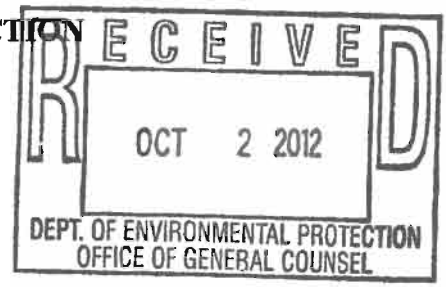
BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION



SAVE OUR CREEKS, INC., and
ENVIRONMENTAL CONFEDERATION
OF SOUTHWEST FLORIDA, INC.,

Petitioners,

v.

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.
_____/

ERP File No. 22-0303652-002;
Modification of Permit No. 22-0303652-001
Case No.:

PETITION FOR ADMINISTRATIVE HEARING

Pursuant to sections 120.569 and 120.57, Florida Statutes, Save Our Creeks, Inc., ("SOC") and Environmental Confederation of Southwest Florida, Inc., ("ECOSWF") (collectively, "Conservationists") respectfully petition the Florida Department of Environmental Protection ("DEP") for a formal administrative hearing challenging DEP's September 10, 2012 Environmental Resource Permit and state-owned Submerged Lands Authorization (File No. 22-0303652-002; Modification of Permit No. 22-0303652-001), which authorizes the Florida Fish and Wildlife Conservation Commission ("FWC") to backfill and effectively obliterate the publicly-owned, navigable stream known as Fisheating Creek, where it flows through Cowbone Marsh.

I. COURSE OF EVENTS LEADING TO THIS CONTROVERSY

This case is the latest in a twenty-three year legal dispute between Conservationists and Lykes Brothers, Inc. ("Lykes Bros." or "Lykes") over public access by recreational boaters to Fisheating Creek. The Creek is a major tributary of Lake Okeechobee and Lykes is the riparian

land owner that owns most of the land on both sides of the Creek. The Creek courses through prairie, cypress swamps, and marshes, one of which is known locally as Cowbone Marsh. This controversy began in 1989, when Lykes Bros. felled cypress trees across the navigation channel of the Creek and posted "No Trespassing" signs stating that the Creek is not navigable. After several years of litigation, the Conservationists and the Board of Trustees of the Internal Improvement Trust Fund ("Trustees") prevailed and a jury found that all of the lower 40 miles of Fisheating Creek was navigable. Much of the dispute concerned whether there was a historic, navigable channel through the cypress swamps and marshes, including Cowbone Marsh, which courses through the lower 8 to 10 miles of the Creek. The jury found for the Conservationists and the Trustees on all issues, effectively prohibiting Lykes from interfering with boaters using the Creek.

At trial, the Conservationists and the Trustees relied in large part on a 1929 U.S. Army Corps of Engineers on-the-ground land survey that found Fisheating Creek to be a continuous stream or river in its lower 40 miles, including a survey of the exact location of the channel in Cowbone Marsh. The Chief Surveyor for the State of Florida field verified the location of the channel under the marsh tussock. Attached as Exhibit A is a photograph of the Conservationists field-verifying the location of the navigation channel in Cowbone Marsh by manually removing tussock.

While the case was on appeal, the Conservationists, the Trustees and Lykes settled the case wherein Lykes abandoned its claims concerning the navigability of the Creek. Part of the settlement agreement required the managing agency -- the Florida Fish and Wildlife Conservation Commission ("FWC")[1] – to maintain and improve navigation throughout the entire

[1] Formerly called the Game and Freshwater Fish Commission.

lower 40 miles of the Creek course, including removal of weeds and invasive vegetation. The settlement was reached in 1999.

FWC initially neglected to do any navigation improvement and maintenance on the Creek but after cajoling and threats of litigation, FWC restored and maintained navigation over most of the stream course by removing invasive vegetation in marshes and deadfalls in cypress swamps. However, Cowbone Marsh continued to be neglected until about 2 ½ years ago when FWC ran a "cookie cutter" boat through the Cowbone Marsh channel and cleared almost all of the navigation channel of tussock and extensive invasive vegetation and bushes. A photograph of the cookie cutter boat in operation is attached as Exhibit B. Although "cookie cutter" boats have been in use for clearing navigation channels by the state and federal governments for decades, Lykes complained to government agencies that a "floating dredge" had dredged a canal through Cowbone Marsh that was as much as 260 feet away from where the navigation channel had been surveyed in 1871.

DEP considered the issue to be a minor problem but noted that the matter was complicated by threats by a Lykes' lobbyist to use the influence of a corporate officer of Lykes that served on the Board of the South Florida Water Management District. It was and remains a minor problem because if there was any violation at all by FWC, it was in failing to capture any muck that was attached to the shredded vegetation and deposit the muck in an upland site. The adverse environmental consequences of that violation have long past; it is completely unreasonable to require the channel to be filled with sand as a remedy for that violation. It was for that reason that in 2010, a compromise was reached with DEP, the Conservationists and FWC whereby FWC agreed to install several log and sandbag piles in the restored channel to

slow water flow, and to complete the channel restoration project manually. That compromise was a reasonable one but it was ultimately abandoned by DEP.

This latest stage of the controversy ripened when DEP recently accepted Lykes' proposal to "restore" Cowbone Marsh by constructing roads across it and conveying several hundred dump truck loads of sand provided by Lykes in order to completely fill almost two miles in the navigation channel and replant it with invasive vegetation. The process by which that decision was reached is the subject of two pending cases, *Save Our Creeks, et al. v. FWC*, Case No. 1D12-0764 in the First District Court of Appeal, and *Save Our Creeks, et al. v, FWC*, Case No. 2012 –CA00460, pending in Leon County Circuit Court.

The instant case is under sections 120.57 and 120.569, Florida Statutes, asking an Administrative Law Judge to formulate final agency action on the matter of DEP's regulatory action regarding restoration of the Cowbone Marsh navigation channel.

II. IDENTIFICATION OF THE PARTIES

1. Petitioner Save Our Creeks, Inc. is a nonprofit Florida corporation composed of interested citizens and groups devoted to the conservation of natural resources—especially creeks and small waterways—in Southwest Florida and throughout Florida. SOC has a substantial number of members in Glades County that use and enjoy Fisheating Creek.

2. SOC's address is located at 33 Mockingbird Rd. Lake Place, FL 33852. SOC's phone number is (207)712-5481.

3. Petitioner Environmental Confederation of Southwest Florida, Inc. is a nonprofit corporation composed of member organizations, corporations, groups, business entities, governmental agencies, and individuals devoted to the conservation of Florida's natural resources. Specifically, the corporate purposes are to conserve, maintain, and protect the air,

water, soil, wildlife, historic and architecturally significant structures, flora and fauna, and other natural resources of Southwest Florida, the State of Florida, and the United States. A substantial number of ECOSWF's members live, work, and recreate in Glades County and used and enjoy Fisheating Creek.

4. ECOSWF's offices are located at 421 Verna Road, Sarasota, Florida 34240. ECOSWF's phone number is (941)735-0469.

5. Respondent Florida Department of Environmental Protection, through its Division of Water Resource Management is the permitting authority in this proceeding and its offices are located at 2600 Blair Stone Road, MS #5505, Tallahassee, Florida, 32399-2400.

6. The Florida Fish and Wildlife Conservation Commission is an agency of the State of Florida, the recipient of the permit at issue, and is responsible under the 1999 Settlement Agreement and the subsequent lease for the management of the sovereignty lands of Fisheating Creek, including the waters and bed out to the ordinary high water boundary, which boundary encompasses swamps and marshes in the Creek course, including Cowbone Marsh.

7. FWC's offices are located at 620 South Meridian Street, Tallahassee, FL 32399-6543.

III. NOTICE

8. Petitioners, through their counsel, received notice of the challenged permit via email from FWC staff on September 18, 2012. This petition is filed within fourteen (14) days of that notice and is therefore timely filed pursuant to section 120.569(1), Florida Statutes, and Rule 62-110.106(3), F.A.C.

IV. PETITIONERS' SUBSTANTIAL INTEREST

9. Save Our Creeks, Inc. is a nonprofit Florida corporation made up of interested citizens and groups with a mission to conserve natural resources—especially of creeks and small waterways—in Southwest Florida and throughout the State. SOC was organized in 1989 specifically to preserve public access to Fisheating Creek and was a party to the cases which conclusively established the existence of a historic, navigable channel through the entire Creek in Glades county Florida, including numerous swamps and marshes, and including Cowbone Marsh. SOC was also a party to the 1999 Settlement Agreement, which explicitly provides for the maintenance and enhancement of navigation throughout Cowbone Marsh in perpetuity for public boating, fishing, and other recreational purposes. That Settlement Agreement also granted SOC the right to enforce its provisions. As a party to the original litigation and subsequent settlement, SOC has a unique legal right and a substantial interest in maintaining and enhancing navigation throughout Fisheating Creek, including the stream segment running through Cowbone Marsh. Because SOC's unique rights under the Settlement Agreement will be destroyed by the implementation of the channel filling project authorized – or more accurately, directed – by DEP, SOC has a substantial interest in the agency action at issue.

10. A substantial number of the members of SOC use and enjoy boating and camping on Fisheating Creek and it has over 25 members in Glades County. Additionally, SOC has standing under 403.412(6) to institute this action.

11. Additionally, SOC owns property on Fisheating Creek in Glades County, approximately nine river miles upstream of Cowbone Marsh. SOC's members use this property as a boating access point to Fisheating Creek and Cowbone Marsh. As riparian landowners, SOC and its members have unique rights to use and enjoy the waters of Fisheating Creek, including the stream segment through Cowbone Marsh, for navigation, fishing, and recreation.

If the State fills the channel in Cowbone Marsh with sand, it will obliterate the navigable stream through Cowbone Marsh, and SOC's riparian right to use the waters of Fisheating Creek for navigational and recreational purposes will be permanently and substantially impaired.

12. The Environmental Confederation of Southwest Florida, Inc. is a not-for-profit corporation composed of member organizations, corporations, groups, business entities, governmental agencies, and individuals devoted to the conservation of Florida's natural resources. ECOSWF's mission is to conserve, maintain, and protect the air, water, soil, wildlife, historic and architecturally significant structures, flora and fauna, and other natural resources of Southwest Florida, the State of Florida, and the nation. Like SOC, ECOSWF was a party to the 1997 lawsuit that conclusively established the existence of a historic, navigable channel through Cowbone Marsh. ECOSWF was also a party to the 1999 Settlement Agreement. That Settlement Agreement also granted ECOSWF the right to enforce its provisions. As a party to the original litigation and subsequent settlement, ECOSWF has a unique legal right and a substantial interest in maintaining and enhancing navigation throughout Fisheating Creek, including the stream segment running through Cowbone Marsh. Because ECOSWF's unique rights under the Settlement Agreement will be destroyed by the implementation of the backfill project authorized by DEP, the organization has a substantial interest in the agency action at issue.

13. Additionally, a substantial number of the members of SOC and ECOSWF use and enjoy the navigable waters of Fisheating Creek, including the stream segment running through Cowbone Marsh, for a variety of purposes, including wading, walking, canoeing, boating, wildlife observation, photography, personal and commercial research, fishing, and other recreational purposes. If FWC is permitted to backfill and obliterate the navigable stream

through Cowbone Marsh, a substantial number of Petitioners' members will suffer substantial harm to those recreational, aesthetic, and economic interests.

14. These injuries are sufficiently immediate and of the type and nature that Chapters 373, 403, and 120, Florida Statutes, are designed to protect.

V. DISPUTED ISSUES OF MATERIAL FACT

15. Whether Conservationists joined with the Trustees in a lawsuit against Lykes Bros. to establish the navigability and public ownership of the bed and waters of Fisheating Creek, including the stream segment coursing through swamps and marshes, including Cowbone Marsh.

16. Whether a central issue in that case was the dispute over the existence of a historic, navigable channel through the swamps and marshes of the Creek, including Cowbone Marsh, that was in fact used for recreation and small scale commerce several decades before Lykes attempted to close it.

17. Whether Cowbone Marsh has in recent decades been covered with a layer of floating vegetation called "tussock," which overlay the navigation channel.

18. Whether one of the key pieces of evidence in that trial was a 1929 U.S. Army Corps of Engineers survey map that showed Fisheating Creek was a continuous open stream in its lower 40 miles.

19. Whether the existence of a navigable stream through Cowbone Marsh has been field verified to follow the same route as the 1929 survey map.

20. Whether a jury in the 20th Circuit Court for the State of Florida, Glades County, determined that Fisheating Creek, including the stream segment that runs through Cowbone Marsh, is navigable and therefore belongs to the public.

21. Whether that judgment conclusively established the navigability and public ownership of the waters and streambed of Fisheating Creek in Glades County, including the stream segment through Cowbone Marsh.

22. Whether the parties to the adjudication described above were the Trustees, Conservationists, and Lykes Bros.

23. Whether DEP, as the agency responsible for performing all functions related to the administration of sovereignty lands, stands in privity or shares identity with the Trustees.

24. Whether the parties to that litigation executed a Settlement Agreement in 1999, in which Lykes Bros. agreed to abandon any claim to the bed and waters of Fisheating Creek, including Cowbone Marsh.

25. Whether the Trustees agreed under the Settlement Agreement to lease the entirety of the Creek, its streambed, and surrounding uplands to the Florida Fish and Wildlife Conservation Commission ("FWC" or "the Commission") to manage for the benefit of the public.

26. Whether FWC is required under the Settlement Agreement and subsequent lease to maintain and enhance in perpetuity the entirety of the Creek, including the stream segment through Cowbone Marsh, for public navigation, fishing, and recreation purposes.

27. Whether FWC is required under the Settlement Agreement and lease to control aquatic weeds and invasive vegetation in Fisheating Creek, including the stream segment through Cowbone Marsh.

28. Whether FWC refused to comply with the terms and conditions of the Settlement Agreement and subsequent lease, which require the maintenance and improvement of the navigable stream through Cowbone Marsh from 2000 through 2010.

29. Whether DEP, as the agency responsible for performing all functions related to the administration of sovereignty lands, failed to require FWC to fulfill the state's trust obligations under the 1999 Settlement Agreement and subsequent lease.

30. Whether FWC's failure to maintain and enhance the navigable stream through Cowbone Marsh deprived Conservationists of their unique right to the maintenance of navigation through Cowbone Marsh.

31. Whether a (now former) FWC employee misrepresented the channel restoration project to regulatory agencies as to obstruct the restoration project in Cowbone Marsh.

32. Whether, during the time the FWC was neglecting its obligation under the Settlement Agreement to maintain navigation in Cowbone Marsh, parts of the Marsh became overgrown with a thicket of non-native willow and button bush.

33. Whether periods of drought caused by drawdowns to Lake Okeechobee were a contributing factor in the overgrowth of invasive vegetation in the Marsh.

34. Whether the navigable stream through Cowbone Marsh would have remained unimpeded had FWC timely satisfied its obligations under the Settlement Agreement to remove invasive vegetation and maintain navigation in the stream.

35. Whether in 2007, Conservationists demanded that FWC maintain and improve the navigable stream through Cowbone Marsh as required by the 1999 Settlement Agreement.

36. Whether the FWC agreed to restore the navigable stream through Cowbone Marsh channel in 2010.

37. Whether the FWC contractor who began removing the invasive vegetation from the navigable stream through Cowbone Marsh faithfully adhered to the field-verified 1929 Corps' survey map delineating the historic stream bed.

38. Whether that restoration was conducted with equipment that has been used for decades throughout Florida for control of invasive vegetation in lakes and streams.

39. Whether the material removed by that equipment constituted invasive vegetation and tussock that provides no habitat or poor habitat for aquatic species and birds.

40. Whether the purpose of the channel restoration project was to remove noxious aquatic vegetation to restore navigation, facilitate fishing and other recreation, and to improve habitat.

41. Whether the cookie cutter boat removed any organic detrital material.

42. Whether the cookie cutter boat removed any mineral substrate.

43. Whether the cookie cutter boat could have deposited any organic detrital material or shredded vegetation in an upland site.

44. Whether the state and the federal governments have for over a decade routinely operated cookie cutter boats in a way so that organic detrital material and shredded vegetation was deposited in an upland site, or instead left the shredded vegetation and organic detrital material where it was side-cast by the cutter blades.

45. Whether the state and the federal governments have for over a decade routinely operated cookie cutter boats in that way to improve and maintain navigation channels for recreational boating and fishing and to restore and maintain habitat.

46. Whether the turbidity mixing zone for the cookie cutter in fact exceeded 150 meters downstream of where it was cutting.

47. Whether there is now any continuing adverse environmental effect from any organic detrital material removed by the cookie cutter that was transported downstream in the stream channel.

48. Whether there is now any continuing adverse environmental effect from any shredded vegetation that was side cast by the cookie cutter downstream in the stream channel.

49. Whether Lykes Bros. complained to the Corps, DEP, and/or the South Florida Water Management District ("SFWMD") that FWC's invasive vegetation removal project constituted dredging by a "dredge barge."

50. Whether FWC's invasive vegetation removal project constituted unauthorized dredge and fill activity.

51. Whether FWC's Cowbone Marsh restoration project adversely affected the hydrology of the Marsh, caused soil erosion, or adversely impacted downstream water quality.

52. If FWC's Cowbone Marsh restoration project adversely affected the hydrology of the Marsh, caused soil erosion, or adversely impacted downstream water quality, whether those adverse effects continue.

53. Whether the open water channel restored by the cookie cutter boat is providing habitat for birds, alligators, fish and other aquatic life that would not otherwise exist and improves diversity of native aquatic plant species.

54. Whether the restored channel improves habitat for endangered species such as the American Crocodile, threatened species, and species of special concern.

55. Whether completion of the channel restoration project would provide a route for the passage of fish and aquatic life between the area upstream of Cowbone Marsh on Fisheating Creek and Lake Okeechobee.

56. Whether DEP ordered FWC to implement corrective measures and develop a site restoration plan to correct the alleged adverse aquatic impacts to the Marsh.

57. Whether those corrective measures were effective.

58. Whether FWC's corrective measures, which consisted of a water-control weir and a series of small, low-impact log check dams made of sand bags and wooden wing walls, successfully controlled the flow of water in the Marsh.

59. Whether DEP reached a compromise with the Conservationists and FWC whereby FWC agreed to install the six check dams.

60. Whether an officer of Lykes Bros. is a member of the SFWMD.

61. Whether DEP developed the permit at issue in consultation with Lykes Bros.

62. Whether DEP's September 11, 2012 Environmental Resource Permit ("ERP") and state-owned Submerged Lands Authorization directs FWC to implement a $3 million plan to build roads and "staging areas" across the Marsh so that several hundred dump trucks can transport sand – supplied by Lykes – into the creek bed.

63. Whether filling the channel with Lykes Bros.' sand would effectively obliterate two miles of a publicly-owned, navigable stream held in trust by the State for the benefit of the people.

64. Whether the approved plan to fill two miles of the Cowbone Marsh channel with sand obstructs, impairs, or interferes with the public's use of the stream for navigation, commerce, fishing, boating, and/or other recreational activities.

65. Whether the plan to fill the channel with sand is appropriate given generally accepted engineering and scientific principles.

66. Whether DEP's characterization of the channel filling project as a "Trail Restoration" accurately reflects the nature of the stream through Cowbone Marsh, which has been formally adjudicated to be a navigable water of the State held in trust for the benefit of the public.

67. Whether Lykes Bros.' sand is proposed to be used to backfill and obliterate the navigable stream through Cowbone Marsh.

68. Whether SOC owns riparian property on Fisheating Creek, upstream of Cowbone Marsh, which the organization uses as a boat launch to access and enjoy the navigable water of Fisheating Creek.

69. Whether the plan to fill the navigation channel in Cowbone Marsh, thereby foreclosing completion of the channel restoration project, will adversely impact SOC's riparian rights to navigate to the lower reaches of the Creek and Lake Okeechobee.

70. Whether dumping approximately sixty-five million pounds of sand and several thousand pounds of chemical fertilizer will cause adverse water quality impacts to the surface waters of Cowbone Marsh.

71. Whether building a road across Cowbone Marsh so that heavy machinery can dump sixty-five million pounds of sand into Cowbone Marsh will adversely affect any threatened, endangered, or sensitive species or their habitat.

72. Whether FWC's plan to backfill the publicly-owned, navigable stream through Cowbone Marsh strictly complies with the terms and conditions of the 1999 Settlement Agreement and subsequent lease.

VI. ULTIMATE FACTS DEMONSTRATING THAT THIS ACTION SHOULD NOT PROCEED AS PROPOSED

73. Fisheating Creek, including Cowbone Marsh has been adjudicated to be navigable and to contain a historic channel.

74. The FWC restoration project by the cookie cutter boat restored the existing channel under the tussock as surveyed in 1929 by the Corps of Engineers and field verified by the State.

75. In Cowbone Marsh, the tussock overgrew with willows, button bush and other invasive vegetation for over a decade after FWC was obliged to improve and maintain the navigation channel, with the result that removal of the invasive vegetation became substantially more difficult.

76. DEP stands in privity with the Trustees of the Internal Improvement Fund and with FWC through the 1999 Settlement Agreement and lease.

77. DEP and FWC are required under the Settlement Agreement and subsequent lease to maintain and enhance in perpetuity the entirety of the Creek, including the stream segment through Cowbone Marsh, for public navigation, fishing, and recreation purposes and are required to remove invasive vegetation.

78. The channel restoration project was conducted with equipment that has been used for at least a decade throughout Florida by state and federal agencies for control of invasive vegetation, including willows, in lakes and streams.

79. The FWC Aquatic Plant Control Division that restored the Cowbone Marsh channel had been housed at DEP only two years before and did not change its practices concerning use of cookie cutter boats when it was transferred to FWC.

80. The restoration project complied with the regulations governing mechanical removal of noxious aquatic plants under Rule 68F-20.0045, F.A.C. and was done for the purpose of complying with a lease condition in its lease with the Trustees. Similar restoration projects have been conducted by the Aquatic Plant Control Division throughout the state using the same cookie cutter boat for the same or similar purposes without DEP or any other agency suggesting that it was illegal, improper, a violation of statute or rules and without any complaints about

short term adverse impacts of stirring up detrital material or side casting shredded vegetation. *See* Exhibit B.

81. The material removed by the cookie cutter boat was tussock, which is legally defined as vegetation which is "elevated above the natural grade on a mound built up of plant debris, roots, and soils, so that the growing vegetation is not subject to the prolonged effects of soil anoxia."

82. The cookie cutter boat may have removed some amount of organic detrital material but did not remove any mineral substrate. Any organic detrital material removed by the cookie cutter boat was not deposited in an upland site.

83. The state and the federal governments have for over a decade routinely operated cookie cutter boats in a way so that organic detrital material was removed but was not deposited in an upland site.

84. The state and the federal governments have for over a decade routinely operated cookie cutter boats in a way that left the shredded vegetation and any organic detrital material where it was side-cast by the cutter blades.

85. There is no evidence that the turbidity mixing zone for the cookie cutter, in fact, exceeded 150 meters downstream of where the cookie cutter boat was operating.

86. There is now no continuing adverse environmental effect from any organic detrital material or shredded vegetation removed by the cookie cutter boat.

87. FWC's invasive vegetation removal project was not unauthorized dredge and fill activity.

88. The Cowbone Marsh restoration project did not adversely affect the hydrology of the Marsh, cause soil erosion, or adversely impact downstream water quality.

89. Any possible adverse effects of the restoration project on the hydrology of the Marsh, on soil erosion, or on downstream water quality do not continue presently.

90. The open water channel restored by the cookie cutter boat is providing habitat for birds, alligators, fish and other aquatic life that would not otherwise exist and completion of the channel restoration project would provide a route for the passage of fish and aquatic life between the area upstream of Cowbone Marsh on Fisheating Creek and Lake Okeechobee.

91. DEP's September 11, 2012 Environmental Resource Permit ("ERP") and state-owned Submerged Lands Authorization directs FWC to implement a $3 million plan to build roads and "staging areas" across the marsh so that several hundred dump trucks can transport sand – supplied by Lykes – into the Creek bed.

92. Filling the channel with Lykes Bros.' sand would effectively obliterate two miles of a publicly-owned, navigable stream held in trust by the State for the benefit of the people.

93. Filling two miles of the Cowbone Marsh channel with sand would thwart the public's use of the stream for navigation, commerce, fishing, boating, and/or other recreational activities.

94. The plan to fill the channel with sand is inappropriate given generally accepted engineering and scientific principles because it is unnecessary and will result in a net loss to the ecosystem of the Creek.

95. DEP's characterization of the channel filling project as a "Trail Restoration" is a misrepresentation of the navigation channel determined to exist by a judicial judgment that is binding on DEP.

96. Lykes Bros.' is providing sand to facilitate the obliteration of the navigation channel through Cowbone Marsh.

97. SOC owns riparian property on Fisheating Creek, upstream of Cowbone Marsh, which the organization uses as a boat launch to access and enjoy the navigable water of Fisheating Creek.

98. The plan to fill the navigation channel in Cowbone Marsh would foreclose completion of the channel restoration project and would thereby thwart SOC's riparian rights to navigate to the lower reaches of the Creek and Lake Okeechobee.

99. The sand filling project would require sixty-five million pounds of sand which would cause adverse water quality impacts to the surface waters of Cowbone Marsh.

100. Building a road across Cowbone Marsh so that heavy machinery can dump sixty-five million pounds of sand into Cowbone Marsh will adversely affect any threatened, endangered, or sensitive species or their habitat.

101. The plan to fill the channel with sand violated the terms and conditions of the 1999 Settlement Agreement and subsequent lease.

102. Conservationists relied to their detriment on the Trustee's promises in the 1999 Settlement Agreement and FWC promises in the subsequent lease agreement, as well as FWC's subsequent representations that they would properly improve and maintain navigation throughout Cowbone Marsh.

VII. APPLICABLE STATUTES AND RULES OF LAW

103. Rule 62-110.106(12), F.A.C., provides that a person whose substantial interests are affected by a DEP permitting decision may petition for an administrative hearing under Sections 120.569 and 120.57, Florida Statutes. Based on Conservationists' unique rights to enforce the 1999 Settlement Agreement and SOC's riparian rights on Fisheating Creek and standing under section 403.412(6), Conservationists have a substantial interest in maintaining the

navigability of the stream through Cowbone Marsh that will be adversely affected if FWC is permitted to obliterate the stream.

104. Section 253.003(1), Florida Statutes, vests the Board of Trustees of the Internal Improvement Fund with administration of sovereignty submerged lands. DEP is responsible for performing all functions related to the administration of sovereignty lands, including all environmental permitting of activities and water quality protection on sovereignty lands. § 253.002, Fla. Stat.; Rule 18-21.002, F.A.C.

105. Under the principle of estoppel by judgment, parties are estopped from litigating in a second suit issues common to both the first and second causes of action and which were actually or could have been adjudicated in the prior litigation.

106. DEP is responsible for performing all functions related to the administration of sovereignty lands and therefore shares an identity with the Trustees.

107. Because the Order of Judgment and subsequent Settlement Agreement in *Board of Trustees of the Internal Improvement Trust Fund et al v. Lykes Bros., Inc.*, No. CA 93-136) (Fla. 20th Cir. Ct. Feb. 19, 1998), conclusively established the both the navigability of the stream segment through Cowbone Marsh and the public's interest in maintaining navigability, DEP, which shares an identify with the Trustees, is estopped from arguing that the public interest favors backfilling and obliterating the publicly-owned, navigable stream.

108. Similarly, DEP is estopped from arguing that FWC was required to obtain a permit before conducting invasive vegetation removal activities in Cowbone Marsh.

109. Finally, DEP is estopped from contesting the navigability of the stream segment through Cowbone Marsh, or the public's right to use the stream for navigation, fishing, and other recreational purposes.

110. FWC, as the lessee of the sovereignty lands at issue, is in privity with DEP, as the agency responsible for performing all functions related to the administration of sovereignty lands. Because the navigable stream through Cowbone Marsh became occluded as a result of FWC's refusal to fulfill its obligations under the Settlement Agreement, the Trustees and its representatives are barred by the doctrine of unclean hands from asserting that FWC must now backfill the navigable stream through Cowbone Marsh.

111. Section 373.4211(20)(12) defines "tussock" as vegetation which is "elevated above the natural grade on a mound built up of plant debris, roots, and soils, so that the growing vegetation is not subject to the prolonged effects of soil anoxia."

112. Section 369.25(1)(a) defines "aquatic plant" to mean any plant, including an emersed species, "growing in, or closely associated with, an aquatic environment."and includes any part of the plant. Section 369.25(1)(d) defines "noxious aquatic plant" as those with a potential to "interfere with irrigation or navigation." The plants removed by the cookie cutter were noxious aquatic plants because they hinder navigation.

113. Section 369.20(7) makes FWC the permitting authority for removal of nuisance and invasive aquatic plants, including mechanical control activities.

114. Rule 68F-20.0045, F.A.C. sets out FWC's permitting criteria:

(1) The commission recognizes the varied human and environmental concerns for Florida's waters. Aquatic plant management permits shall be issued to allow persons reasonable access to, and use of, these waters while maintaining sufficient native vegetation to provide for environmental concerns such as the impact upon fish, wildlife, water quality, and shoreline stabilization. Native aquatic plant species in natural waters will not be considered for control unless the native species alone, or when intermingled with nonindigenous species, have become noxious.
(2) In determining whether a permit shall be issued for aquatic plant management purposes, the commission shall consider the following criteria:
(a) The noxious aquatic plant species present and the potential of the target plants to create adverse effects.

(b) The amount and quality of the aquatic plants within the waterbody and the proposed management site, and their importance to biological communities that are utilizing them.
(c) The positive or adverse impacts of the aquatic plant management activities on public interest considerations such as:

1. Health and safety of the public.
2. Navigation.
3. General public's access to, or use of, the waterbody.
4. Riparian property owners' access to, or use of, the waterbody.
5. Swimming, fishing or other recreational activities.
6. Water flow or the potential for flooding.

(d) The positive or adverse impacts of the aquatic plant management activities on fish and wildlife considerations such as:

1. Endangered or threatened species, species of special concern, or their prey species and habitat.
2. The potential of the management activities to improve habitat for the production of fish and wildlife, including non-game species.
3. The potential of the plant management activities to increase or improve native aquatic plant species diversity.

(e) The positive or adverse impacts of the proposed aquatic plant management activities on water quality considerations such as:

1. Native plant coverage which may protect or improve water quality.
2. Native plant coverage which may prevent or reduce shoreline erosion and runoff.
3. Nutrient levels, dissolved oxygen levels, deposition of organic matter, herbicide residues or other impacts on water quality outside of the control area designated by the commission.

(f) The protection of the receiving waterbodies consistent with the classes of surface waters established pursuant to Chapter 62-302, F.A.C.
(g) The potential of the proposed activity to spread noxious aquatic plants, or to promote the survival and growth of native aquatic plants.

115. As the permitting agency under section 369.20, FWC does not need to issue permits to itself for its own activities and the facts demonstrate that FWC complied with its rule criteria in deciding to conduct the restoration project with the cookie cutter boat when it satisfied the following factors: (a) and (b), the noxious aquatic plants were willows and button bush that are major invasive species that create a nuisance in lakes and streams; and that those noxious plants were and are spreading; (c) the restoration has major positive effects on navigation, the general public's access to, or use of, the waterbody, riparian property owners' access to, or use of, the waterbody, and swimming, fishing or other recreational activities; and (d) the restoration

project improves habitat for endangered or threatened species, species of special concern, or their prey species and also improves the habitat for fish, aquatic species, wading birds, wetlands wildlife and improves native aquatic plant species diversity.

116. Section 403.813(1) provides that no permit is required under chapters 373 or 403 for activities described in subsection 403.813(1)(r), which are removal of "tussocks" and aquatic plants, provided that organic detrital materials are deposited in upland sites. Subsection (1)(r)(4) prohibits DEP from adopting rules implementing this subsection. Section 369.20(14) provides that activities exempt under section 403.813(1)(r) are granted a mixing zone for turbidity for a distance not to exceed "150 meters downstream in flowing streams."

117. The operation of the cookie cutter boat in the channel restoration project was exempt from the permit requirements of chapters 403 and 373 if a) the cookie cutter boat was removing tussock, and b) the material removed was deposited in an upland site.

118. The remedy in all enforcement cases must be tailored to the harm and to the context of the violation. The legal context is that the Aquatic Plant Control Division of FWC that conducted the restoration project was part of DEP less than two years before the channel restoration project and was implementing its obligations under a lease from the Trustees. And the violation, if there was one, was meeting the criteria used in aquatic plant control permitting under Rule 68F-20.0045, F.A.C. but not also transporting detrital material and shredded vegetation to an upland site as could have been required under section 403.813(1)(r).

119. Section 373.413, Florida Statutes, provides DEP with authority to require permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant

work, or works will comply with the provisions of Chapter 373 and applicable rules promulgated thereto and will not be harmful to the water resources of the district.

120. Section 373.414, Florida Statutes, provides that the department shall require an applicant for a permit to provide reasonable assurance that state water quality standards will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands is not contrary to the public interest. FWC and DEP have failed to provide adequate assurances that the proposed backfill project is not contrary to the public interest because the 1999 Settlement Agreement conclusively established that the public's interest in Cowbone Marsh consists of maintaining and enhancing navigation in the stream, not obliterating it. DEP's conclusion that the utter destruction of a navigable stream is somehow consistent with maintaining navigation in the stream is facially absurd.

121. In determining whether an activity, which is in, on, or over surface waters or wetlands is not contrary to the public interest or is clearly in the public interest, 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.

§ 373.414(1)(a), Fla.Stat.

122. All but one of these factors counsel against the proposed backfill project and the remaining factor is irrelevant[2]:

a. The factor in section 373.414(1)(a)1. (whether the activity will adversely affect the public health, safety, or welfare or the property of others) weighs against the project because the project will adversely affect the Conservationists' unique rights in the 1999 Settlement Agreement, as well as SOC's riparian rights.

b. The factor in section 373.414(1)(a)2.(whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats) weighs against the project because it will adversely affect the numerous, diverse populations of fish and wildlife that inhabit Cowbone Marsh, including many threatened, endangered, and sensitive species.

c. The factor in section 373.414(1)(a)3. (whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling) weighs against the project because it will utterly destroy navigation opportunities in the stream and any harmful erosion or shoaling has been dealt with through FWC's construction of non-navigation blocking weirs.

d. The factor in section 373.414(a)4. (whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity) weighs against the project because it will adversely impact fishing and recreational values by destroying a fishable, navigable stream that serves as habitat for numerous marine and fish species.

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[2] There are no historical or archeological resources located in Cowbone Marsh.

e. The factor in section 373.414(1)(a)5. (whether the activity will be of a temporary or permanent nature) weighs against the project because filling a navigable stream with sixty-five million pounds of sand is permanent and intended to permanently obstruct navigation and destroy recreational use of the navigation channel through Cowbone Marsh.

f. The factor in section 373.414(a)7. (the current condition and relative value of functions being performed by areas affected by the proposed activity) weighs against the project because the project replaces a historic navigation channel with sand, chemicals, and invasive willows.

123. Under Rule 62-330.200(4)(b), F.A.C., DEP adopts by reference SFWMD Rule 40E-4.301, F.A.C., which provides that to obtain an ERP permit, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a surface water management system:

> (a) Will not cause adverse water quantity impacts to receiving waters and adjacent lands;
>
> (b) Will not cause adverse flooding to on-site or off-site property;
>
> (c) Will not cause adverse impacts to existing surface water storage and conveyance capabilities;
>
> (d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;
>
> (e) Will not adversely affect the quality of receiving waters such that the water quality standards set forth in Chapters 62-4, 62-302, 62-520, 62-522 and 62-550, F.A.C., incorporated by reference in paragraph 40E-4.091(1)(d), F.A.C., including any antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), subsections 62-4.242(2) and (3), and Rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated;
>
> (f) Will not cause adverse secondary impacts to the water resources;
>
> (g) Will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to Chapter 373.042, F.S.;
>
> (h) Will not cause adverse impacts to a work of the District established pursuant to Section 373.086, F.S.;

(i) Will be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed;

(j) Will be conducted by an entity with the sufficient financial, legal and administrative capability to ensure that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued; and

(k) Will comply with any applicable special basin or geographic area criteria established in Chapter 40E-41, F.A.C.

Rule 40E-4.301, F.A.C.

124. FWC and DEP have failed to adequately analyze the following factors:

a. 40E-4.301(a) (will not cause adverse water quantity impacts to receiving waters and adjacent lands) weighs against the project because dumping sixty-five million pounds of sand into a navigable river will plainly cause adverse water quantity impacts to receiving waters.

b. 40E-4.301(d) (will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters) weighs against the project because the project will adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters by displacing numerous species currently inhabiting the area, permanently precluding fish from migrating upstream, and returning the vegetation in the area to invasive monoculture.

c. 40E-4.301(e) (will not adversely affect the quality of receiving waters such that the water quality standards set forth in Chapters 62-4, 62-302, 62-520, 62-522 and 62-550, F.A.C., incorporated by reference in paragraph 40E-4.091(1)(d), F.A.C., including any antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), subsections 62-4.242(2)and (3), and Rule 62-302.300, F.A.C., and any special standards

for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated) weighs against this project because a river cannot be "restored" by dumping sixty-five million pounds of sand into it, and there is no evidence that the plan will do anything but obliterate a navigable waterway.

d. 40E-4.301(f) (will not cause adverse secondary impacts to the water resources) This factor weighs against the project because it would foreclose the completion of the channel restoration project, thereby eliminating a passage for fish and other aquatic life between Lake Okeechobee and the upper reaches of the Creek, diminishing the food sources for wading birds, and preventing the restoration of wading bird habitat.

e. 40E-4.301(i) (will be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed) weighs against the project because the project is not based on generally accepted engineering and scientific principles in that the roads and staging areas will necessarily damage the Marsh and because driving hundreds of dump trucks in a marsh cannot possibly be done without damaging its ecosystem.

125. In sum, FWC and DEP have failed to provide reasonable assurances that the proposed project complies with these requirements.

126. DEP's regulations also incorporate SFWMD's "Additional Conditions for Issuance of Permits," Rule 40E-4.302, which provide that an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, and abandonment of a system located in, on, or over wetlands or other surface waters

"will not be contrary to the public interest" and "will not cause unacceptable cumulative impacts upon wetlands and other surface waters." Rule 40E-4.302(1)(a) & (b), F.A.C. FWC's backfill plan is contrary to the public interest because the 1999 Settlement Agreement in this case conclusively established that the public's interest in Cowbone Marsh is served by the maintenance and enhancement of navigation in the stream. The DEP-approved backfill plan will cause unacceptable cumulative impacts to wetlands and surface waters because it calls for building a road across the wetlands in Cowbone Marsh and utterly destroying a navigable waterway. Moreover, the project will impede the propagation of fish and wildlife and contribute sediment to downstream waters.

VIII. RELIEF SOUGHT

127. Conservationists respectfully request that DEP refer this matter to the Division of Administrative Hearings for a formal administrative hearing pursuant to Sections 120.569 and 120.57, Florida Statutes, and that the Administrative Law Judge enter a Recommended Order setting aside DEP's September 11, 2012 ERP directing FWC to fill the stream in Cowbone Marsh with sand, and instead recommending to DEP that the existing check dams be maintained and monitored.

Respectfully submitted this 2nd day of October, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing petition was filed by hand delivery on October 2, 2012, with the Clerk of the Florida Department of Environmental Protection in the Office of General Counsel for the Department, 3900 Commonwealth Blvd., Mail Station 35, Tallahassee, Florida 32399-3000. In addition, a copy of the petition was served on the permittee at the following address via U.S. mail and electronic delivery on October 2, 2012:

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Attorney

Exhibit A



Exhibit B

