

BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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SOUTH DISTRICT

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

IN THE OFFICE OF THE
SOUTH DISTRICT

Complainant,

OGC NO. 06-2345-DF

vs.

CITY OF CAPE CORAL,
LEE COUNTY,

Respondents.

SECOND AMENDED CONSENT ORDER

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

The Department and the Parties agree:

1. The County is a signatory to this Amendment for the express and sole purpose of escrow account creation and implementation as described below and is not alleged to have caused violations of law. This Amendment shall not create any permitting responsibilities or obligations for the North Spreader Waterway System on the County.
2. The Department and the City previously entered into Consent Order 06-2345-DF on February 13, 2007. That Consent Order allowed modification of the requirements of Consent Order 15 entered into between the DER, predecessor agency to DEP, and Gulf American Corporation (GAC). Consent Order 15 required GAC to take certain actions to protect the water quality of both the canal system of Cape Coral and the receiving waters of the Caloosahatchee River and Matlacha Pass. One of the actions required, pursuant to Paragraph 3 of Consent Order 15, was the installation of Boat Lift C1 as depicted in Exhibit 2 of Consent Order 15. In 2006, it came to the Department's attention that erosion had occurred at the west end of the boatlift structure allowing water to bypass the structure. The erosion may have occurred as a result of the volume of waters in the canal system and the lower elevation of mangrove wetlands on the west side of the boatlift. The erosion has caused the loss of mangrove wetlands to the west of the

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boat lift and has caused scouring of submerged sediments. The erosion is severe. It allows navigable depth and width bypassing the boat lift structure. It also results in shoaling upstream and downstream of the boatlift structure that requires dredging to maintain navigational access.

The erosion is on-going and continues to impact additional acreage of mangrove wetlands. The modification contained provisions regarding certain restoration activities in the vicinity of the Ceitus Boat Lift. These provisions included the removal of the existing boatlift structure and the design and construction of a new stormwater barrier with either a boat lift or a boat lock to provide navigation access to the canal system.

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

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

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

Therefore it is,

ORDERED:

Corrective Action

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

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

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

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

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

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

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

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

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

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

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

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

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

Escrow Account

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

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

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

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

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

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

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

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

17. If any event, including administrative or judicial challenges by third parties unrelated to the City, occurs which causes delay or the reasonable likelihood of delay, in complying with the requirements of this Consent Order, City shall have the burden of proving the delay was or will be caused by circumstances beyond the reasonable control of the City and could not have been or cannot be overcome by City's due diligence. Economic circumstances shall not be considered circumstances beyond the control of City, nor shall the failure of a contractor, subcontractor, materialman or other agent (collectively referred to as "contractor") to whom responsibility for performance is delegated to meet contractually imposed deadlines be a cause beyond the control of City, unless the cause of the contractor's late performance was also beyond the contractor's control. Upon occurrence of an event causing delay, or upon becoming aware of a potential for delay, City shall notify the Department orally within 24 hours or by the next working day and shall, within seven calendar days of oral notification to the Department, notify the Department in writing of the anticipated length and cause of the delay, the measures taken or to be taken to prevent or minimize the delay and the timetable by which City intends to implement these measures. If the parties can agree that the delay or anticipated delay has been or will be caused by circumstances beyond the reasonable control of City, the time for performance hereunder shall be extended for a period equal to the agreed delay resulting from such circumstances. Such agreement shall adopt all reasonable measures necessary to avoid or