

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

MATLACHA CIVIC ASSOCIATION, INC.
J. MICHAEL HANNON,
KARL R. DEIGERT,
YOLANDA OLSEN,
ROBERT S. ZARRANZ,
DEBRA HALL, MELANIE HOFF,
and JESSICA BLANKS

DEP FILE No.: 244816-005
OGC Case Nos. 18-1443 - 1460

Petitioners,

v.

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

Respondents.

PETITION FOR ADMINISTRATIVE HEARING

Petitioners request an administrative hearing to challenge the Florida Department of Environmental Protection's ("FDEP") Notice of Intent to Issue an Environmental Resource Permit ("ERP") to the City of Cape Coral for removal of the Chiquita Boat Lock ("NOI"). The NOI was issued and signed on November 7, 2018, by Jon Iglehart, FDEP Director of District Management for the South Florida District.

INTRODUCTION

1. The Chiquita Boat Lock is a water detention barrier across the South Spreader Waterway in the City of Cape Coral. The purpose of the Chiquita Lock is to separate the canal waters of the southern end of the City from the navigable waters of the United States at the mouth of the Caloosahatchee River. The Chiquita Lock and the South Spreader Waterway were

constructed over 30 years ago by the early developers of Cape Coral (collectively identified as “GAC”) to remedy a Clean Water Act enforcement action brought in 1977 by the predecessor of FDEP, the Florida Department of Environmental Regulation (“DER”).

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

3. This history is reported by consultants to the City, Avalon Engineering, in documents appended to the NOI. Avalon Engineering, at page 3 of its appended report, describes the goal of Consent Order No. 15: “to restrict destruction of the mangroves and to provide additional control and treatment of stormwater discharges” and “to be a freshwater system designed to retain and treat the stormwater runoff and then to provide uniform discharge of the stormwater into the adjacent mangroves.” FDEP and the City of Cape Coral do not dispute that Consent Order No. 15 requires these structures, including the Chiquita Lock and the Ceitus Boat Lift Barrier.

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

5. There is no environmental purpose whatsoever served by removal of the Chiquita Lock. On the contrary, its removal will cause significant environmental damage.

6. The State of Florida and the City of Cape Coral are also bound to maintain the Chiquita Boat Lock by the terms of a Warranty Deed of April 12, 1977, which was executed as a requirement of Consent Order No. 15. The Warranty Deed transferred mangrove wetlands

originally owned by GAC to the State of Florida in order that the North and South Spreader Waterways be maintained as designed and constructed by the original developer, GAC. The State of Florida, and hence its Department of Environmental Protection, is obligated under the Warranty Deed to maintain those lands in their natural state in an environmentally responsible manner.

PETITIONERS AND PARTIES AFFECTED

7. The agency which issued the NOI is the Florida Department of Environmental Protection, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000, FILE No.: 244816-005. Director Jon Iglehart has been responsible for FDEP oversight in the City of Cape Coral for over thirty years.

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

9. Petitioners are the Matlacha Civic Association, Inc., a non-profit association for the residents of the island of Matlacha, Florida; Karl R. Deigert and J. Michael Hannon, residents of Matlacha; Melanie Hoff, a resident of St. James City, FL; and Cape Coral residents Yolanda Olsen, Jessica Blanks, Debra Hall, and Robert S. Zarranz, M.D. The additional information required by Rule 28-106.201(b), F.A.C., is contained in Exhibit 1, attached to this Petition.

PETITIONERS' SUBSTANTIAL INTERESTS

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

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

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

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

12. All Petitioners will suffer injury in fact of sufficient immediacy to entitle them to a hearing, and Petitioners’ substantial injury is of a type and nature a hearing is intended to protect. Petitioners will suffer direct, immediate, and irreparable harm if the Chiquita Boat Lock is removed. The Chiquita Lock was originally constructed in the late 1970's as part of the Spreader Waterway System in mitigation of a Clean Water Act Section 404 violation. The Waterway System was designed to maintain natural flows of water which preexisted the canals. The removal of the Lock will alter the natural flow of water and allow direct flow of polluted canal waters into protected natural resource areas utilized by Petitioners, thus directly affecting their use and enjoyment of the water and natural resources of the area including Matlacha Pass

Aquatic Preserve. Petitioners allege that removal of the Chiquita Lock will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state, including manatees and the habitat of the smalltooth sawfish.

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

14. The Matlacha Civic Association is a Florida not-for-profit corporation, tax exempt as an IRS Section 501(c)(3) organization, located in Matlacha, Florida, in unincorporated Lee County. The principal purpose of the Association is to “Provide a unified voice on civic problems so that the best interests of Matlacha can be effectively presented to our County Commissioners, State Legislatures, other elected officials and the general public.” The Association has over 130 members on a tiny island with approximately 600 registered voters, almost all of whom live on canals. The waters surrounding Matlacha are impaired from nutrients emanating from the Cape Coral Spreader Waterways. If the Chiquita Lock is removed, the impairment of the waterways will increase, and the mangrove wetlands on the eastern edge of the Matlacha Estuary will die.

15. Karl R. Deigert is a resident of Matlacha, a certified boat Captain, operator of a motel located on the waters of the Matlacha Estuary, and conducts boat tours throughout the waterways of the Caloosahatchee, the estuaries, Charlotte Harbor, Pine Island Sound, and the Gulf of Mexico. Removal of the Chiquita Boat Lock threatens his use and enjoyment of those waters.

16. J. Michael Hannon is a resident of Matlacha, living on the waters of the Matlacha Estuary. He is a boater, fisherman, and kayaker enjoying the waterways which will be adversely affected by removal of the Chiquita Boat Lock.

17. Debra Hall's also states her substantial interest as follows: I moved to Southwest Cape Coral near the Chiquita Lock in September of this year. I also live on a canal approximately one mile due north of the Chiquita Lock. This Lock has successfully kept the cyanobacteria that is released from Lake Okeechobee into the Caloosahatchee River out of my canal. The environmental devastation seen in the Southeast Cape from the cyanobacteria migration due to Lake Okeechobee releases was not present in my canal due to this Lock. We had no green sludge. We saw no fish kills or dead manatees. Fish continuously thrived in the canal on which I live during the entire devastating event as a result of this Lock providing a barrier. We know that every person tested for microcystin in the City of Stuart, Florida, an airborne toxin that comes from cyanobacteria, tested positive due to the presence of cyanobacteria as a result of the Lake Okeechobee releases into the St. Lucie River. I have serious health issues. The risk to my health by the removal of the Chiquita Lock by the City of Cape Coral puts the City in a position of liability for any personal injury to me. Additionally, the property value of the home in which I live will be negatively affected, as will the property values of the homes in the entire Southwest Cape, should the Chiquita Lock be removed. The City will be liable for any devaluation of property due to contamination of the adjacent canals as a result of this willful, wanton, reckless and purposeful act of removal of the Chiquita Lock. The City of Cape Coral is hereby put on notice that they will be held legally liable for any ill effects to my health, and/or property devaluation of my home and the homes in my immediate vicinity should they remove the Chiquita Lock. The State of Florida and their Department of Environmental

Protection will be equally legally liable should they grant a permit to the City of Cape Coral for the removal of the Chiquita Lock. There have been no environmental impact studies done to assess the environmental risks posed by the removal of the Chiquita Lock and granting a permit to do so is ill-conceived and irresponsible.

18. Robert S. Zarranz, M.D., also states his substantial interest as follows: As a citizen of Florida and permanent resident in Cape Coral Florida, living on a canal, the actions of the DEP in allowing the removal of the lock will negatively impact my health, my family's health, property values and further endanger the ecosystem. As a physician, I am able to render expert opinion on the health impact.

19. Yolanda Olsen also states her substantial interest as follows: My home is on a dead-end canal adjacent to the south spreader canal and I travel by boat through the Chiquita Lock and fish in the south spreader canal on a frequent basis. I am a homeowner and have grandchildren and a puppy which is a water dog breed. If the lock is removed, Blue-green algae, cyanobacteria will bloom in the south spreader and adjacent canals. Cyanobacteria can be toxic to humans and pets. Exposure to the cyanobacteria neurotoxin BMAA may be an environmental cause of neurodegenerative diseases such as ALS, Parkinson's Disease and Alzheimer's Disease. Cyanobacteria is both water and airborne, so we will not be able to enjoy our outdoor spaces during 8 months of the year based on the 2018 bloom duration. Cyanobacteria can clog our boat engine intake and cause damage which requires repairs. Cyanobacteria can poison fish so we cannot eat the fish we catch, resulting in a higher grocery budget. Cyanobacteria in our canals will lower my property values, evidenced by reduced property values of canal homes plagued by blue green algae this season in Cape Coral Zip code 33904.

20. Jessica Blanks is a resident of Cape Coral and uses the waterways affected by the NOI. She is concerned that removal of the Chiquita Boat Lock will adversely affect her environment, the water, and cause further pollution and risk of bad health to her and others.

21. Melanie Hoff is a resident of St. James City on the south end of Pine Island and across from the mouth of the Caloosahatchee River. The removal of the lock will negatively impact the water quality of the surrounding areas resulting in loss of critical habitat for fish and wildlife and degraded conditions for recreational water activities. Her health and use and enjoyment of the water will be substantially affected by removal of the Chiquita Lock.

RECEIPT OF NOTICE

22. Petitioners received notice of the NOI when it was issued on November 7, 2018. The Department of Environmental Protection extended the time period in which to file this Petition to December 14, 2018.

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

A. The NOI Violates Consent Order No. 15 and the Obligations of the Warranty Deed of 1977.

23. In the mid-1970's, the Co-Trustees of Gulf American Corporation, GAC Properties Credit, Inc., and GAC Properties, Inc. (collectively referred to herein as "GAC") filed original permit applications, after work commenced, for a dredge and fill work project that created the canal system in Cape Coral with the FDEP's predecessor agency, the Department of Environmental Regulation ("DER"). Today, Cape Coral has over 400 miles of canals, the largest municipal canal system in the world.

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

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

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

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

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

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

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

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

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

(Attached as Exhibit 3). More specifically, Messrs King and Ward wrote:

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

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

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

(*Id.* at 114-15, Exhibit 3). They described the Matlacha Estuary as “the most valuable marine habitat in the State.” (*Id.* at 108, Exhibit 3).

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

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

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

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

(Warranty Deed, April 12, 1977, at 3, attached as Exhibit 4).

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

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

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

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

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

34. Consent Order No. 15 is a contract. A Consent Order once issued is binding on the parties in future disputes under the legal doctrine of *res judicata*. *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So.2d 648 (Fla. 3rd DCA, 1982). Similarly, a Warranty Deed is enforceable among the parties as well as by persons whose interests are protected by the terms of the Warranty Deed. *White v. Metropolitan Dade County*, 563 S.2d 117 (Fla. 3rd DCA, 1990). There is no doubt that the NOI violates both precedents as a matter of law.

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

35. The litany of “reasonable assurances” in the NOI are unsupported by fact.

However, there is an existing model demonstrating without doubt that removal of the Chiquita Lock will increase pollutants delivered to the Caloosahatchee. In 2008 the City of Cape Coral removed the Ceitus Boat Lift Barrier on the North Spreader Waterway. As a comparative example, nitrogen concentrations in the North Spreader Waterway (the Cape Coral MS4 discharge) have exhibited an increasing trend since removal of the Ceitus Boat Lift Barrier in 2008. As a result, the EPA has declared the Matlacha Pass Aquatic Preserve impaired, adding it to the section 303(d) list in August of 2015.

36. The result of removing the Chiquita Lock will have a similar effect on the Caloosahatchee Estuary as compared to removal of the Ceitus Boat Lift Barrier. In this case, the Caloosahatchee Estuary is already verified impaired with a TMDL for TN. Removing the Chiquita Lock will eliminate the intended MS4 detention and treatment function of 797 acres (estimated at 3000 – 5000 acre feet) of the South Spreader system from the MS4 treatment area. As described by the applicant in response to the FDEP RAI, removing the lock will allow tidal influence and exchange to overwhelm or substantially change the hydraulic dynamics of the South Spreader treatment area. In effect, removing the lock will reduce the intended hydraulic functioning of the system. The intended function of the South Spreader System can only be maintained by isolating the treatment area and increasing the hydraulic residency time with the lock in place, currently required as part of the MS4 permit. This system can no longer be considered as a treatment area without the lock in place resulting in the necessary hydraulic

residence time or detention needed to effectively sequester nitrogen and other pollutants from Cape Coral's stormwater runoff.

37. Removing such an extensive volume of water from the current NPDES stormwater active treatment system eliminates reasonable assurance that the NPDES system will not contribute pollutants to a downstream waterbody already impaired for nutrient pollution. Furthermore, removing the Chiquita Lock will reduce the function of the treatment system related to its water level enabling redistribution of Cape Coral stormwater from the spreader canals into the mangrove fringe before impacting waters of the state. All of these outcomes also violate the terms of Consent Order No. 15.

38. A review of nitrogen concentrations occurring within the South Spreader treatment area indicates that nitrogen concentrations are not declining but continuing to trend upward. Chlorophyll a and BOD concentrations, apparently in response to the upward trend in TN concentration, are also trending up at the same location within the South Spreader predominantly confined for treatment as intended and required by the Chiquita Lock. Similar upward TN trends are evident in the Caloosahatchee Estuary despite implementing the load reduction requirements (23% reduction in TN loading per TMDL 62-304.800(2), F.A.C.) of the associated TMDL (2009) and BMAP begun in 2012. The increasing trend of TN concentration in the estuary emphasizes the need to reduce discharges and loading from watershed sources including Cape Coral.

39. As derived from Tidal Caloosahatchee BMAP Annual Progress Reports, Cape Coral has only averaged 651 lbs. TN load reduction per year for 2013 – 2015 with 53,977 lbs. of annual load reduction remaining to achieve the BMAP TN load allocation for Cape Coral. At

the current rate of TN load reduction, it would take Cape Coral 83 years to achieve the BMAP TN load reduction target assuming no additional loading during the 83 year period.

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

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

Biological Diversity v. Marina Point Dev. Associates, 434 F. Supp. 2d 789, 798 (C.D. Cal. 2006).

C. The City of Cape Coral Fails to Establish that Removal of the Chiquita Lock is in the Public Interest.

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

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

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

(Emphasis supplied).

43. The burden to demonstrate entitlement to an ERP permit is on the applicant, the City of Cape Coral. The Avalon Engineering Report that accompanies the NOI says removal of the Chiquita Boat Lock is necessary “to resolve a public safety issue due to increased boat traffic utilizing the Spreader Waterway.” (Avalon Engineering Report at 1). Although the United

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

44. Nor is there any indication of the magnitude of boater use of the Chiquita Boat Lock. In 2003, Cape Coral commissioned the design of a dual high speed lock for the Chiquita Boat Lock. In the report on the dual boat lock, it was stated that in 2001-2002, boater transport at the Chiquita Lock averaged 200 passages a month, or less than 7 a day. The report noted 30-45 minute waits on weekends. However, the report noted that the dual lock would have increased boat passage by 250% over the existing lock. The report also recommended that both the dual lock and the single lock remain in place to accommodate maintenance. No similar data has been produced for the current time period.

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

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

47. The NOI also does not take into account the adverse impact of falling canal levels. In the last year, during low canal levels, seawalls of Cape Coral residents have fallen into the canals. Cape Coral has required these residents to rebuild their seawalls at an average expense of \$30,000. In addition, Cape Coral has entered into a million dollar contract with a northern neighbor to release millions of gallons of fresh water south into the Cape Coral canals. While the folly of this purchase is self-evident from the fact that these waters simply flow out the open North Spreader canal, the purchase would be entirely unnecessary with both the Chiquita Lock and Ceitus Boat Lift Barrier in place. Waters would be retained during the dry season. Moreover, the NOI takes no account of the impact of falling canal levels on the very boaters it intends to benefit. Boats of even average draft will not be able to negotiate canals with depths of 2-3 feet. The larger boats which dock in Cape Harbour Marina will be left sitting on their expensive props.

48. Therefore, there was no actual balancing of the seven criteria set forth in Section 373.414(a) (F.S.). FDEP admits in the NOI that removal of the Chiquita Boat Lock will have an adverse impact on the wetlands and the waters of the United States. Rather than weighing that impact against calming the nerves of an unknown number of weekend boaters, the FDEP says Cape Coral has engaged in several other projects which improve the environment. (NOI at 2). The problem with this observation is two-fold: (1) federal law requires proof that an activity adversely affecting federal waters is “unavoidable” before a permittee can be given credit for mitigation measures; and, (2) the mitigation measures offered by Cape Coral have no impact on ameliorating the adverse impact of removing the Chiquita Boat Lock. (*See* Memorandum of Agreement at 1, U.S. Dept. of the Army and EPA, December 13, 2017, attached as Exhibit 5).

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

STATEMENT OF DISPUTED ISSUES OF MATERIAL FACT

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

51. Cape Coral has not met the load reduction requirements of the BMAP.

52. The load reduction requirements of the BMAP utilized by FL DEP are antiquated and do not represent current nitrogen loading. The compensatory mitigation proposed by Cape Coral, to meet the no net increase in TN, was based largely on estimates of loading in the Caloosahatchee Estuary BMAP. These BMAP loading and subsequent load reduction targets were based on loading from 2004/2005 land use. It is unknown how much additional loading has occurred since 2004 or what the current loading is which would make a net change estimate from the proposed mitigation arbitrary.

53. Cape Coral erred in applying fresh water criteria to determine nitrogen load of the Spreader Canal.

54. Cape Coral erred in determining that uplands contributing runoff to the Spreader Canal have reached their maximum build out. Further build out will increase nutrient laden runoff into the Spreader Canal.

55. FDEP and Cape Coral are bound to comply with Consent Order No. 15 which prohibits removal of the Chiquita Lock. FDEP may not “amend” Consent Order No. 15 through

the issuance of a permit allowing FDEP and Cape Coral to evade the requirements of Consent Order No. 15.

56. FDEP is bound by Consent Order No. 15 to maintain the west berm of the Spreader Waterway and the Chiquita Lock.

57. FDEP is bound by the Warranty Deed of 1977 to maintain the west berm of the Spreader Canals and the Chiquita Lock.

58. Director Iglehart erred in the following:

a. Giving Cape Coral load reduction credits for its alleged environmental improvements. Those projects do not prove any environmental benefit to the affected wetlands and waters of the United States adversely affected by removal of the Chiquita Lock.

b. Not requiring Cape Coral to conduct a nutrient budget study to ascertain the adverse impacts of removal of the Chiquita Lock

c. By granting 70,000 lbs of TN/yr reduction as a result of septic to sewer conversion. There is no data quantifying TN pollution from septic tanks. In addition, treated wastewater displacing septic would still deliver TN to the canal system and overall nutrient budget.

d. Awarding about 27K lbs. TN/yr reduction for using treated wastewater for lawn irrigation. There is no data supporting this assumption, and assumes too much sequestration of TN based on existing soil characteristics.

e. Giving Cape Coral credit for nitrogen load reduction for the Spreader Canals and freshwater canals. Those canals do not act as a “sink” for nitrogen assimilation; rather, they are a source of nitrogen flowing into waters of the United States. FDEP has granted about 28,000 lbs of TN/yr reduction credit from the detention sequestering of the freshwater canal system that

flows into the South Spreader upstream of the lock. The freshwater canals are more likely a source instead of a sink due to their age of over 50 years and accumulated TN as a legacy component. Also, the canals were not designed as a modern wet detention basin on which TN sequestering estimates are based but were designed mostly to convey water off the landscape as flood control with highly variable hydraulic residence times. One estimate is that a wet detention basin needs a minimum of 14 days residency to effect the assumed sequestering.

f. Not recognizing that increased flow from removing the Chiquita Lock would depress salinity in the downstream area that is also a sawfish exclusion zone.

g. Failing to ascertain the level of sediment and pollutant dispersal into the Matlacha Estuary from removal of the Chiquita Lock, despite ample evidence of the devastating and continuing deliver of pollutants into the Estuary when the Chiquita Boat Lift Barrier was removed in 2008.

h. Concluding there would be no adverse effect on manatees, ignoring the ACOE Public Notice which states: *“The Corps has determined the proposed project may affect, likely to adversely affect the West Indian manatee (Trichechus manatus).*

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

j. Failing to consider alternatives to removal of the Chiquita Lock to achieve the goal of boater safety. First, had FDEP and Cape Coral conducted regular maintenance of the Spreader Waterways, none of the so-called “breaches” on the western berm would currently exist. This maintenance is required by both Consent Order No. 15 and the Warranty Deed of

1977. Second, in 2002, Cape Coral engaged engineers to prepare plans for a dual boat lock system which should have been installed at both the Ceitus Barrier site and the Chiquita Lock site.

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

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

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

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

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

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

RULES AND STATUTES WHICH REQUIRE DENIAL OF THE NOI

60. Florida Statutes 373.016.

61. Florida Statutes 373.414.

62. Title 16 U.S.C. Section 1456.

63. Title 16 U.S.C. Sections 1531, *et seq.*

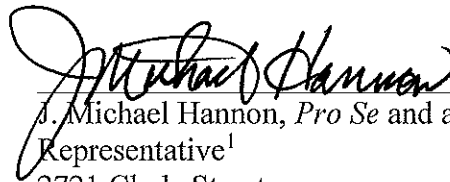
64. Title 33 U.S.C. Section 1311.

- 65. Title 33 U.S.C. Section 1313.
- 66. Title 33 U.S.C. Section 1341.
- 67. Title 33 U.S.C. Section 1342.
- 68. Title 33 U.S.C. Section 1344.
- 69. Title 40 C.F.R. Section 130.7
- 70. 50 C.F.R. Section 17.108.
- 71. 50 C.F.R. Section 226.218.

RELIEF SOUGHT

Petitioners request that the NOI be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was sent via electronic transmission to the following this 14th day of December, 2018:

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