18 243:4 | learned 110:6 | 50:20 60:1 84:9, 10, 20, 23 86:11 87:6 |
| 35:5 36:14 40:24 | L-A-M-B 230:18 | 188:14 190:19 | 198:21 199:2, 5 |
| 41:20 42:14, 21 43:7 | land 79:9 120:16 | 214:18, 23 217:25 | 241:10 |
| 50:24 51:13 55:22 | 121:19 124:9, 24 | leave 95:14 120:7 | lifted 81:3 |
| 57:9 60:20 67:12 | 126:10 184:24 | 123:13 150:4 208:20 | lightning 238:7 |
| 72:5, 11 73:16 76:17, 18 84:21 87:15, 19, 23 89:20 94:12, 21 | 186:11 232:13 240:3 | leaves 39:16 | limit 96:9 |
| 97:24 98:12 100:25 | land-based 65:9 | leaving 3:16, 23, 25 | limitations 227:21 |
| 104:9 107:25 108:11 | 76:13, 20 | 96:7 125:16 | limited 9:12 12:24 |
| 115:23 117:11, 25 | landmarks 79:16 | led 132:8 | 13:1 15:3 29:19 |
| 119:11 121:19 | landowners 175:4 | leeway 27:7 72:11 | 224:14 235:6 |
| 123:12, 16 134:19 | Lands 111:24 | left 1:20 4:6 78:22 | limiting 29:6 |
| 137:7 140:17 149:24 | Landscaping 165:25 | 88:8 131:5 133:7, 12, 21 135:16, 22 | |
| 150:9 151:25 152:14 | language 16:5 | legacy 82:20 192:22, 24 | |
| 161:21 177:11 178:7, 12, 14 179:8, 10, 13 | large 18:12, 14 42:8 | legal 4:8 7:14 13:24 | |
| 188:19, 21, 23 189:7, 23 190:3, 11 192:2, 22 193:14 195:11 | 70:23 80:18 95:9 | 16:25 20:3 26:15 | |
| | | 30:11 201:11 207:21 | |
| | | 208:2 215:3 | |

| | | | |
|--|---|---|--|
| <p>line 34:12 69:4 79:2 124:20 210:17 221:17, 18 lines 196:8 197:15 200:3, 4 202:17 235:8, 16 list 25:19 51:10 52:9 87:16 92:12 239:22 listed 17:23 112:22 114:15 162:24 240:3 listen 195:12 listing 4:17 143:8 lists 205:4 litany 26:11 literally 185:13 little 3:8 6:23, 25 27:7 72:11 78:23 79:4, 15 83:2 84:4 95:19 100:21 105:20 108:3 110:17 114:24 116:17 117:11, 20 119:20, 21 125:6, 21 127:19 132:6 136:4, 5 141:16, 19 151:8 154:9 160:11 161:20 167:12 168:7 197:12 201:4 228:12 240:24 lived 85:6 lives 85:4 living 81:24 86:1 LLP 10:4 load 189:16 loadings 111:12 local 238:2 located 33:14 45:18, 25 80:16 84:24 85:13 86:4 149:8 151:1 232:6, 10 location 21:12 33:11 40:1, 12 43:18 71:4 80:25 82:5 90:4 104:24 105:1 111:16 120:7 126:12 132:22 161:13 172:1 173:20 192:17 218:24 226:22 locations 33:7 72:1 86:1 129:3, 13 133:3 136:14, 16 146:22</p> | <p>171:5 173:6, 10 189:2 219:24 Lock 34:15, 23 40:18, 20, 25 42:21, 22, 24, 25 43:2, 3, 20 44:4, 15 46:4 48:2, 4, 9, 12, 16, 21, 25 49:2, 11 50:3, 20 51:12 54:2, 4 55:10, 12, 14, 20, 25 56:1, 2 58:1, 4 59:15, 19 60:5, 6, 10 63:14, 20 64:16 65:3, 13 68:19 69:14 70:18 71:14, 20 72:20 73:20 75:3, 18, 21 76:5, 8 80:16, 20 81:1, 3 82:12 83:5 85:1, 8 86:16 87:6 88:9, 12, 20 89:10, 14 91:8 92:14, 20, 22 100:13 110:16, 21, 23 111:4, 15 112:21 114:8, 11 115:4, 10, 17, 24 116:25 119:24 120:2, 7, 15, 16, 17, 24 121:21 122:20 123:6, 8, 17, 18 124:3, 9, 10, 18, 25 125:7, 9, 12, 16 127:1, 4, 8, 13 128:2, 9, 10, 11, 15, 20, 21 129:4, 5, 7, 8, 13, 15 131:10, 13, 18 132:4, 22 133:3, 5, 6, 9, 11 136:11, 17, 23, 25 138:14 146:19 151:20 154:2, 8, 18 155:1, 4, 17 166:15 170:15, 17, 19, 22 173:21, 24 174:11, 14 183:13, 23 184:13, 14 185:8, 11, 17, 19, 23 186:4, 11, 12, 16, 22 187:5, 12, 15, 16, 23 196:16, 18 198:17 199:16, 17 206:10, 17 208:18, 19, 21 210:20 211:17, 23 213:6 214:3, 15, 19 215:1 216:2, 21, 23, 25 217:9, 18, 19 218:4, 5</p> | <p>220:4, 11, 12 231:14 233:8, 11, 16, 17, 19 235:12 236:7, 10, 12, 14 237:9, 10, 13, 15, 22 238:6, 11 239:4 242:17 243:13, 18, 19, 22 locks 79:13 100:12 114:25 121:22 lock's 74:16 loft 65:22 log 10:19 logged 3:19 logical 126:10 213:12 long 9:17 24:1 35:9 50:8 63:2, 5 64:18, 20 65:14 77:14 79:20 94:11 95:25 219:10, 14, 15 221:19 224:4 230:6, 25 231:3 236:13 longer 28:2 33:14 53:7, 8 55:12, 13 68:12 Longman 2:7 long-term 110:22 look 21:9, 25 22:4, 25 33:8 35:24 56:9 103:16 111:9, 13 117:1 119:2 125:5 137:13, 14 140:7 166:7 167:10 174:22 183:8 203:9 looked 4:14 5:6 45:10 54:2 57:25 59:9, 22 60:2 108:9 111:11, 12, 16, 17, 18 120:2, 5, 6 121:14, 15 126:15 128:19 142:10 143:14, 17 166:25 208:25 209:4, 7, 9 227:7, 11 234:20 looking 3:21 22:7 23:24 40:1 78:7, 12 94:21 95:11 108:9 110:20 111:1, 3 114:7 119:23 125:8, 10 127:13 128:23 131:6 133:7, 12 136:11 143:15, 20</p> | <p>148:24 149:18 151:17 166:23 181:5 183:4 184:13 194:14 198:10 205:1 209:2 212:16 214:22 226:8 237:11 242:16 Looks 14:3 35:7, 8 79:25 105:2, 3, 7 119:24 121:19 197:23, 24 204:12 216:24 223:3 244:7 loose 138:18 Loquilla 84:13 loss 41:11, 13 lot 13:24 33:17, 21 34:18 35:16 36:9 39:13 58:6 59:16, 23 100:11 101:22 158:10 189:15 195:25 196:8 lots 81:23 84:7 89:25 107:21 196:5 244:22 loud 105:6 Lovegrove 86:7 low 132:3 133:13 135:25 206:13 209:3, 5 lower 45:12 lunch 3:16, 23 61:12 77:7, 12, 15, 17 94:8 < M > ma'am 157:21 176:12 245:18 Madam 60:23 96:17 118:2 230:4 magistrates 195:23 magnify 122:25 magnitude 42:11 main 71:9 82:4 95:21, 22 186:4 maintain 102:22 maintained 83:4 91:5, 6 maintaining 190:10 maintenance 65:6 100:13, 14 102:9, 24 115:20, 21, 23 217:5</p> |
|--|---|---|--|

| | | | |
|--|--|--|---|
| <p>major 100:13 116:16, 23 117:4 208:10 221:11</p> <p>majority 65:3, 12 85:19 120:8 152:3 194:23, 24</p> <p>maker 210:4</p> <p>making 15:23 18:24 24:10 32:13 47:18 135:12</p> <p>man 85:9</p> <p>managed 219:23</p> <p>Management 18:9 23:16 38:13 45:14 48:24 83:8, 9 91:11 99:15 136:24 138:11, 12 145:1 158:2, 5 161:11, 13 172:14 230:24</p> <p>manager 134:23 167:22</p> <p>manatee 48:11, 13 54:23 84:25 137:1 139:4, 9 155:10 166:24 187:13, 15 211:16, 23 213:6, 12 214:19</p> <p>manatees 48:7, 9, 13, 22 115:8 138:23, 25 139:6 143:25 154:2, 5 205:4 211:21 214:14, 25 215:22 216:3</p> <p>mangrove 33:19, 22 40:13 41:12 43:8 46:12, 21 55:25 56:1, 3 80:4 88:15 146:21 147:6, 7, 8 162:17 171:1, 4 183:14 192:16 226:8</p> <p>mangroves 10:21, 22, 24, 25 33:24 36:7, 12, 18, 24, 25 38:1, 9 40:14 41:11, 16 42:18, 19, 20, 23, 24 43:5, 15, 16 46:15 49:25 50:17 56:4 59:17, 25 60:4, 12 81:14, 15, 25 82:22, 24, 25 84:19 107:21</p> | <p>124:15 126:3 143:22 188:23, 24 189:3 191:15, 25 221:9</p> <p>manifest 135:14</p> <p>manner 91:20</p> <p>Mansoor 18:1</p> <p>map 33:7, 15, 16 38:19 40:9 43:9 52:14 87:14 104:21 149:10, 13, 17 151:4 173:9 225:14 226:19 234:4 242:25</p> <p>maps 79:23 242:16</p> <p>map's 52:12</p> <p>Marina 80:15, 17 232:3, 5 234:12 235:10, 13, 14, 18 241:10, 11 242:17 243:11, 18, 20, 21, 23</p> <p>marine 46:16 55:4 63:17, 23, 25 64:24 65:5, 6 67:16, 18, 25 68:3, 20 69:6, 17, 21 70:20 71:3, 6, 8, 9, 11 75:6, 11 76:6 109:15 175:3 231:21, 22 232:1, 2, 3, 4, 10 236:4 238:1 240:4</p> <p>marine-based 76:20</p> <p>marked 169:19 224:24 226:3 233:1 237:20</p> <p>marked-up 202:21</p> <p>Market 85:13, 17, 19, 23</p> <p>markings 179:9</p> <p>mass 124:9</p> <p>master 100:14, 16 102:2, 9</p> <p>material 121:22 124:14 137:22 158:2, 5 220:25 222:18 234:1</p> <p>materials 138:18 224:2 236:3</p> <p>Matlacha 33:17, 18, 19 35:14, 15 36:7, 23 38:9 45:9 54:7 57:4 58:1, 4, 7, 10, 23 78:8, 24 79:8, 21 80:6</p> | <p>81:25 84:11, 15 85:12, 14, 25 86:6, 8, 9 87:8 88:15, 23 89:12 92:7, 9, 10, 17 94:4 143:16 192:16 240:17 241:2, 4</p> <p>matter 6:9 17:15 244:6</p> <p>matters 6:21 18:3 100:8 156:5</p> <p>max 229:10</p> <p>maximum 227:21</p> <p>Maya 2:12</p> <p>meals 95:20</p> <p>mean 12:23 25:17 72:6 73:19 87:23 94:23 108:13 109:11 123:6 124:2 132:17 133:13 135:25 141:7, 16 190:13, 16 192:25 204:23 205:10, 12 206:25 213:18 215:14 218:21 220:14 228:17 237:8 246:4, 17</p> <p>means 13:21 37:15 131:19 132:1 141:5 204:11</p> <p>meant 26:13 27:1 58:9 59:6 130:13 246:3</p> <p>measured 90:7 93:23</p> <p>measurements 107:19</p> <p>mechanism 82:6</p> <p>meet 4:15 6:7 26:7, 24 27:8 29:24 54:12 56:25 165:12 204:13, 18 207:19 238:22</p> <p>meets 29:19 56:6 187:6 205:11 207:9, 18 213:22</p> <p>Megan 152:22</p> <p>member 109:23 126:16</p> <p>members 2:23 209:20, 21, 24</p> <p>memberships 99:7</p> <p>memorandum 4:23 5:10, 15 10:2</p> | <p>mention 22:21 78:22 208:9</p> <p>mentioned 39:21 70:20 78:21 80:12 114:1 138:20, 23 142:23 152:14 197:18, 24 236:22</p> <p>MER 238:1</p> <p>merely 16:10</p> <p>met 11:5 53:24 140:24</p> <p>metal 116:3, 5 117:4</p> <p>method 90:5</p> <p>methodology 91:14</p> <p>methods 166:15</p> <p>Mexico 84:14 85:18, 20</p> <p>mic 234:7</p> <p>Michael 2:1 97:13 153:21</p> <p>Michigan 85:11</p> <p>microphone 32:9 100:20, 22 176:6, 10 198:25</p> <p>middle 105:12 229:14</p> <p>mile 105:20</p> <p>miles 60:11 65:4 79:20</p> <p>mill 203:3</p> <p>Miller 103:13 105:4 107:25 108:2</p> <p>millions 119:10, 12 208:10</p> <p>Mills 152:22</p> <p>mind 29:2 66:9 68:18 187:20 234:4</p> <p>mindset 12:15</p> <p>mini 79:13</p> <p>Minimal 128:18</p> <p>minimizes 209:10</p> <p>minor 197:23</p> <p>Minus 134:16 135:25</p> <p>minute 169:12, 14</p> <p>minutes 60:19 96:3 168:22 181:10 229:10 238:14 244:5</p> <p>mirrors 21:21 22:10</p> <p>mischaracterization</p> |
|--|--|--|---|

| | | | |
|---|-----------------------------|------------------------------|-------------------------------|
| 218:8 | motions 18:25 | navigate 107:13 | 222:17 229:12 230:3 |
| mislead 213:17 | mound 79:11 | 174:7, 14 214:5 | 245:11 246:19 |
| misleading 200:17 | mouth 143:23 | navigating 122:10 | N-E-F-F 97:18 |
| missing 211:17 | move 61:3, 19 70:6 | navigation 48:23 | negative 155:3, 6 |
| misspellings 1:11 | 104:8 112:5 132:15 | 54:25 114:16 115:2 | 175:1 209:10 |
| mistranslations 1:8 | 161:9 169:6 171:9 | 122:12, 15 123:21 | negotiating 162:25 |
| misunderstood 31:14 | 176:6, 10 187:19 | 127:15, 22, 25 128:15 | neither 20:20 |
| mitigate 89:24 90:1, 2, 4 | 188:8 191:22 198:2 | 137:6 174:3 175:1 | net 58:8, 10 167:7, 17 |
| mitigating 89:18 | 199:22, 23 203:17 | 206:4, 17 211:16, 21 | never 19:10, 11 |
| 90:5 91:15 | 212:17 213:25 | navigation's 131:24 | 76:16 90:5 212:6 |
| Mitigation 44:21, 22, 23 47:22 57:8 93:6 | 223:22 | navigator 206:7 | 229:22 |
| mix 37:16 | moved 8:13 30:13 | near 84:12 99:25 | new 1:21 72:20 |
| mixing 165:6 | 87:13 169:4 190:14 | 143:23 | 147:15, 23 148:1 |
| mockup 182:3 | movement 42:5 | nearby 217:23 | 185:16 186:16 187:5 |
| modalities 176:19 | 123:12 143:17 | 234:22 | 195:24 196:8 197:4 |
| model 90:9, 23 92:1 | 152:16 | nearly 106:1 126:4, 5 | newfound 78:4 |
| 93:9, 16 111:11 | moves 107:8 | necessarily 30:12 | newly 41:7 |
| 142:23 | moving 75:15 | 193:24 | night 94:14 |
| modeled 93:12 | 106:10 107:10, 17 | necessary 50:3, 4 | nine 153:6, 14 159:11 |
| modeler 157:17 | 118:7 166:18 202:7 | 112:13 | nitrogen 57:17, 21 |
| modelers 90:22 | 222:9 | necropsied 48:14 | 58:9, 10 89:10, 11, 18, |
| modeling 49:16 | multiple 25:10 46:20 | necropsies 48:20 | 19, 23 90:9 91:3, 15 |
| 93:14, 20 111:7 | 178:25 179:3 186:1 | need 3:20 5:10 13:9 | 92:4 93:10 111:12 |
| 142:7, 24 | 200:8 201:7 205:20 | 18:25 19:6 20:25 | 143:19 152:14 162:5 |
| modelling 90:10 | museums 90:16 | 26:5 30:12 48:19 | 167:6 193:5 196:17 |
| 111:9 | mute 4:1 | 55:18 65:11 74:6, 7 | nodding 118:25 |
| modifications 147:25 | muted 3:6 | 77:23 81:24 83:20 | 244:20, 25 |
| 197:24 | mutually 220:21 | 94:11 95:11 96:2, 10 | nonsensical 1:9 |
| modified 25:1 | Mya 245:11 | 118:22 120:11 132:3 | nonspecific 28:2 |
| 150:10, 14, 16 196:7, 9 | Myers 16:15 33:8 | 178:15 180:18, 19 | non-stenotypists 1:10 |
| moment 5:13 66:24 | 47:7, 16 79:5, 16 | 193:18, 22 195:12 | normal 137:16 |
| 70:9 176:18 197:6 | 90:14, 19 162:25 | 198:24 203:17 | normally 229:19 |
| 198:3 | 163:2, 12, 19 | 227:25 240:24 | north 34:21 35:15 |
| Monday 242:20 | myriad 66:22 212:8 | needed 13:13 19:10 | 38:11, 12, 18, 19 |
| 244:7, 9 | < N > | 20:13 23:10 41:1 | 39:20, 21, 23 40:6, 11, |
| monitoring 166:19, 21 | NABD 131:10 | 94:12 114:8 117:3 | 13 41:19, 23 42:6 |
| months 20:16 | name 2:17 62:20 | 203:19 | 50:16 59:23, 24 79:2 |
| moor 80:18 | 85:25 97:11, 15, 17, | needs 3:13 13:3 | 80:9, 15 82:4 83:18, |
| morning 1:24 2:6 | 18 192:13 230:17 | 53:9 | 20, 21, 23, 24, 25 84:2, |
| 4:23 32:15, 16 33:2 | Nancy 85:4 | Neff 2:11 96:24 | 7, 13 85:3 87:3, 6 |
| 94:17 244:10, 23 | Nancy's 87:7 | 97:9, 13, 15, 18, 20 | 88:14, 16 93:19 94:2 |
| motion 6:14, 15 8:21, | narrative 204:24 | 98:2, 5 114:2 115:13 | 105:20 120:17 |
| 22 9:2, 16, 17 15:9, | 205:3, 20 | 116:18 118:8 132:6 | 124:19 125:20 126:7 |
| 10 19:15, 25 20:9 | narrow 122:21, 22 | 141:24 145:14 153:2 | 132:1 164:23 186:12 |
| 26:3, 6 27:17, 19 | narrowed 13:20 | 157:9 168:10 169:23 | 189:10 223:13, 15, 16 |
| 28:9, 11, 15, 19, 22 | native 46:22 | 176:4 177:17 183:8 | 225:16, 20 242:18 |
| | nature 24:6 26:2 | 186:14, 17 187:9 | 243:20 |
| | 109:9 147:16 | 199:2, 25 201:24 | Northeast 43:10 |
| | navigability 144:1 | 211:12 217:25 220:1 | 132:1 189:10 |

| | | | |
|--|---|--|---|
| <p>northern 50:9 224:13 nose 35:9 notch 107:8, 11 108:6 notches 103:16, 18, 19 note 49:13 73:11 230:4 242:15 noted 58:12 233:9 notes 1:10 16:6 87:24 179:16 198:3 notice 7:21, 22 8:5 9:20 11:10, 11 17:14 20:12 25:12 51:4, 7, 8 52:9 189:9 203:1 noticed 7:23 notify 139:7 number 1:19 4:18 11:2 18:2, 20 22:21 23:22 36:6 42:8 69:22 72:3 75:1 78:11 96:9 99:3 100:9 101:20 105:8 112:19 114:14 143:14 144:6 146:5 150:15 151:9 158:25 161:10 171:18 172:10 183:13 186:2 189:13 190:24 191:8, 14 192:5, 8 209:1 223:11 232:18, 21 233:20 235:13 240:1, 18 243:4 numbered 225:9, 24 numbers 59:13 90:7 91:8 146:6 152:5 226:7 numerous 52:3 54:10 99:19 100:17 nursery 35:4 45:21 46:16 nutrient 39:12 52:16 111:12 148:12 nutrients 46:8, 9, 11 47:4 58:6, 9 82:16, 19, 20, 24, 25 88:23 90:25 91:1 92:17 93:3, 14 162:5 189:17 192:23, 24 193:1</p> | <p>< O > object 6:18 67:20 68:6 70:2 87:12 140:15 143:2 200:9, 11 227:2 228:5 244:21 objected 5:20 8:13 18:6 objection 6:22, 25 9:19 14:23 72:21 98:4, 6 104:3 141:7, 11, 13 142:20 144:16, 17, 21 156:19 157:16 167:18 168:6 169:8, 9, 12 177:7, 15, 25 179:24 180:5 185:24 187:18 190:25 191:2, 17 193:7 194:5 195:9 200:7 202:1 205:18 206:19 207:12, 21 209:15 210:14 212:1 213:7, 14 214:11 215:2 216:4, 6 217:11 218:7 220:14 222:4 223:23 224:10 227:8 239:8 240:11, 21 241:21 244:19 objections 6:18, 23 8:19 200:9 202:15 203:6 obligation 15:21 49:8 207:10 obligations 23:1 observations 106:9 observe 107:22 173:23 174:9, 13 observed 107:3 108:22 observing 174:10 obstructed 235:3 obstruction 120:19 obstructions 129:14 obtain 183:22 obtained 187:11 obviously 78:7 107:11 124:17 135:17 245:5</p> | <p>occasion 48:5 71:24 occasionally 36:17 occasions 33:2 occur 67:12 111:14, 15 occurred 55:19 56:5 218:6 220:4, 11 223:11 239:23 occurrence 86:24 occurring 38:8 56:3 217:10 occurs 13:19 Ocean 41:2 109:15 offense 9:4 24:25 168:9 199:4 offer 203:9 246:11 offered 149:2 offering 98:2 168:2 office 2:21 71:6 75:9 officer 2:12 64:21 65:9 officers 67:18 68:4 69:6 offices 3:9 official 1:5, 14 61:22 offline 57:14 offset 89:17 oftentimes 65:8 238:5 Oh 14:15 26:25 35:15 94:15, 19 145:11 154:11 177:3 221:21 oils 82:16 Okay 3:3 4:3 5:5, 11, 18 13:6 14:4 23:7 27:15 28:24 29:18 30:22 31:18 32:2 34:13, 16 39:1 42:20, 22 47:14 61:7, 10, 14, 20, 25 65:1, 21, 25 67:3 70:7 72:4 73:3, 22 74:5, 20 77:1, 8, 16, 21, 25 78:14, 16 89:24 91:23 94:23 95:2, 5, 8, 16 97:17 98:1, 4, 9 99:20 100:6, 18, 23 101:1, 6, 10, 16 103:9 106:24 108:17</p> | <p>109:17 111:20 112:22 113:23 116:19 118:6, 8, 11, 24 119:13, 17 120:4, 13 121:7 122:9, 13 123:15, 19 124:8 125:4 127:10, 17 128:2 129:10 130:9, 20 132:7, 13 133:7, 20, 24 136:8, 20 137:10 138:7 141:3, 15 142:19 143:5 144:20 145:20 146:16 148:21 150:5 151:12, 15 153:5, 17, 20, 25 154:17 155:2, 6, 19 156:3 157:13, 18 158:9 160:11, 19 162:24 163:8, 16 165:13, 23 166:7, 13, 18 167:10, 14 170:2, 11, 21 171:13 172:3, 16, 20 173:9 174:21 175:3, 7, 11 176:25 177:3, 11, 14, 24 178:4, 23 179:19 180:2 181:8, 14, 22 186:7 187:17 188:9 189:6 195:6, 11 196:15 197:6, 22 198:2 199:19 201:5, 14, 25 202:10 203:5, 11 212:19 213:23 214:1 216:9, 11 220:8 221:7 222:8 223:2 224:19 225:4, 24 226:3, 17 227:18 231:6 234:8, 14 236:22 237:14 240:17 242:3, 8, 10, 11, 13, 21 243:16, 24 244:16, 19, 24, 25 246:15, 20 old 147:18 148:1 193:5 oldest 78:25 once 3:15 9:24, 25 19:17 42:24 87:9 92:22 123:12 183:9 227:7</p> |
|--|---|--|---|

ones 13:17 134:22
138:10 150:13
174:19
one's 138:10
ongoing 115:21
164:4 217:4
open 3:23, 25 55:11,
20 69:1 86:19, 22
89:14 96:8 105:4
109:14 135:3, 5
147:20 174:3 209:11
214:3 244:8, 12, 14
opened 58:5
opening 30:18 31:4
58:4 59:15 61:6
77:7, 12, 17 80:12, 13
87:18, 21, 24 88:4
89:7 105:8 126:23
186:9
openings 31:1, 12, 15
opens 34:24 40:21
operate 71:8 77:23
102:11 116:5 214:6
operates 123:10
operating 123:7
operation 48:12, 15
199:17 206:10
214:25
operational 68:20, 24,
25 69:1, 3
operations 49:2
51:12 236:19
opinion 49:15
125:17 154:21 155:8
206:3, 7, 16, 24
207:18 214:4 233:7
240:6
opinions 50:24
206:22 208:4
opportunity 8:24
9:1 10:9 19:4 94:10
124:16 238:23
opposed 42:6 168:2
opposing 181:4
opposite 126:20
optimum 209:10
option 120:2, 6, 18
121:10, 15 122:4, 6
126:11, 19 154:7
186:18 187:4 190:5

208:18, 19, 20 209:3,
5, 6, 8, 9, 10 210:4, 18,
19 211:9 216:17
options 120:3, 5
154:6, 8, 15, 17 155:5,
16 186:15, 16 208:15,
24 209:1, 2, 14, 19, 22
210:23 211:2, 4
212:17 213:22
oral 209:21
order 24:14 29:15,
16 31:13, 15, 22
42:11 66:3 95:19, 23
165:12 179:2 190:24
191:8, 10, 14 192:5, 8
221:23 229:7
organisms 47:1
108:11, 13 115:3
organized 12:19
orient 78:5
oriented 33:7
original 147:19
191:14
originally 136:9
227:3
osmosis 51:22
ought 210:25
output 111:11
outputs 142:7, 23
outset 112:15
outside 29:11 52:10
68:7 70:2 71:14
72:9, 21 75:2 80:20,
22 91:8 128:9 133:5,
6 212:4 241:15
outstanding 32:7
45:10 58:12, 13
92:11
overall 63:11 142:9
144:24 145:4 225:14
overfertilize 39:10
overflow 152:6
overhead 78:5 85:2
183:13
overlying 189:5
overrule 67:22 68:8
142:19 191:21 203:6
209:17 217:14
240:13

Overruled 143:5
218:9
overseeing 236:18
oversight 100:15
overtopped 36:17
55:14
overview 70:17
88:12 145:21 184:7
OW 54:7
Owned 111:24 184:4
owner 49:3 209:25
ownership 183:23
192:3
owns 185:2 214:14
216:2
oxbow 41:8
oyster 146:21 162:18
oysters 46:25 83:2
88:7 108:13, 17

< P >
Pacific 41:2
page 10:6 16:5, 6
44:20 51:3, 5, 6 52:6
53:1 64:3 70:12
88:11 89:5 91:22, 25
112:6 113:2 114:19
119:17, 18 137:5
143:7 151:10 171:16,
18, 19 176:16 179:10
182:3 185:7 188:11
192:4 194:15 198:4,
10, 18 204:22 216:16
218:24 223:9 224:8
225:7 227:20 232:24
pages 26:11 167:13
201:16 202:16 205:3
paid 228:22
painful 116:10
Pair 114:19 232:23
Panama 40:22 41:3
paper 5:13
parade 42:14 55:17
paragraph 10:13, 15,
17 17:11 20:1 26:17
27:22 67:4 68:17
89:17 127:21 182:21
183:18 188:12
218:25 219:6

paragraphs 5:21
10:12 11:2 15:3
26:12 30:2 242:1
parallel 72:20
185:16, 19 186:16
parameters 111:10
park 45:15, 18 79:18
80:11 84:25 86:6
146:21 147:6 161:8,
12, 16, 17, 25 172:9,
11, 14
parks 91:6
part 10:14 15:10
22:2 34:4, 19 38:22
45:12 52:20 53:23
54:10 57:8, 15 69:12
78:6 83:15 84:1
86:18 89:1 91:4, 22
99:18 100:16 101:18,
21 106:4 112:20
117:1 141:4 149:2
158:4 161:5 163:5
164:3 168:14 170:8,
18, 21 171:11 173:7
178:8 196:7 200:25
201:6 204:24 205:15
212:2 217:4 222:17
232:17 237:15
243:23
participate 100:7
participates 238:1
particular 11:20
76:9 86:11 90:4
93:25 99:20 100:7
102:13 111:10
114:19 130:21
204:19 227:13
237:12
particularly 50:9
83:24 127:3 143:21
174:6 221:1
parties 3:14 4:2
5:14 12:24 13:23
17:12 30:6, 14 97:21,
22
partner 95:24
parts 46:20 50:25
140:16 142:5
party 16:10

| | | | |
|--|--|--|---|
| <p>Pass 33:17, 18, 19 35:14 36:8, 23 38:9 40:22 45:9 54:7 57:4 58:1, 4, 7, 8, 10, 24 79:8 81:25 84:12, 15 86:9 88:23 89:12 92:7, 10, 17, 18 94:4 143:16 192:17 passage 115:2 123:2, 8 126:20 188:19 patience 91:24 94:5 patrol 64:24 65:5, 6, 9 75:6, 15 pause 168:19 pdf 64:3 PE 97:20 pending 19:15 peninsula 79:7 people 3:12 31:4 67:19 77:14 84:7 96:10 100:25 101:5 118:12 139:8 148:25 192:1 244:22 people's 27:4 percent 47:10, 11 90:21 91:4 93:15 percentage 195:6, 7 196:3 perfect 26:1 perform 84:2 110:21 111:1 162:13 performed 55:6 performing 162:14 174:21 perimeter 82:21 221:15 period 82:18 122:19 123:4 218:18 periodically 193:18 permanently 53:6 214:3 Permission 14:5 228:21 permissions 1:25 permit 14:22 15:23 16:12, 17 18:11 20:2 23:17 32:21, 24 33:3 44:2, 3, 5, 7, 17, 19, 24 45:3, 14 47:24 49:9 51:3 52:10, 21, 23</p> | <p>53:2, 7, 15, 18, 23, 24 54:11, 24 56:6 57:9 89:16 90:2 100:8 102:12 106:4 109:18, 25 110:4 111:23 112:16, 17 139:14, 22 143:13 145:15 150:21 155:17 156:22 159:5, 20, 24, 25 160:3 161:5 162:21 163:5 166:3 167:5, 16 168:14, 16 169:24, 25 170:4, 6, 8, 9, 12, 14, 24 171:11, 18 173:7 175:15, 16 185:23 186:22, 23, 24 187:5 200:23 203:13 215:17 227:21 231:17 permits 99:16, 19 186:4 permitted 16:11 18:14 28:3 72:20 125:5 186:3 189:19 194:15 permittee 166:20 167:25 permitting 9:6 57:1 99:15 110:3, 21 140:20 141:4 142:3 160:7 167:22 201:20 204:16 215:16 216:13 perpetually 190:9 perpetuity 102:22 perplexes 205:17 Perrigan 2:10 64:2 112:5 person 14:14 48:17 168:6 personal 179:15 185:13 188:15 personally 114:4 116:10 161:2 174:9, 13 185:13 190:3 personnel 139:6 persons 81:22 perspective 22:9 58:11 64:24 69:20</p> | <p>154:20 perspectives 69:16 pertinent 100:10 Petersburg 2:4 164:16 petition 4:14 5:23 6:6, 11, 16, 19, 20 7:5, 9, 23 8:4, 6, 12 9:4, 11, 24, 25 10:23 11:4, 24 12:13, 19, 25 13:2, 4, 19 15:1, 2, 8, 15 16:10 17:6, 21, 23 18:3, 12, 23 19:6, 9, 18 20:2, 5, 13, 21 21:18 23:18 25:6, 9 26:6, 21, 22 27:20, 23 28:4, 12 29:9 petitioner 7:8 16:2, 20 17:4 25:18 28:1 35:18 Petitioners 1:23 2:2, 4 4:17 7:2, 4 8:10 10:18 15:7, 13 19:15, 25 20:2, 9 21:15 26:11 29:23 30:20, 23 33:13, 14 34:18 37:19 42:10, 15 43:23 48:1 49:18 50:14, 24 55:17 56:10, 17 61:4 169:12 197:9 198:4 199:23 200:2 203:21 229:18 Petitioner's 35:11 39:19 222:10 petitions 8:15 phenomenon 86:24 89:3 phosphorus 193:5 photo 122:24 126:3 183:15, 17 216:24 224:24 photograph 79:24 188:20 206:2 photographs 36:2 41:7 42:7 147:13 photography 60:3 photos 107:19 198:17 221:6 223:6</p> | <p>225:6 Photoshop 125:9 physical 78:5 148:17 pick 4:6 195:20 picked 40:19 103:12 190:12, 13 208:23 picking 1:20 picture 74:6, 7 117:5 119:24 184:13 189:3 226:18 pictures 40:10 117:10 226:21 227:13 piece 5:12 pilings 138:3 Pine 35:15 78:22, 23, 24 79:20 84:8, 16 164:22, 24 240:17 241:2, 4 pipe 90:13 piped 164:20 pipes 83:11 196:13 pizza 117:2 118:21 119:3 place 73:9 83:7 86:2 103:23 125:16 126:10 128:2 192:19 208:22 218:4, 5, 19 220:11 placed 16:1 166:14 167:16 197:7 placement 171:5 172:1 Plaintiffs 86:25 88:11 Plan 91:11, 18 93:7 100:14, 16 102:2, 9 147:11 237:3 planning 246:11 plans 44:5 53:13 108:5, 6 110:17 125:11, 12 136:23 146:18, 19, 20, 21 161:4 162:20 168:13 170:2, 12 173:1 183:14 186:5 189:5 204:9, 11, 12, 17, 19 plant 51:23, 25 183:14</p> |
|--|--|--|---|

| | | | |
|--|---|--|--|
| <p>planting 46:12, 22 162:17 171:4, 10 189:2</p> <p>plantings 146:21, 22 147:6, 8, 9 171:1, 5, 6, 22</p> <p>plants 46:7, 10 53:14 164:15</p> <p>playing 11:20</p> <p>pleading 7:16 9:15 25:17 27:8</p> <p>pleadings 6:13 8:24 24:23 25:9</p> <p>please 1:22 3:5, 16 13:8 28:25 60:22 62:14, 19 67:5 78:3 96:8 97:11, 15 137:11 171:9 172:20 184:21 191:22 195:12 202:13 213:25 218:12 220:18 230:16</p> <p>pleased 238:22</p> <p>pleasure 61:9 77:3, 6</p> <p>pled 4:19 15:14 18:11, 12, 13, 22 22:20 23:18, 19</p> <p>pledged 20:21</p> <p>plow 95:12</p> <p>plug 102:25 103:21, 22 105:18 190:5</p> <p>plugged 219:18</p> <p>plugging 102:17</p> <p>plugs 103:14, 15</p> <p>plus 137:25 245:1</p> <p>point 3:10 8:20 9:14 17:16 18:8, 19 20:10 21:5, 8 23:9, 14 28:8, 12, 17 29:1 35:15 41:9 43:7 44:8 51:10 81:6, 17 87:20 101:3 104:21 117:3 118:17, 19 120:15 123:24 127:1 135:22 136:1 149:7 151:13 161:17 180:15 201:15 227:5 229:13 230:3 232:4 233:24 234:4, 5, 9, 16</p> | <p>235:9 241:11, 25 242:22, 24 243:9</p> <p>pointed 14:22 18:17 20:15 227:25</p> <p>pointer 32:3 104:15 118:16 120:11 161:17 234:15, 17</p> <p>pointing 35:22</p> <p>points 52:24 135:19, 20</p> <p>poisonous 86:21</p> <p>police 61:5 62:6, 25 63:3, 6, 8, 17, 24 64:13 70:21 96:4 241:24</p> <p>policy 12:22 15:4 69:24</p> <p>pollutants 82:16 92:5, 9 93:16 148:10, 11 193:6 235:20</p> <p>pollute 89:21</p> <p>polluted 83:16</p> <p>pollution 82:1 85:22 88:23 90:15 94:3</p> <p>ponds 194:16</p> <p>pops 130:22</p> <p>popular 79:19</p> <p>population 84:6</p> <p>pop-ups 130:7</p> <p>portal 169:13 200:2</p> <p>portion 18:13 21:21 43:10, 11 95:9 111:18 202:2 223:10 232:7</p> <p>portions 109:21 110:8 198:9 235:2 240:7</p> <p>pose 233:22</p> <p>position 5:22 6:24 7:1, 3, 4 10:10 55:11, 12 63:2 89:8 216:2 230:21</p> <p>positive 54:25</p> <p>positively 54:21</p> <p>possession 216:11</p> <p>possible 121:25 129:25 137:21, 24 216:21</p> <p>potential 44:23 56:11 111:3 115:2, 3,</p> | <p>10 124:18 127:14, 21, 24 140:9 143:11 144:14 166:16, 21 174:22 200:17 217:1 236:8</p> <p>potentially 44:24 235:18 240:3</p> <p>pounds 53:4 57:16, 20 89:18, 22 90:9 91:15 196:19</p> <p>pouring 85:2</p> <p>power 206:13</p> <p>practice 39:6, 7</p> <p>practices 136:24 138:12</p> <p>Prado 241:12</p> <p>predated 41:17 221:22</p> <p>predictable 94:2</p> <p>predicted 93:16</p> <p>prefer 31:6, 22 77:13, 16</p> <p>prehearing 4:7, 17 29:23 30:16</p> <p>pre-Hurricane 69:2</p> <p>prejudice 7:1</p> <p>prejudicial 8:9 12:12</p> <p>preliminaries 98:10</p> <p>premarked 64:7</p> <p>preparation 139:22 146:2, 13 207:2</p> <p>prepare 15:19 24:14</p> <p>prepared 77:6 87:1 110:12, 17 112:10 114:4, 5 134:18 139:24 141:17 146:18 157:24 170:3 181:23 198:8 199:9</p> <p>preparing 179:2 199:8</p> <p>presence 74:16 76:8</p> <p>present 8:19 49:14 54:16 56:14 65:17 69:5 139:6, 11 203:8, 23 207:8 238:24 245:21</p> <p>presentation 31:1, 2, 9, 12, 13</p> | <p>presented 7:18 10:2, 11 25:3, 5 49:18 51:17 56:13 228:14</p> <p>presenting 56:14, 16</p> <p>preserve 78:23 192:3</p> <p>press 20:25</p> <p>pretty 11:9 36:1 39:19 70:4 76:10 79:1 81:12 101:14 105:3, 7 107:17</p> <p>prevent 43:12 81:22 211:16 216:3, 17 217:9 220:12</p> <p>preventing 231:10</p> <p>previous 7:12 10:19 11:7, 8 28:7 57:9 110:5, 7 183:11 197:11 199:24 224:14</p> <p>previously 110:14 138:20 169:2 212:11</p> <p>prima 246:2, 5</p> <p>primarily 103:19 139:24</p> <p>primary 141:25 146:4 164:16 199:13</p> <p>principally 68:23</p> <p>principles 211:5</p> <p>prior 11:3 29:5 44:2, 4 50:19 79:13 102:12 107:25 110:20 115:6 150:8 162:6 175:12, 16 193:1 200:23 201:20 218:8</p> <p>pristine 86:2</p> <p>private 194:19 233:18</p> <p>privilege 178:10</p> <p>pro 77:10</p> <p>probably 26:16 68:12 78:24 99:22 117:10 132:5 195:3 226:22 230:1 242:16 243:25</p> <p>problem 21:20 50:24 67:25 102:24 122:25 149:1 179:5 202:20 206:8 215:25</p> |
|--|---|--|--|

| | | | |
|---|---|---|--|
| problems 41:15 67:18 87:3 93:18 211:25 | 112:4, 16, 21, 23 124:11 125:5, 7 144:15 145:16 147:5, 16, 17 149:3 154:21 155:8 159:17, 24 161:1, 6 162:11, 14, 17, 24 163:3, 4, 10 167:22 170:3 173:19 175:8, 11, 12 190:14 199:7 204:20 210:12 211:13, 20 212:7, 9 | 201:10 206:15 207:10 | Purdue 99:1 |
| proceed 62:15 97:6 157:22 169:1 177:22 181:24 | projecting 121:21 | proven 206:16, 23 207:19 | pure 165:6 |
| proceeding 7:3, 5, 12 8:9 9:7 11:3, 5, 7, 8, 9 14:22 15:20 19:17 26:4, 15 29:11 33:9 64:8 160:1 199:25 201:21 212:4 224:15 238:24 239:3 | projects 44:16, 18 45:3 49:8 52:3, 9, 22 53:6, 10, 11, 20 54:10 57:8, 20 93:25 99:15 100:7, 10, 11, 17 101:17 102:16 112:20 139:5 146:14 147:2 152:15 160:4 162:22 174:23 186:5 195:25 207:6 212:8 219:21, 22 | provide 22:15 48:25 50:4 51:13 52:2 141:1 145:3 146:5 152:15 154:3 162:20 181:4 192:18 219:23 237:6 240:8, 10 | purported 7:10 51:20 |
| proceedings 1:6 17:13, 17 28:7 | proliferated 86:22 | provided 11:6 16:6 17:8 22:5 56:25 88:16 139:21, 25 142:5 146:4, 6, 7 157:15, 25 158:1 159:12 180:19 | purportedly 200:13 |
| process 9:11 15:12, 16, 17 16:19 17:15 24:3 110:2 160:7 194:4 215:16 | promoted 236:17 | provides 88:13 126:11 144:24 145:3 209:11 | purpose 48:3 52:12 82:14 148:7 153:10 163:10 178:17 191:19 192:18 198:12, 15 211:15 |
| procuring 17:3 | proof 17:4 93:23 | providing 14:9 159:6 | purposes 38:3 46:19 165:11 198:16 |
| produce 48:7 | proofread 1:13 | proving 30:11 | pursuant 17:24 107:25 |
| product 93:20 163:7 164:6 | properly 9:15 15:19 | provision 22:11 | pursue 103:12 210:4 |
| production 11:22 | properties 125:23 234:21, 22 | Provisional 24:7 | pursued 190:4 |
| productivity 55:4 | property 39:16 49:3 54:20 174:23 231:12 | provisions 12:16 18:11 20:8 21:22 22:13, 14, 16 23:17, 19 | pursuing 24:24 211:14 |
| products 164:16 | proposed 55:7 125:7 144:7 147:14 149:25 154:4, 21 160:4, 5 162:21 216:16 | proximity 21:13 | put 18:7 23:2, 3 25:12 48:19 61:5, 12 112:20 149:7 177:19 178:17, 20, 24 179:7 180:25 187:12 197:15 199:3 200:16 |
| professional 96:24 97:20 98:3, 22 99:4, 7, 11 112:23 204:8, 23 205:12 207:2, 4, 24 | properly 9:15 15:19 | prudent 132:15 | puts 6:23 205:5 |
| professionalism 204:17 | properties 125:23 234:21, 22 | public 2:23 4:16 12:21 15:4 18:17 21:9, 19, 24, 25 22:2, 17 23:12 26:7, 10 28:5, 18, 20 29:4, 6, 19 30:3, 12 39:9 44:6, 21, 25 46:21 48:24 51:18, 22 54:13, 19 56:7 63:11 65:17 75:11 92:8 99:9, 12, 24 100:1 116:10 137:7 187:6, 21 198:12 212:2 213:22 233:18 | putting 51:19 105:9 228:6 234:24 |
| profile 97:20 | property 39:16 49:3 54:20 174:23 231:12 | public 2:23 4:16 12:21 15:4 18:17 21:9, 19, 24, 25 22:2, 17 23:12 26:7, 10 28:5, 18, 20 29:4, 6, 19 30:3, 12 39:9 44:6, 21, 25 46:21 48:24 51:18, 22 54:13, 19 56:7 63:11 65:17 75:11 92:8 99:9, 12, 24 100:1 116:10 137:7 187:6, 21 198:12 212:2 213:22 233:18 | pyramid-looking 105:10 |
| Program 33:1 34:19 39:14 44:14 45:4 54:11 111:23 112:12 144:24 162:12 163:25 231:18 | proposed 55:7 125:7 144:7 147:14 149:25 154:4, 21 160:4, 5 162:21 216:16 | public 2:23 4:16 12:21 15:4 18:17 21:9, 19, 24, 25 22:2, 17 23:12 26:7, 10 28:5, 18, 20 29:4, 6, 19 30:3, 12 39:9 44:6, 21, 25 46:21 48:24 51:18, 22 54:13, 19 56:7 63:11 65:17 75:11 92:8 99:9, 12, 24 100:1 116:10 137:7 187:6, 21 198:12 212:2 213:22 233:18 | < Q > |
| programs 51:15, 16 55:4 208:10 | proposing 155:9 | pull 5:5 26:22 64:2 138:2 232:23 | qualifications 98:5 |
| progression 36:15 38:21 | proposition 10:8 | punishment 81:22 | Qualified 2:1 |
| project 2:11 44:6, 11, 12, 13 45:13, 22 46:7, 14 47:6 49:11 54:19 55:5 57:6, 10, 15 90:12, 24 91:12, 17 102:9, 20 103:3 109:19 110:3, 23 | protect 10:20 52:12 81:24 211:21 | purchase 163:1 | quality 26:25 39:6, 7, 14 40:24 46:12, 14, 15 50:4, 5, 17 51:16 52:8 57:7, 19 59:20 65:7 100:11 137:13 143:19 144:25 150:18 152:15 160:3 167:8, 17 193:3 208:11 |
| | protected 58:14 | purchased 79:10 86:3 | question 15:8 20:24 21:14 67:23 68:1 72:24 74:11 76:4 95:6 131:5 132:8 136:9 145:10 149:5, 22 156:25 157:2, 9, 19 179:8, 12 184:9 187:2, 7 189:22 |
| | protecting 48:7 | | |
| | Protection 2:18 6:8 32:22 88:17 99:17 109:25 139:9 152:25 166:24 187:13 | | |
| | protections 211:24 213:6 | | |
| | prove 16:11, 16 17:5 49:22 53:23 87:2 | | |

| | | | |
|---|--|--|--|
| 191:7, 25 192:7 193:12 195:14, 15, 20 205:8, 10, 19 209:18 210:16, 25 211:1, 9 212:11 215:20 216:12 220:10, 15, 21 224:1, 2, 3, 21 227:15 228:20 229:6 242:23 questioning 98:23 152:10 178:18 179:6 201:3 208:17 228:15 229:7 questions 66:1, 5 73:24 75:1, 4, 21 76:14 104:11 150:5 159:7, 9 175:18, 21, 23 177:19, 20 179:17 180:24 183:9 204:6 205:20 219:22 220:23 238:17, 18 243:4 queue 67:8 69:4, 7, 8 206:5, 8, 9 queued 122:24 quick 229:15 quickly 104:8 107:18 118:7, 9 181:16 quid 77:10 quite 40:12 47:17 196:4 210:8 quo 77:10 quote 27:23, 25 28:7 182:25 199:17 < R > rage 49:2 rains 148:14 raise 18:14, 22 19:7 24:21 26:2, 5 62:8 241:25 raised 5:23 6:18 7:7, 17, 22 8:4 12:25 13:2 15:14 18:3 20:11 27:1, 17 28:10, 16 29:4 158:19 196:9 201:12 215:17 216:12 241:24 raising 8:9 15:18, 22 | ramp 80:21 243:21 ramps 233:18 rank 64:22, 23 rapid 211:16 rapidly 106:11 rate 246:18 ray 35:6 re/PRAERG 26:8 reach 162:1 reached 144:2 160:6 reaches 45:6 50:8 144:6 210:12 reaching 45:7 162:6 read 20:12 27:19 29:1, 2 67:5 68:19 110:7 114:25 142:4 149:24, 25 150:4 177:23 179:20 180:17, 20 191:10 199:8 218:21, 25 225:25 226:22 241:20 reading 59:13 68:18 192:5 ready 27:9 30:17, 20 60:23 96:13, 16 118:4 148:14 197:22 244:17 real 24:19 reality 93:15 realize 62:23 really 6:23 7:19 8:3 9:8 11:11 27:1 30:16 34:1 35:18 42:12 58:18 69:10 102:25 110:11 124:21 126:8 136:1 143:4 190:6 202:18 221:24 224:5 reason 28:11, 19 32:8 79:19 114:10 122:5 125:17 136:9 210:22 reasonable 7:10 11:4 17:3 22:5, 15 24:5 56:25 93:18 125:10 reasoned 24:12 reasons 114:13, 14 | 121:12 125:2 238:9 rebuild 185:12 rebuilding 187:5 211:9 recall 75:4 109:3 113:10, 11 114:13 119:8 153:3, 7 156:1, 13 196:23 214:17 223:2 232:20 238:25 243:6 recast 208:16 receive 25:7 152:20 157:10 received 4:24 48:8 102:16 157:10 158:20 186:21, 23 receiving 39:13 42:2 153:3 156:1, 13, 22 recertify 229:23 Recess 1:16 14:17 60:21 96:12 98:16 168:24, 25 recirculator 92:2, 3, 15 93:4, 20 reclaimed 163:2 recognize 64:9 70:14 111:25 112:2 158:24 159:21 168:17 224:8, 24 225:6 226:11, 15 227:1, 12 232:25 recognizes 51:11 recollection 156:3 191:12 223:7 227:4 242:15 243:25 recommend 123:4 245:2 recommendation 46:2 recommendations 210:24 recommended 120:2, 3 122:11 123:24 124:10 155:17 179:2 reconditioning 116:16 reconstruction 117:4 211:3 reconvene 96:6 reconvening 1:18 record 1:5, 14, 17 14:16, 18 61:22 62:20, 24 73:18 | 96:14, 20 97:12 98:14, 17 102:19, 23 108:5 155:7 178:6, 20, 25 179:25 188:6 204:3 230:4, 14, 17 233:2 236:1 244:18 recount 10:18 recovered 48:14 recovering 68:11 Recreational 46:19 55:3 68:13 red 57:10 86:12, 20 132:1 133:1, 2 134:21, 24 136:4, 5 177:9, 19 179:9, 13 193:21 197:15 200:3, 4, 12 202:17 228:6 redirect 74:1 76:18 242:11 243:2 redo 181:11 reduce 90:24 91:1 222:11 reducing 162:5 231:11 reduction 52:17 53:4 91:9, 17 152:16 167:7 reductions 148:12 redundant 5:21 reef 46:13, 23 147:9 162:18 171:1, 4, 14, 24, 25 172:5 reefs 47:9, 12 refer 14:10 35:17, 19 47:3 121:18 180:9 reference 10:12, 16 33:16 135:12, 19, 20, 22 151:9 154:15 170:7 199:6 235:23 referenced 10:22 25:6 29:4 references 11:6 199:13 226:7 referencing 179:24 referral 6:13 referred 6:11 35:23 37:9 43:25 44:12 80:5 121:5 191:13 198:5 206:4 |
|---|--|--|--|

| | | | |
|--|---|--|---|
| referring 14:10 44:22 104:23 118:20 129:20 147:2 154:13 160:16, 19, 23 217:5 218:23 refers 6:9 44:25 reflect 73:8 133:18 179:25 227:7 reflected 113:7 reflecting 133:16 reflective 135:10 reflects 36:2 refrain 183:4 refresh 191:25 227:4 refreshes 223:7 refreshing 191:12 refused 178:9 regard 16:1 34:3 42:13 52:8 108:20 109:17 127:3 129:7 135:15 138:13 142:13 143:12 144:7, 14 145:15 146:1, 17 155:10 156:4 167:16 regarding 6:15 10:25 20:5 74:15 regards 28:22 65:17 regions 50:10 registered 99:4 112:23 regular 85:17 Regulation 24:7 127:7 regulations 126:24 127:3 regulator 12:15 regulatory 12:6 166:5 reiterate 30:3 213:19 reiterates 28:17 reiterating 29:3 rejected 121:11, 12 122:6 125:1 relate 10:25 172:8, 23 related 35:16 40:15 64:15 146:13 161:6 162:21 170:14, 17 172:10 relating 147:13 | relationship 20:7 148:16, 17 relative 55:6 133:19, 21 135:23 relatively 122:21 136:3 relevance 100:8 186:2 187:3, 18 200:9, 20, 24 201:1 207:14 210:15, 17 212:11, 23 213:8, 10 214:11 223:24 224:10, 14 227:3, 8, 14 239:9 240:12 relevant 20:5 reliance 64:24 relied 17:2 27:17 rely 28:15 29:15 49:19, 22 204:16 remain 2:1 89:13 remains 167:21 remember 121:9 170:17 183:24 184:1, 2 185:18 196:24 214:20, 22 223:5, 12, 18 225:21 227:17 239:5 remembering 4:1 remind 11:17 reminding 27:4 reminds 10:17 177:4 removal 10:19 39:24 41:14, 17, 21 43:17, 20 44:15 46:6 48:3, 21, 25 50:19 54:2, 4 59:25 60:5, 6 75:18, 20 85:7 89:9 92:14 110:9, 20 111:4, 15 112:21 114:8, 25 120:2 125:7, 12 127:13 128:8 136:23, 25 137:5 138:13 146:19 154:18 155:1, 4, 16 162:12 166:15 170:14, 17, 18, 21 186:3, 18 198:12 208:15, 25 209:2 211:3, 14, 15 212:17 216:17 217:9 220:12 236:7 238:10 | remove 42:24 44:3 48:22 120:9, 18 121:16 124:2, 19 137:23 154:8 163:11 187:16, 23 208:19 removed 43:14 46:4 50:20 60:9 84:24 85:1 86:11 87:10 110:23 208:18 216:24 233:8 239:4 removing 40:21 43:3 46:10 47:4 49:10 58:1 114:11 121:10 123:2 124:9, 14, 25 125:18, 19 137:21, 22 186:10 rendered 55:15 rendering 125:5 renovation 146:17 repair 54:7 182:16 218:3 220:3 repaired 116:21 219:17 repairs 184:3, 6, 11, 16 189:23, 25 repeat 39:22 68:1 123:14 repeatedly 10:23 24:23 rephrase 222:5 Rephrasing 157:9 replaced 119:6 147:25 replacement 146:17 160:14, 25 161:6 173:13 replacements 172:25 replicated 128:11 report 53:19 113:14, 21 114:5, 7, 22 117:5 140:2, 3, 11, 16 141:2 142:8, 25 143:11 144:6, 11 145:8, 13 150:12 165:19 182:9 196:22 197:1, 19 198:5, 9 199:3 201:18 202:5, 6 204:2, 25 211:19 218:15 222:14 227:6, 19 | reported 142:24 144:2 reporter 1:11, 21 13:7, 11 25:22 60:23, 24 75:24 85:15 96:17, 18 117:23, 25 118:3, 4, 7, 10 129:17 134:12 142:16 147:7 158:4 171:21 176:6, 10, 13 198:22 222:24 230:4 232:9 reporter's 158:12 reporting 166:19 reports 49:18 67:14 183:11 represent 93:22 120:1 202:18 Representative 2:2 245:12 representatives 48:6 represented 25:18 204:23 233:11 representing 32:19 represents 89:7 201:19 request 94:16 140:25 156:23 158:25 159:6 requested 229:22 requesting 77:7 requests 152:20 153:11 require 8:23 16:11 17:22 25:18, 20 130:15 189:24 190:4 206:22 required 6:8 7:23 11:5 12:7 44:18 45:3 168:14 185:12 189:23 191:14 requirement 29:24 102:21 191:18 requirements 25:18 27:8 166:19 requires 25:17 194:4 requiring 99:16 rereading 183:5 Rescue 232:16 235:1 236:16 241:3, 5, 6 |
|--|---|--|---|

| | | |
|---|---|---|
| <p>research 21:1 45:24 190:1, 2 219:12</p> <p>researched 185:5</p> <p>reserve 31:4</p> <p>residence 50:7</p> <p>residency 82:18</p> <p>residential 163:24 164:25 165:24 194:21 195:25 196:5 234:21</p> <p>residentially 83:22</p> <p>residents 231:9 233:23</p> <p>resolve 198:12</p> <p>resource 32:21 57:1 76:19 99:16 109:18 110:4 111:23 139:22 143:13 145:1, 15 159:5, 20 185:22</p> <p>Resources 81:7, 17</p> <p>respect 6:20 8:17 28:9</p> <p>respected 93:24</p> <p>respond 23:9 63:19 65:9, 12 74:17 75:14 76:11 156:24, 25 157:5, 13 177:14 178:15 232:16 236:4, 8 237:3, 24</p> <p>respond-at-the-time 75:13</p> <p>responded 157:2, 14</p> <p>Respondent 9:21 32:20</p> <p>respondents 4:18 6:23 8:1, 6, 10 9:14 11:10 19:14 78:4</p> <p>responding 65:6 76:5 140:25 231:11 233:16</p> <p>response 5:25 14:21 19:25 27:21 28:21 65:11 74:23 75:12 76:6, 7, 10, 12, 13 140:19 152:19 156:20 158:25 159:4, 6, 8, 10 167:20 186:8 210:17 234:1 237:7 238:2 240:4</p> | <p>responses 74:14, 15 76:14</p> <p>responsibilities 16:1 63:9 64:15 102:1 231:7</p> <p>responsibility 63:19</p> <p>responsible 48:6, 17, 18 63:10 65:5 109:22, 23 140:22 146:12 167:23 190:9 232:14</p> <p>rest 13:25 121:24 140:17 193:23</p> <p>restate 211:18</p> <p>restaurant 96:4</p> <p>restaurants 95:22</p> <p>restoration 46:13, 22</p> <p>restore 208:19</p> <p>restrict 39:11</p> <p>restriction 128:6, 7</p> <p>restrictions 81:3 128:14</p> <p>restrictive 129:2</p> <p>restrooms 60:20</p> <p>result 55:1 94:1, 2 125:11</p> <p>resulting 44:24</p> <p>resume 101:14, 15 169:4</p> <p>retain 82:15</p> <p>return 96:10 234:6, 14</p> <p>returned 46:9</p> <p>reuse 47:20 90:12 163:15, 16, 25 164:3, 10 165:2, 16, 20</p> <p>reversal 17:22 25:20</p> <p>reverse 51:22 92:15</p> <p>reversed 10:10 24:9</p> <p>review 139:25 141:2, 18 153:23 156:13 157:11 185:21 188:14</p> <p>reviewed 110:5 142:4 144:7 162:15 163:7 182:12, 14 196:22, 25 197:13, 25 199:25 222:18</p> <p>reviewers 157:11</p> | <p>reviewing 153:7</p> <p>reviews 204:12</p> <p>rework 95:11</p> <p>Richard 2:9</p> <p>right 1:18 2:9, 22 3:4 4:5 5:1, 20 12:25 13:15 24:16 25:11 28:15, 19 30:17 32:15 33:8, 18 40:7 44:11, 21 53:3 55:23 60:16 61:13, 20 62:4, 8 66:2, 6, 14 68:25 73:25 76:24 77:3 78:17 82:5 85:5, 13 86:4 87:22 90:12, 15 94:7 95:8, 18 96:5, 13, 19 99:14 104:2, 21 106:4 109:1, 4 110:19 112:15, 25 113:20 114:1, 4 115:13 117:24 118:14 120:13 121:13 123:1, 19 124:8 126:19, 23 128:13 129:20 131:3, 7, 8 132:25 133:4, 16, 19 134:4, 9, 18 135:11 139:16 140:1, 7 141:6 143:6 151:20 154:3 156:7 157:1 158:18, 22 159:14 160:8, 12 161:9 162:3, 11, 16 166:23 167:5 168:8 169:11 170:17 171:19, 24 172:7 173:12, 15, 18 175:25 176:14 178:23 183:6 184:15 189:14 197:20 198:15 200:1, 6 203:2 204:9, 14 205:7 206:1 211:7, 19 212:14 213:9 215:23 216:14 218:16 220:8 222:3 223:13, 22 224:22 225:13, 19, 25 226:1, 17, 19, 21 229:19 238:16, 19 242:14</p> <p>244:3, 5, 13 245:24 246:13, 21</p> <p>right-hand 176:17 189:11</p> <p>rights 9:12</p> <p>rise 168:23</p> <p>risk 48:23 174:5 188:6 217:18 231:11 233:14, 22 236:20, 22 237:4, 16</p> <p>risks 237:2</p> <p>River 33:10 34:25 35:2 45:9, 12 47:18, 19 52:12, 13 54:8 57:4, 12, 15, 23, 24 71:18 79:6, 8 80:3, 14 82:1 83:16 86:19, 20 88:14 89:11, 19, 21, 23 90:11, 20 91:2, 16 92:21 93:3, 5 94:4 143:16 162:1, 7 163:12 164:1 192:16</p> <p>rivers 83:16</p> <p>Road 78:24 79:1 82:16 84:8 164:22, 24</p> <p>roads 78:25 82:9 83:12 194:11, 25</p> <p>Rober 245:11, 13, 16, 17</p> <p>Robert 2:12 153:2</p> <p>role 109:18 142:1 146:1, 3, 16</p> <p>roll 82:21 113:20 192:20</p> <p>rolling 246:15</p> <p>Ron 2:17</p> <p>roof 70:23</p> <p>roofs 194:25</p> <p>room 94:24 124:21 158:16</p> <p>Rotary 45:15 80:11 147:5 161:12, 16, 17 172:9</p> <p>rough-draft 1:5</p> <p>roughly 65:4 146:8 151:21</p> <p>Route 80:7</p> <p>routine 65:5, 11</p> |
|---|---|---|

| | | | |
|---|--|--|---|
| <p>rule 4:12 7:19 8:23, 24, 25 9:2 11:11 12:2, 4 18:11, 13, 14, 15 20:4, 19 21:3, 4, 5 22:8, 12, 14, 16 23:17, 20, 22, 23 25:14 27:9</p> <p>ruled 29:5 144:21 212:11</p> <p>rules 6:7 7:24 11:15, 22, 25 17:21, 24 20:8 21:18 22:21 24:20 25:19 28:3</p> <p>ruling 28:16 29:18 187:25 188:8 224:14</p> <p>rulings 188:3</p> <p>run 36:7 81:12 158:11 210:8</p> <p>runoff 38:25 82:16 138:17, 18 189:17 194:3, 6, 10</p> <p>runs 78:25 79:1</p> <p>rusted 117:3</p> <p>RYAN 230:8, 14, 18</p> <p>R-Y-A-N 230:18</p> <p>< S ></p> <p>safe 123:5 206:12 216:24</p> <p>safety 54:20 63:11 65:18 114:16 115:1 121:12 122:8, 12, 15 137:1 198:12 206:9, 13, 17 231:9 233:9, 11</p> <p>sake 131:24</p> <p>salinity 59:10, 11 109:9, 12, 14 111:11 143:21</p> <p>salt 37:16, 21 42:6, 17 152:4</p> <p>saltwater 38:10 55:21 102:5 116:2, 3 127:11</p> <p>Sampson 18:19</p> <p>sand 79:19, 20, 21</p> <p>sandbagged 19:14</p> <p>sandwiches 95:20</p> <p>Sanibel 79:17 84:12</p> <p>Sarasota 1:20</p> | <p>sat 149:23</p> <p>satisfied 54:15</p> <p>save 48:24</p> <p>saw 35:8 52:9 91:13 108:21 146:19 164:23 174:19 223:20</p> <p>sawfish 35:5, 6, 11 45:21, 24 46:3 54:23</p> <p>Saybar 10:7</p> <p>saying 8:5 16:23 89:16, 20 130:24 134:5 205:11 220:3, 5, 6 245:20</p> <p>says 10:15 20:1 24:2 27:23 29:3 53:3 68:2 88:21 89:9, 24 140:18 150:12 182:24 186:20 192:14 198:10, 11, 18 214:18 219:8, 10, 11, 15, 18 220:1, 5 227:6, 11</p> <p>school 121:10</p> <p>science 98:25 121:9 207:2</p> <p>scientific 56:14 208:3</p> <p>scientifically 43:5</p> <p>scientist 90:8</p> <p>scope 18:15 26:15 29:11 68:7 70:3, 5 72:9, 22 140:2 186:2 191:19 211:13 241:16</p> <p>screen 35:25 44:9 66:15, 18 70:8, 11 74:5 101:5 118:18, 19 130:8 138:16 176:4 197:7, 9 219:3 222:11 233:1 239:13, 16</p> <p>screens 3:8 137:18</p> <p>scroll 78:9, 19 114:19, 24 117:11 120:10 127:18 129:10 137:3, 11 138:21 140:6 146:24 147:10 151:8 153:5, 13 154:9 156:8 167:2, 12 170:18</p> | <p>172:20 197:11 209:1 218:19</p> <p>scrolled 176:16</p> <p>scrolling 153:18 167:14 170:11</p> <p>Seafood 85:13</p> <p>seagrass 88:7</p> <p>Seagrasses 143:23</p> <p>seal 110:12 113:19 114:2 204:9, 11, 17, 24, 25 205:14 209:23</p> <p>seated 2:1 60:22 62:14</p> <p>seawall 124:20, 22 125:14, 20, 22, 24, 25 126:4, 9 138:8 162:19</p> <p>seawalls 121:20, 22 125:24 137:19, 22, 24 138:1, 3, 16, 20 217:2, 20</p> <p>second 10:14, 16 14:16 17:11 27:23 45:13 67:4, 22 91:21 116:20 121:15 122:2 124:8 154:10 182:21 209:6</p> <p>secondarily 17:1</p> <p>secondary 111:3</p> <p>Section 10:16 20:4 21:6 29:20 143:7 144:4 182:4 185:7 188:18 199:15 227:20 228:3</p> <p>sections 26:22 177:18</p> <p>sector 116:25</p> <p>sediment 41:13 85:1, 6 138:15 157:25 194:3, 6 216:18 217:7, 22</p> <p>sedimentation 41:16 88:6</p> <p>see 23:6 26:20 33:15, 16 35:25 36:7 41:6 42:7 43:8, 15 44:20 53:3, 21 59:18 60:3, 5, 6 66:3, 18, 20, 22 70:23 71:14, 21 72:19 78:19, 20 79:4, 6, 15, 23 80:2, 6, 10,</p> | <p>19 84:1, 9 85:2, 5 87:5 88:7, 14, 15, 19 90:13 94:22 100:24 101:3, 4, 8 107:9 117:15 118:25 119:2 124:17 125:13, 15, 20, 22 126:2, 3, 7 130:4, 5 131:6, 12, 19, 20, 24 133:10 136:4 139:10 147:18, 23 148:1, 2 152:3, 5 153:5 174:16 179:9 187:18 188:22 189:9 198:2, 17 199:21 206:10 217:4 218:22 221:9 222:12 223:6 226:6, 24 239:17</p> <p>seedlings 162:17 183:14</p> <p>seeing 66:21 101:12 219:2 223:12, 13, 18 244:19</p> <p>seek 8:1 19:17 138:13</p> <p>seeking 19:7 143:12 200:10</p> <p>seeks 211:20</p> <p>seen 5:14 102:10 109:1 202:22 222:21</p> <p>selected 154:7 209:14</p> <p>sell 205:10</p> <p>semi 65:11</p> <p>seminal 16:2</p> <p>Seminole 23:25</p> <p>Senate 100:25</p> <p>sending 92:9</p> <p>sense 29:25 82:13 93:21 117:1</p> <p>sentence 10:17 13:13 67:4 68:2, 18 182:24 227:22 228:1</p> <p>sentences 25:24</p> <p>sentiments 16:9</p> <p>separates 33:10</p> <p>separating 34:2 102:5</p> <p>September 152:25</p> <p>septic 51:18 53:14</p> <p>sequence 87:5, 9, 14</p> |
|---|--|--|---|

| | | | |
|---|---|---|---|
| <p>sergeant 64:1 serve 100:3 230:23 served 4:24 232:18 serves 232:7 service 65:15 73:12 187:12 231:22 232:21 set 92:4 170:16, 24 172:4, 7, 21, 23 settings 130:16 seven 22:18 44:15 45:2 54:12, 15 seven-factor 21:20 severely 9:12 sewer 47:17 53:14 57:18 83:24 164:4 195:1 196:8 sewers 51:18, 19 91:18 194:11 shaking 161:20 shallower 128:24 193:25 shallowest 193:22 shape 50:16 118:21 share 66:14 70:8 239:13 shared 78:2 sharing 74:6 89:1 176:4 shark 35:6 sheds 42:12 sheet 36:10, 11, 18 49:24 50:3 171:3, 9 172:3 sheets 170:16 171:4, 7 172:10 173:5 she'll 85:6 shellfish 83:2 shift 75:16 shifted 91:10 shipped 116:14 shoaling 55:2 175:8 shock 59:19 shocking 59:14 shores 90:15 short 4:12 17:2, 11 60:19 84:5 short-changing 195:3 shorthand 236:2</p> | <p>shortly 94:16 shot 88:19 show 33:6 34:6 36:13, 19 39:3 40:13 41:4, 7 43:15, 16 50:5 51:1 53:16 54:1, 5, 18 55:22 57:2 59:5, 10 60:7, 13 97:19 112:7 117:8 173:6 223:6 226:5 showed 58:21 193:21 196:10 showing 54:15 64:6 87:9 111:20 135:10 136:12 152:24 180:1, 17 182:11 200:12 201:16 225:15 227:4 232:25 237:20 shown 57:9 79:25 93:13 108:7 122:24 129:23 188:19 202:1 shows 133:1, 15 134:18, 20 136:2 149:11 223:2 shrink 119:21 shut 8:1 116:11 130:11, 17 shutdown 116:2, 9, 22 shuts 181:10 sic 142:2 176:9 side 3:22 30:25 35:13 38:6 40:19 43:2 60:12 105:12 116:13 121:23 124:15, 19, 22 125:13, 20 126:3, 7 127:7 136:10 223:3 sides 56:2 59:19 120:16 124:10 127:5 sidewalks 194:25 sign 113:19 204:8 205:14 209:23 signage 139:7 signature 114:2 signed 49:24 114:1 204:11 significance 37:12, 14 58:15 156:5</p> | <p>significant 116:1, 4 119:5 120:20, 24 172:18 significantly 74:18 117:2 signs 214:8, 9 silt 138:16 similar 38:19 105:18 108:2 110:13 126:16 146:3 164:12, 17 197:16 207:6 Similarly 83:18 simple 50:14 simply 43:5 44:3, 5 49:9 55:23 56:10, 17 91:4 123:1 124:2 178:21 187:23 234:5 simultaneous 123:2 simultaneously 105:24 single 47:12 123:7, 10 sir 62:3 64:11 66:13, 22 67:2, 17 72:17 99:9, 13 100:9 103:4 108:19 138:9 139:2 158:14 173:16 182:18, 20 183:21 184:12 190:22 192:21 197:5 198:20 199:4 204:10 205:15 206:6 230:16 231:7, 25 232:2, 5, 13, 14, 18 233:4 236:24 237:23 238:12 241:7 sit 30:5 75:9 site 84:25 106:19, 20, 21 situation 18:16, 23 19:12 56:12 123:19, 21 124:3 155:7 235:24 situations 236:9 six 100:1 238:14 Sizemore 62:7, 10, 19, 21 63:13, 16, 23 64:6, 9 241:14 S-I-Z-E-M-O-R-E 62:22</p> | <p>Sizemore's 241:13, 20, 23 skiers 65:8 slab 125:16 131:8, 9 134:11, 15 135:6, 21 slices 119:3 slightly 61:2 133:14 slips 126:8 slosh 92:23, 24 sloughs 42:8 slow 7:1 117:18 127:5, 10 slowing 42:4 65:7 181:14 slowly 120:4 148:13 small 40:23 121:1 136:19 148:2, 12 smaller 42:3 43:22 72:14 107:20 121:2 130:2 smalltooth 35:5 45:21, 24 So.2d 24:1, 8 soil 105:11 221:8 solely 15:11 54:12 solutions 154:4 solve 211:24 214:9 somebody 2:24 somewhat 201:1 soon 81:2 88:24 sooner 194:1 sore 208:25 sorry 13:9 18:13 21:23 27:14 31:14 38:16 44:4 51:3, 4, 5, 6 58:9 74:24 78:10 103:9 104:7 112:6 114:18 130:7 145:11 148:22 154:24 155:1 157:7 161:20 166:12, 13 171:16 172:21 176:8 180:3 184:9, 14 194:19 197:22 198:23 203:12 211:18 217:13 221:3 222:24 223:14, 17 245:15 sort 36:10 79:13 105:10 138:5 193:11 sorts 158:12</p> |
|---|---|---|---|

Sound 84:16 125:25
 211:4
sounded 227:3
sounds 29:12 35:8
 131:7 179:16 181:5
 211:4 244:3
soups 95:20
source 38:3 183:20
South 2:21 18:9
 23:15 32:24 34:3, 7,
 20 35:17, 20 36:10
 37:2, 3 38:2, 15, 16
 39:3, 15 41:24 42:1,
 16, 20 44:13 45:6, 16
 46:1 49:3, 20, 23, 25
 50:6, 9, 10, 21 57:3
 58:17, 21 59:8 60:11
 63:21 68:21 73:16,
 19 74:15 79:2 80:8,
 11, 14 81:4 82:3, 4
 83:12, 14, 21, 22, 23
 84:3, 9, 12 86:15
 89:13 91:18 92:6
 102:13, 17 103:6, 25
 104:22 107:7 109:5,
 9, 19 112:3, 11
 120:17, 23 121:23
 125:13 126:3, 25
 129:13 131:17
 136:17 148:18 149:9,
 14 150:7, 10, 15
 151:1, 21, 23, 24
 152:2 159:16 160:16,
 19, 23 164:22 173:3
 175:5 184:25 185:8
 190:20, 23 191:7
 192:15 196:1 208:21
 218:1 220:25 221:20
 223:10, 14 224:17, 25
 225:7, 14, 21 226:11,
 12 231:17, 24 232:8,
 11, 12, 14 236:9, 12
 237:10 239:23
 242:17
southern 232:11
Southwest 78:6
 86:12, 18 131:22
space 125:23
speak 4:20, 23 5:7, 8
 13:8, 9 94:10 100:24
 118:4, 22, 23 140:15
 234:7 242:6
SPEAKER 32:5
 40:3, 5, 8 59:3 62:8
 95:23 181:17
speaking 32:9 105:24
speaks 17:17 23:22
 118:9 156:19
special 11:22 167:1,
 10 236:18 243:12
specialists 193:4
species 46:22 54:23
 115:8 143:24
specific 12:16 18:13
 24:4 27:20 44:25
 45:3 52:5, 7 89:6
 138:24 146:6 150:21
 166:3, 8 167:1 170:3
 177:25 227:5
specifically 18:11
 19:5 23:16, 18
 100:13 111:16 143:3
 154:3 161:1 170:6
 185:15 233:25
 237:15 238:25
specificity 23:10
 24:13
speculation 49:15
 56:10 216:4
speed 53:17 65:6
 81:2 127:3, 5, 10
 225:15
spell 62:19 97:15
 230:16
spend 48:1
spoil 158:2, 5
spoils 79:12
spoke 69:15
spoken 35:16 80:3
 89:6
spread 192:12, 14
 193:4 232:12
Spreader 32:24 34:3,
 7, 20 35:17, 20 36:10
 37:2, 3 38:2, 12, 15,
 16, 18 39:3, 15, 20, 21,
 24 40:7, 11, 14 41:19,
 23, 24 42:1, 6, 16, 20
 43:12 44:13 45:7, 17
 46:1 49:3, 20, 23
 50:7, 9, 10, 16, 21
 57:3 58:17, 21 59:8,
 23, 24 63:21 68:21
 73:16, 19 74:15 80:8,
 9, 11, 14, 22 81:4, 20
 82:2, 3, 6, 17 83:13,
 14, 19 84:2, 3, 9 85:3
 86:15 87:3, 6, 9
 89:13 91:2, 3 92:5,
 19 93:2 102:13, 18
 103:6, 25 104:22
 107:7 109:6, 9, 19
 112:3, 11 120:23
 121:17, 21, 24 124:21
 126:25 131:16, 17
 148:18 149:9, 14
 150:7, 10, 15 151:2,
 21, 23, 24 152:2
 159:16 160:17, 19, 23
 173:3 175:5 182:12
 184:11, 16, 25 185:8
 190:20, 23 191:8
 192:13 195:1 196:1
 218:1 220:25 221:20
 222:14 223:10, 13
 224:13, 17, 25 225:7,
 14, 16, 20, 22 226:11,
 12 231:17, 24 232:8,
 14 236:9 239:23
square 93:1
squeaking 176:21
SSW 218:25
St 2:4 164:16
stacked 105:10
stage 8:8
stance 233:7
stand 10:8 180:19
 230:15
standard 25:25
 139:4, 9 205:12
 237:4
standards 21:8
 93:23 204:14, 19
 207:10
star 131:14
start 5:9 11:14
 30:22 33:9 34:14
 51:6 74:11 173:6
 211:5 237:19 244:7
 245:9
started 7:13 59:13
 231:5 244:9
starting 1:22 36:3
 130:15
starts 34:20 52:7
 195:18 199:16 228:2
 229:13
State 2:17 7:21
 11:21 12:20 24:13
 58:14 62:19 79:17
 81:18 97:11 98:23
 99:5 111:23, 24
 155:21 156:4 161:14
 185:3 187:11 191:16
 192:1, 3 212:6
 230:16
stated 5:22 7:2, 20
 14:24 20:1 24:23
 33:1 45:5 126:24
 199:13
statement 17:21
 87:19, 21 171:22
 180:3 186:9
statements 15:1
 87:24 158:12 228:6,
 8
state-of-the-art
 187:13
states 16:8 17:10, 20
 23:16 47:9 86:1
stating 135:11 178:9
Station 232:15
 241:12
stationed 232:2, 3, 4
statistics 73:4, 8, 12
 74:12
statute 4:16 11:14,
 15 12:3, 4 21:4
statutes 11:25 13:3
 15:3, 25 17:19, 20, 22
 24:20 25:19
statutory 20:8 21:6
 22:8
stay 3:16, 18 228:23
staying 228:24
stays 125:18
stenotype 1:8
step 79:15 110:18, 19
stepped 103:1
Steve 2:11 153:2

| | | | |
|---|--|--|--|
| <p>Steven 96:24 97:13, 17, 20 S-T-E-V-E-N 97:17 Stevenson 20:17, 18 stipulated 30:1 97:22 stipulation 4:7, 17 6:2, 5 12:8 13:18, 20, 21 14:24 18:7 21:16 26:8 29:13, 21, 23 30:16 113:5 stood 103:2 107:15, 19 stop 38:24 48:21 112:6 170:14 229:6 stopped 38:20 stops 74:5 storage 70:24 80:19, 23 Store 241:10 storm 55:14 56:4 196:12 storms 40:16 41:5 stormwater 38:13, 25 39:4 45:4, 5, 14 51:14 52:2 83:7, 8, 9, 11, 13 99:10, 12 100:14, 15 101:17, 19, 21, 23 138:17 144:25 147:21 148:4 160:15, 25 161:6, 11, 13, 14, 24 162:4, 8 172:13, 24 189:19 194:15, 16, 17, 20 196:1 207:5 story 49:19 213:12, 13 straight 244:1 strategically 232:6, 10 233:13 streamline 98:10 street 64:21 95:18, 21, 22 235:3 street-based 65:9 Streeter 85:10 streets 194:11, 25 stricken 29:10 30:13 strictly 40:23 194:21 strike 8:14 30:5 striking 9:12 strokes 1:8</p> | <p>struck 86:12 115:14 structural 217:19 structurally 125:25 structure 12:7 103:20 107:23 120:8 121:16, 18 217:2 structured 8:15 structures 102:4 103:23 105:25 study 127:14 128:13 190:19 196:16 studying 218:1 stuff 177:23 style 147:18, 23 148:1 149:4 styled 26:23 subdivision 25:15 subject 169:24 Submerged 111:24 submit 24:19 submitted 25:9 110:14 112:25 113:24 202:20 submitting 109:24 113:10, 11 140:23 sub-rule 25:14 subsection 21:10 subsequent 41:14 106:18, 20 substances 86:21 substantial 12:8 25:9 26:1 substantially 7:24 substrate 46:24 successfully 174:19 197:7 219:17 suck 92:16 sucked 89:12 suffer 50:22 sufficiency 15:8 sufficient 16:18 22:22 29:9, 10 38:7 suggest 42:15 43:3 89:4 154:4 188:4 suggested 211:2 suggesting 77:9 suggestive 228:6 summarize 237:21 summary 8:22 9:3, 6</p> | <p>12:13 15:9 26:3 summer 90:16 supervisor 235:5 supervisory 64:22 supplement 164:19 support 17:19 75:17, 20 76:2 235:1 238:10 240:6 supported 7:11 81:12 supporting 37:17, 22 supposed 25:14 36:11 51:13 91:5, 6 101:4 108:8 sure 3:12 21:17 25:7, 8 61:21 71:25 72:12 100:18 104:7 115:1 118:1 122:3 129:11 130:18 137:7 148:21 149:23 151:6 157:3 164:8 171:21 183:25 190:11 197:12 204:21 211:10 218:14 223:8 224:5 228:25 230:18 245:20 246:10, 18 surface 21:12 47:14 51:23 82:9 194:24 surfaces 82:8 surge 55:14 surprised 104:11 surrounding 54:6 99:21 232:8 survey 110:15 128:19 131:16 134:8 135:18 136:15 Surveying 97:14 surveys 108:9 suspenders 138:5, 7 suspending 230:2 sustain 168:5 187:18 222:4 239:11 240:23 Sustainability 32:25 112:4, 12 sustainable 102:25 Sustained 157:6 194:8 205:23, 24 206:21 207:15 208:1 213:9 214:12 215:7 216:9 241:17, 22</p> | <p>sustenance 96:1 swale 148:9 swales 196:6, 12 swim 234:24 swimmer 235:6 swing 84:10 switch 79:22 sworn 62:11 97:2 230:9 system 38:13 40:13 45:15 46:24 47:13, 20 50:13 51:24 55:21, 25 56:1 57:18 58:18, 20 59:15, 16, 19 72:15 81:20 82:2, 7, 13, 14 83:3, 8, 10, 19, 24 86:17, 23 88:24 90:3 92:4 93:7, 8, 9, 12, 17, 22 109:6, 10 131:17, 18 143:24 145:5 148:9 150:9 151:22 152:2, 5, 8 161:12, 13 162:4 163:17, 21 164:2, 3, 7, 17, 20, 21 165:2, 4, 6, 15, 21 172:14, 16, 19 176:23 187:14 189:19, 20 195:1 196:1 211:23 system/irrigation 164:3 systems 152:1 194:15 196:2 < T > tab 61:21 table 2:10 140:7 take 30:7 41:10 46:7 47:23 49:13 50:8 52:21 60:18 69:9, 20 73:9 83:7 87:23 93:10, 11 96:1 102:21 116:20 122:23 125:17 127:23 158:11 168:22 183:8 188:1, 5 197:6 199:4 203:1 216:1, 3, 10 224:4 229:13, 20, 25 230:5 245:6</p> |
|---|--|--|--|

| | | | |
|---|---|--|--|
| <p>TAKEN 1:2 56:17 57:21, 23 145:21 163:20 168:11 takes 71:17 tale 50:1 talk 19:5 20:25 23:12, 13 35:10 61:13 84:22 129:18 138:11 182:21, 22 193:17 194:21 197:6 199:6 214:14 216:16, 17 talked 30:9 35:19 45:16 68:22 69:16 91:7 126:14 131:9 143:18 182:16 184:17 186:10 215:8 223:4 talking 27:25 38:14 47:7 48:2 55:8, 18 100:25 107:1 117:20 119:10 133:5 164:9 184:8, 16 186:25 188:12 191:3 194:7 203:13 218:20 228:2 243:10 talks 135:20 183:18 205:4 Tallahassee 62:2 Tarpon 232:3, 4 241:10 242:22, 24 243:8 team 109:23 110:21, 24, 25 112:13 126:16 157:14, 16 158:19 209:20, 21, 24 238:1, 2 technical 158:10 technically 213:18 Technology 23:15 television 1:25 32:18 tell 23:23 25:15 29:22 62:11 82:23 85:7 86:7 97:2 106:12 108:1, 10, 12 116:9 220:25 230:9 telling 209:13 tempers 67:7, 19 68:3, 4</p> | <p>ten 244:5 tender 123:17, 18 tends 132:13 tens 92:25 tenure 102:2 term 120:25 127:23 192:22, 24 terms 7:5 23:9 37:8 42:2, 15 107:4 158:10 200:20 test 4:16 12:21 15:5 18:17 21:9, 19, 20, 24 22:1, 2, 9, 17 23:12 26:7, 10 28:5, 18, 21 29:4, 6, 20 30:3, 12 46:21 54:13 56:7, 8 187:7, 21 212:2 213:22 testified 215:15 testifies 62:11 97:2 230:9 testify 103:9 168:3 186:17 229:10 testifying 210:23 213:14 testimony 18:3 23:3 48:19 59:23 141:8, 11 218:8 229:10, 21 230:5 234:7 236:23 245:6, 22 246:9 tests 49:15 text 1:6, 12, 13 177:9 Thank 2:5, 13, 14, 16, 21, 22 3:3 4:5 5:19 12:17 13:11 14:19, 20 19:19, 20 20:23, 24 23:7 24:15, 16 31:19, 20 32:15 33:20 34:7 39:17 56:18, 19, 21 60:15, 16, 22 61:25 62:3, 5, 14, 16 65:25 66:2, 8 67:3 70:7 73:21, 23 76:22, 23 77:1, 23 88:3 91:23 94:5, 6 96:11 97:5 98:19 101:6, 9, 15 113:3, 12, 17 114:21 119:3 122:9, 13 130:19 131:2, 15 136:20</p> | <p>139:18 141:22 145:23 149:12 150:19 151:3 152:7 154:11 155:19 158:9, 15 159:18 160:22, 24 161:19 166:1 168:9 169:20, 21 170:18 171:15, 20 173:18 175:20 176:1, 13, 14 178:13 180:13 181:25 182:1 191:4 195:17 203:10, 24 210:2 213:4 214:1 215:19 217:16 227:9, 18 228:4 232:13 234:15 238:15 242:7 243:24 244:2, 4 246:20 thanks 115:5 Theirs 75:13 theory 92:3, 8, 13, 15, 21, 24 93:6, 20 thereof 180:10 thing 57:14, 19 58:16 59:22 60:1, 9 90:21 91:21 136:3 148:15 149:24 190:5, 8 195:14 199:18 200:20 things 7:1, 9 11:19 16:22 86:14, 15 101:19 104:5 108:13 116:8 121:9 134:20 137:20 138:3 178:22 195:3 217:2, 21 225:15 226:14 228:13 235:16 246:7 think 9:13 11:9 12:23 22:24 23:1 24:20 25:25 26:2, 17 56:11, 22 57:16 61:11 70:19 72:11 77:7 89:22 93:18 95:25 97:25 100:10 113:7 114:22 117:9, 13 119:12, 14 124:13 129:12 130:16 137:19 139:3 141:9, 10 146:7 148:19 154:10 163:22, 23</p> | <p>165:19, 21 170:16 176:22 177:5 178:12 180:5 181:18 184:17 190:3 192:4 193:24 194:10 195:3, 19 196:20 197:3, 18 199:19 201:25 202:19 206:2, 4 212:16 213:11 214:9, 21 216:5 219:19 220:16, 20 223:14 224:13 225:12 245:19 third 16:10 31:17 45:22 68:17 THOMAS 2:3 4:21, 22 5:8, 9, 12, 19 13:1, 8, 9, 14, 16 24:17, 18 25:16, 25 26:16 33:1 66:7 thorough 12:18 54:5 thought 16:15, 18 30:25 31:8, 12 74:3 86:2 87:13 134:3, 9, 25 135:22 136:8 202:23 203:14 217:6 223:25 243:25 thoughts 209:24 thousand 119:13 234:25 thousands 60:11 93:1 119:11 147:24, 25 150:13 threatened 54:22 143:24 three 50:25 59:5 63:4 79:5 93:12 120:2, 5 126:19 154:6 186:15 208:15 209:12, 14 211:3 221:11 231:22 241:7, 9 thriving 60:13 throat 147:20 throw 76:17 193:11 throws 50:18 thumbs 2:24 Thursday 94:20, 25 95:4, 10</p> |
|---|---|--|--|

| | | | |
|---|--|--|---|
| tidal 36:6, 23, 25 37:2 58:23 103:6 | top 84:13 107:10, 12, 15 138:16 147:18 148:7 188:12 189:7, 11 196:3 204:22 | true 7:24 38:22 51:1 187:16 201:24 210:3 | typically 135:24 194:16 |
| tidally 128:3 | total 57:20 93:9 119:14 152:14 167:6 185:12 | truth 17:5 62:11 97:2 199:20 230:9 | < U > |
| tide 59:7 86:12, 20 107:9 135:3 | totally 16:8 | try 25:23 26:22, 24 42:15 56:22 72:12 78:1 93:9 95:12 96:5 100:19 107:15 117:20 130:9 177:18 178:11 181:15 200:21 201:10 204:5 217:15 218:3, 10 222:5, 6 224:20 228:14 | ultimate 39:13 |
| tides 36:24 92:24 107:17 | touched 52:1 102:10 | try 25:23 26:22, 24 42:15 56:22 72:12 78:1 93:9 95:12 96:5 100:19 107:15 117:20 130:9 177:18 178:11 181:15 200:21 201:10 204:5 217:15 218:3, 10 222:5, 6 224:20 228:14 | ultimately 12:9 45:7 63:10 103:10 112:18 144:2 161:25 |
| tie 16:24 125:24 | touches 147:4 | trying 18:7 21:15 26:9 29:12 47:25 104:8 174:13 195:19 210:20 225:10, 13 229:1 240:2 | unable 236:11 |
| till 94:14 | touching 125:14 | turbidity 136:25 137:16, 17, 25 138:5, 8, 19 | unacceptable 21:11 |
| time 8:20 9:14, 23 17:15 26:2, 8 37:19 38:1 48:2 50:7, 8 51:14 57:24 64:20 65:12, 19 68:12, 16, 22, 23 69:1, 2 73:12 74:23 81:7, 11, 17 82:3 85:21 87:5, 8, 14 98:13 100:3, 5 104:25 106:12 108:24 115:16 116:24 123:7, 11 126:2, 21 129:18 130:20, 21 148:14 158:11 174:10 185:15 188:2, 5 203:9, 19, 21 210:8 213:19 218:18 219:10, 15 221:15, 23 229:25 236:15 | Tower 18:8 23:15 | turn 3:7 44:20 46:8 51:5 53:1 119:17 120:11 139:16 143:6, 7 144:3 152:22 158:22 160:10 168:16 | unadulterated 203:7 |
| timeliness 15:11 | town 206:22 | turns 34:24 136:3 | uncertified 1:6 |
| times 19:8 71:12 74:14 76:6 99:25 106:10 107:8, 12 112:14 186:5 201:7 236:23 | Trafalger 82:5 | TV 101:12 | unclear 35:18 |
| timing 9:16 94:9 221:23 238:13 | traffic 198:13 245:3 | Twenty-five 63:7 | uncontrolled 124:3 |
| Title 10:16 | trail 13:12 | two 16:22 42:12 75:11 76:13, 14 79:5 89:3 119:1 123:3, 4, 24 124:1 134:2 135:19 164:19 167:13 181:9 208:19 211:22, 24 243:12 246:4 | uncrease 49:3 |
| titled 97:20 127:21 158:24 | trailer 69:13 241:11 | two-month 116:1, 9, 22 | understand 103:10 122:4 130:12 133:23 141:13, 24 144:20 153:25 156:17 164:8 178:23 180:12 184:9 192:7, 25 193:3 200:14, 24 202:1 205:15 207:17 210:7 211:15 212:10 225:11 226:24 227:10 239:3 244:12 |
| today 2:10 15:20 28:14 30:7 88:8 92:25 119:15 128:2 129:6 135:1 172:17 181:15 187:14 237:19 238:10 | trailing 13:7 | types 65:19 75:11 239:22 | understanding 6:3 13:2 34:3 109:8 127:2 144:13 163:19 167:11, 15, 18 174:1 178:19 191:20 192:10 |
| told 187:14 191:13 194:10 211:2 217:25 | trained 68:4 | typical 133:13, 22 135:23 173:13 196:5 | understands 167:24 |
| tons 95:21 | Training 139:6, 8 | | underway 189:12 |
| | transcript 1:5 | | unedited 1:6 |
| | transfer 103:5, 24 216:18 | | unfettered 48:25 49:4 |
| | transferred 53:7 | | Unfortunately 132:18 209:5 |
| | transport 81:1 217:7 | | unfounded 59:18 |
| | Transportation 16:3 158:1 217:22 | | UNIDENTIFIED 3:2 |
| | trap 9:10 | | uniform 6:7 7:19, 24 8:23, 24, 25 9:1 11:11 17:24 28:3 62:24 |
| | travel 81:2 84:8 | | uniformly 192:14 |
| | travels 84:3 | | unique 82:2 137:20 |
| | traverse 120:19 | | unit 68:20 71:3, 7, 11 232:2, 3, 13, 17 |
| | treated 8:16 9:2 47:19 163:13 164:6, 14 165:9, 14 189:20 | | United 47:9 86:1 |
| | treating 162:8 | | |
| | treatment 47:13 50:5, 6, 12 51:14, 22, 25 164:14 194:17 196:1 | | |
| | tremendous 88:17 | | |
| | trial 19:16 178:12 | | |
| | tribunal 11:17 | | |
| | tried 6:2, 5, 6 8:2 12:9 18:4 19:2, 3 20:22 26:13 201:9 | | |
| | trouble 117:25 118:2 233:15 | | |

units 63:17, 19, 23, 25
65:5 69:17, 21 70:20
71:8 75:6 231:21, 22
236:4
University 99:1
unorthodox 61:2
unrecommended
122:11
unremitting 94:3
unrepresented 27:6
unrestricted 175:3
unsafe 123:25 124:1
unsupportable 43:6
untimely 18:23
untranslations 1:8
untreated 161:14
unusable 55:15
updated 110:15
upgrade 45:4
upland 46:13, 22
144:25 146:22 147:8
171:1, 5, 10 208:21
uplands 137:18
ups 206:11
upstream 39:9 51:16
56:1 127:4, 22, 23
128:11, 15, 18, 20, 25
129:3, 5, 8, 15 131:18
133:11
uptake 148:10
urban 43:22
USC 10:16
use 32:10 34:5 38:2
87:21 92:2 93:21
109:13 111:24
120:11 135:4 158:11
161:16 165:12
180:18 192:22
225:14 228:5 242:25
useful 209:11
uses 127:23
Usually 13:18
utility 52:2 101:19,
21 164:21
utilize 53:10 178:11
utilized 177:7

< V >

VA 121:2

vague 67:21 194:6
valiant 94:10
valid 91:17
value 49:3 186:11
values 55:3
Vana 32:10, 13 34:5
various 99:25
vegetation 46:6 90:8,
10 143:21 162:12
velocities 120:20, 22,
23, 24 121:1 122:21
174:4
velocity 111:14
122:5, 7 126:13, 18
Venturi 121:5
verbally 118:23
verified 181:13
version 79:13, 22
180:10 199:23 200:1
202:21 204:4
versus 10:4 16:3
17:8 18:1, 8, 19
23:15 24:7 101:5
212:7 240:4
vessel 68:20 115:1
234:25 235:21
236:11
vessels 235:13, 15
237:11 238:4, 6
241:9
Veterans 241:12
video 3:8
view 70:14 188:22
201:12 235:3
viewing 84:25
Village 80:15
violation 12:21
violations 20:6
virtually 102:10
116:23 164:22
visible 189:3
visit 106:5, 19, 20, 21
173:20
visited 173:19
visitors 231:9
vista 84:25
visually 174:2
voice 25:23 78:20
volume 2:25

< W >

wait 77:18 130:7
177:12
waiting 9:13 75:9
229:9
waive 31:6, 7
waived 9:14, 21
wake 81:2
walk 181:9
walked 107:16
Walker 2:7
wall 104:22 125:19
161:18
want 29:14, 15, 22
30:3, 5 31:7, 16, 24
39:23 48:1 49:10
51:5, 10 76:4 77:11,
14, 18, 20 91:21 92:1
95:22 98:13 113:13
119:17 149:19 161:9
176:19 178:24
179:17 180:9 187:23,
25 193:13 194:21
203:23 204:22 208:2
211:8 218:21 220:16
228:25 241:13, 25
242:14 244:15
245:20 246:15
wanted 22:13
149:20 186:12 244:1
wanting 3:12
wants 14:2 116:11
181:24 203:17
warning 19:11 214:8,
9
warrant 20:9
warranty 191:13
waste 47:13 51:25
wastewater 47:19
163:14 164:1, 14
165:9, 14
watch 235:6
watching 1:25 81:8
Water 18:9 23:15
26:25 33:23 37:1, 9,
13, 25 39:5, 7, 8, 13,
14 40:24 41:10 42:5,
6, 11 45:11 46:9, 11,
12, 14, 15 47:3, 4, 12,

13, 14, 23 49:5 50:3,
4, 5, 8, 17 51:15, 23,
24, 25 52:3, 8 54:6, 8
55:1 57:7, 19 58:12,
14 59:7, 20 80:22
82:7, 11, 13, 15 83:1,
3, 5 86:3 90:1, 20, 23
92:1, 12, 14, 16, 23
93:2, 15, 16 100:11
102:4 103:6, 24
105:4, 15 106:10
107:7, 9, 17 108:20
111:12, 14 120:23
121:3 122:5, 7
125:15 127:14, 22, 24
128:3 132:14, 22, 23
133:8, 14 135:25
137:13 138:4 139:10
143:17, 18, 19, 23
147:22 148:3, 6, 7, 8,
13 150:17 152:4, 15
160:3 162:4, 9 163:2,
20, 21 164:4, 6, 10
165:6, 7, 9, 10 167:8,
17 186:13 192:14, 19
193:3 194:16, 24
195:23 196:7 207:2
208:11 234:24 241:3,
5, 6
waters 21:12, 13
47:10 58:14 63:20
64:15 75:6 86:8, 10
93:24 143:16, 17
161:25 236:9
watershed 42:2, 3
43:22 93:25 149:8,
14 150:7, 15 151:2,
24 173:2 208:8
Waterway 32:25
34:3, 7, 19, 20 35:17,
20 36:11, 16 37:3
38:2, 12, 15, 17, 18, 23
39:4, 15, 20, 22, 24
40:11, 14 41:19, 23,
24, 25 42:1, 7, 20
43:12 44:13 45:7, 17
46:1, 5 49:3, 20, 23
50:7, 9, 10, 16, 21
57:3 58:17 59:8
63:21 74:16 82:2, 3,

| | | | |
|---|--|---|--|
| 6 83:14, 19 92:19 102:14 103:6, 25 104:22 107:7 109:6, 9, 19 112:11 122:17 126:25 148:18 151:2 159:17 160:15, 16, 17, 18, 20, 23 162:18 173:3 175:5 185:8 221:1, 20 222:14 224:13, 17 231:18, 25 232:14 236:9, 12 237:10 238:8 waterway-based 65:10 waterways 65:4 68:21 72:2 79:24 232:8 237:12 Waterway's 42:16 way 5:10 10:22 16:19 28:13 34:21 37:19 45:5 50:11 52:13 64:21 84:4 88:16 93:10 105:15 108:2 126:23 130:11 135:5 150:11 161:21 163:5 179:13 182:7 206:10 214:6 245:3 ways 90:1, 3 126:17 WBIDs 37:9 weather 238:7 Wednesday 4:6, 10 21:2 30:9 week 15:20 85:21 130:18 221:25 229:11, 24 weekends 67:11, 13 weeks 222:2 weighed 22:18 weighing 22:9, 10 56:9 212:3 weight 144:22 weir 102:9 103:17 weirs 42:4 102:3, 6 151:23 152:6 welcome 31:3 welfare 54:20 65:18 233:11 well 1:9 7:6 16:5, 24 17:15 23:1 26:20, 25 29:16 31:9, 17 | 37:18 38:14 39:5 42:8 43:14 45:6 48:18 50:12 56:17 61:13 70:9 71:6 75:17 77:5, 19 87:18 96:3 102:8, 11 106:10 113:13 115:21, 25 116:9, 23 117:19, 24 128:23 137:8 138:19 141:6 142:12 146:11 147:4, 25 156:16, 21 160:6 162:18 165:4 171:14, 23, 25 180:5 187:8, 16, 20 188:15 192:6 193:25 199:19 200:20, 25 201:9 202:23 203:16 205:2 206:9 210:7, 19 212:25 214:14 215:25 227:16 229:8, 10 234:2 235:4 237:19 242:9 244:21 245:1, 5 well,so 51:21 well-being 231:9 well-known 79:16 well-organized 12:18 went 41:12 45:18 57:22 58:20 77:17 82:11 86:9 107:18 110:2 178:7 197:4 228:17 we're 3:5 9:10 12:2, 3 18:6, 18 26:14 29:17 30:22 32:19 34:17 35:10 37:18 38:14 40:20 44:22 45:1 47:6 57:1, 5 59:10 60:7, 13 71:10 72:8 76:11, 18 78:7, 11 87:12 89:1 96:15 104:22 125:14, 16 130:9, 24 133:4 139:19 145:3 151:17 159:6 160:23 171:17, 18 176:22 181:23 183:4 186:2, 25 187:22 191:3, 18 192:4 194:14 200:13, | 15 219:2 221:10 224:5, 11 226:7 227:5, 20 228:21, 24 229:12 230:14 236:11 237:20 240:7 242:25 245:9 246:18, 21 west 37:1 38:6 49:25 79:1 80:15 82:22 85:22 86:18 105:12 123:13 124:14 126:8 184:25 192:15 218:25 223:3 westbounders 123:12 western 38:21 221:2, 5 Westin 80:14 westward 36:15 38:21 81:13 wetland 143:21 145:1 wetlands 21:11 115:11 216:19 217:6, 8, 23 we've 5:22 7:2 9:13, 24 10:12 11:24 19:17 25:3, 11 45:5 48:8 54:5 80:3, 8 87:12 95:21 201:12 202:22, 23 219:19 229:20 233:9 237:5 White 32:11, 13 33:6 79:19, 20, 21 wide 82:4, 17 105:3, 7, 14 107:6 126:13 221:16 wider 188:22 widest 121:25 width 121:17 124:20, 25 208:20 wildlife 10:20 54:22 145:1 153:22 154:14 187:12 215:9 216:1 Williams 17:8 willing 3:7 94:14 203:5 Wilson 103:13 105:4 107:25 108:2 winding 221:9 | window 25:2 windows 3:9 wisdom 212:7 wish 80:24 withdraw 191:2 witness 61:3, 6 62:4, 13 66:13, 22 76:2, 24 96:22 97:1, 4 100:23 101:1, 3 104:5, 12, 16 105:23 106:1, 14 118:12, 24 122:8, 10 130:20 133:24 134:6, 14, 17 136:14 139:3 141:17 142:17, 21 144:24 145:11, 18 147:8 148:21, 23 149:1, 13, 21 150:2, 6 151:12, 15 152:8 157:23 158:5 161:22 164:12 165:18, 24 168:11 169:3 171:25 175:22 178:6 179:6, 7, 14 180:20 191:5 193:15 195:10, 13, 22 197:22 200:17 201:2 202:2, 11 207:1, 4, 23 209:19 215:6 217:15, 17 218:11 219:4, 7 220:19, 23 221:3, 5, 8, 13, 16, 21 222:1, 25 224:18 226:6, 13 227:6 228:16 229:15, 20 230:12 238:17 240:15 242:20 243:15 245:6, 21 246:9, 11 witnesses 50:2 53:21 54:3 84:22 85:3 97:23 246:5 witness's 141:11 229:21 Woods 18:20 word 1:9 228:2 word-for-word 199:10, 12 words 42:25 131:13 180:17 work 53:22 69:11 70:9 107:24 111:7, 9 118:17 130:25 138:1 |
|---|--|---|--|

158:18 164:19
 171:10 190:7 209:5
 222:18 236:20, 25
worked 99:23
 209:19 210:8
working 102:18, 19
 115:17, 22 185:6
 200:15 212:25
 233:13 237:1
work-product 178:10
works 16:19 27:3
 44:6 51:22 95:7
 99:9, 12, 24 100:2
 116:10
world 116:3
world's 163:24
worst 68:13
Wow 121:6 123:5
write 182:4 185:9
 233:6
writer 198:11
writing 239:6
written 1:11 49:17
 84:24
wrong 41:22 122:6,
 7 184:22 220:20
 244:1
wrote 188:16 227:23

< Y >
Y'all 220:23
Yard 165:25
yards 82:17 93:1
 164:25
yeah 57:21 100:21
 101:3, 14 113:6
 114:21, 22, 25 115:22
 117:8, 9, 14 123:18
 124:1 128:22 130:7
 132:6, 11 150:6, 25
 151:6 167:4 181:20
 197:23 220:9 246:17
year 53:5 55:20
 57:17 89:18 90:9
 91:16 196:19
years 33:4 63:4, 7
 87:9 93:8, 13 99:24
 100:1 101:20, 23
 102:7 112:17 119:15
 146:8 164:1 186:24

190:12 193:5 195:5
 196:18 231:2, 5
 232:19
yellow 182:25
Yep 114:24 131:14
yesterday 10:2 16:14
you-all 26:9

< Z >
Zoom 2:23, 25 3:5,
 19, 23, 24 4:2 66:23
 96:7, 8 101:5 130:1,
 3, 5, 15 160:11 177:1
 180:21, 22, 23, 24, 25
 181:18, 19 245:7