

INTERLOCAL AGREEMENT FOR THE OPERATION AND MAINTENANCE OF THE L-3 CANAL BEST MANAGEMENT PRACTICES PROJECT

THIS Interlocal Agreement for the Operation and Maintenance of the L-3 Canal Best Management Practices Project ("*Agreement*") is made and entered into this _____ day of _____, 2020, by and between Lee County, a political subdivision of the State of Florida ("*County*"), and the City of Fort Myers, a Florida municipal corporation, of the State of Florida ("*City*"), collectively referred to as the "*Parties*."

RECITALS:

WHEREAS, the County and the City desire to enter into this Agreement for the purpose of outlining the responsibilities for operation and maintenance of a portion of the L-3 Canal located between Boy Scout Drive and Canal L, as shown on attached ***Exhibit "A.1"***, entitled "Project Limits Map," this portion of the L-3 Canal being hereinafter known as the L-3 Canal Best Management Practices Project ("*L-3 Canal BMP*", a/k/a the "*Project*"); and

WHEREAS, the L-3 Canal BMP will seek to help reduce nutrients from entering the Caloosahatchee Estuary; and

WHEREAS, the L-3 Canal BMP will help to treat polluted waters prior to its discharge into the Caloosahatchee Estuary; and

WHEREAS, the L-3 Canal BMP may include wetland plantings to remove nutrients; and

WHEREAS, the L-3 Canal BMP will seek to provide an overall improvement to the water quality of the Caloosahatchee Estuary; and

WHEREAS, the City and County are duly empowered pursuant to Florida Statutes §163.01, to enter into Interlocal Agreements for the sharing of certain governmental powers and obligations.

NOW THEREFORE, in consideration of the foregoing, and the mutual covenants hereinafter contained, the receipt, adequacy and sufficiency of which is acknowledge by both Parties, the County and City hereby agree as follows:

I. L-3 CANAL BMP PROJECT AND PERMITS.

- A. The County will be responsible for the initial construction and maintenance of the L-3 Canal BMP. The L-3 Canal BMP may include, but not be limited to, wetland plantings, a riprap check dam and all appurtenances between the top of banks. Refer to **Exhibit "A.1"** for the general location of the project.
- B. The County will apply for all necessary Local (County and City) permits, along with permits from each respective State and Federal agency, and be responsible for permitting costs for a period of five years. The five-year period will start the following day after issuance of the Construction Completion Certification of the Environmental Resource Permit ("ERP") and the Project will be operated in conformity therewith. The City and County will cooperate in submitting the necessary documentation and information to the permitting agencies. Following the initial five-year period, the City will become responsible for all maintenance of the Project.
- C. In addition, the County has the right to continue to drain and flow surface water into the Project from adjacent properties outside the Project Limits Map. The cost of construction of any such improvements or facilities located outside of the area as depicted on the Project Limits Map will be the responsibility of the County.

II. MAINTENANCE AND OPERATION OF THE L-3 CANAL BMP'S.

- A. The County will, at its sole cost and expense, initially construct, maintain and operate the L-3 Canal BMP, as described herein, for a period of five years after issuance of the South Florida Water Management District certificate of completion. After five years from the date of issuance of the South Florida Water Management District certificate of completion, this Agreement expires, and the City will operate and maintain the system in perpetuity at the sole cost and expense of the City.
- B. In maintaining the L-3 Canal BMP during the first five years, the County will perform all activities necessary to keep the L-3 Canal BMP fully and properly functioning for its normal expected useful life in accordance with the original design thereof, whether necessitated by normal wear and tear, accidental or intentional damage, or acts of nature in addition to actions necessary to maintain the hydraulic function of the canal from bank to bank as described in attached **Exhibit "A.2"** entitled "Post Improvement Maintenance." Said maintenance will include, but not be limited to the followings: routine inspection and testing, preventative maintenance, emergency maintenance, and replacement of any component parts of the L-3 Canal BMP. Notwithstanding the foregoing, the City will, at its sole cost and expense, maintain the area from top of bank to end of the right-of-way on each side of the canal as depicted in attached **Exhibit "A.2"** during the first five-year period and then in perpetuity

thereafter. The City's maintenance will also include mowing during this first five-year period.

- C. During the first five years of operation, as the operator of the L-3 Canal BMP, the County will be solely responsible for any local, State or Federal permits. After the initial five-year period, the County will transfer, and the City will accept, all State and Federal permits for the L-3 Canal BMP project. Prior to the transfer from the County to the City at the end of five years, the City may inspect the area to ensure there are no items that need to be addressed prior to acceptance. The County will have 90 days to address the City's concerns, in writing, to the City's reasonable satisfaction. Should the County fail to address the concerns for the City, the County will continue to maintain the area until the City's concerns have been addressed. Such acceptance by the City will not be unreasonably withheld.
- D. During the first five years of operation of the Project by the County, the City agrees it will not perform nor cause to be performed any act or work on the Project without first providing written notice to the County and receiving a written acknowledgement from the County to proceed. The City further agrees that any private consultant or contractor engaged by the City must be both licensed and insured in accordance with the County's insurance requirements in effect at the time.

III. TMDL CREDITS.

- A. All Florida Department of Environmental Protection (FDEP) Total Maximum Daily Load (TMDL) credits earned under the terms of this Agreement will be shared equally between the Parties.
- B. The amount of TMDL credits generated by this Project will be determined by the FDEP based upon information provided by the County.

IV. ACCESS AND EASEMENTS.

The City will provide the County with necessary access and easements, within City rights-of-way and other City lands, for installing, maintaining, and operating the system. County will be responsible for acquiring necessary access and easements outside the City limits for installing, maintaining, and operating the system. Any damage caused by the County to City facilities will be the County's responsibility to restore back to the original conditions.

Notwithstanding any other provision contained herein, during the life of the Project, the County will have a right of access for testing and inspection when deemed necessary by the County.

V. RECORD KEEPING.

The County will keep records of the maintenance and costs associated with this system. All such records will be deemed to be public records and subject to the provisions of Chapter 119, Florida Statutes. During the term of this Agreement, and thereafter, both Parties will make available to the other, for inspection and copying, those records in the each Parties' possession, including the nutrient reduction verification data.

VI. DEFAULT.

If either Party fails to fulfill its obligations under this Agreement, that Party will be considered to be in default. The other Party to the Agreement will provide written notice of the default and an opportunity to cure the default within 90 days of receipt of said notice. If the defaulting Party fails to cure the default within said time period, the other Party may terminate this Agreement for cause or breach. Failure of either Party to exercise its rights in the event of any breach will not constitute a waiver of such rights. Neither the City nor the County is deemed to have waived any failure to perform by the other Party unless such waiver is in writing and signed by the waiving Party. In any litigation arising out of this Agreement, the prevailing Party will be entitled to recover reasonable attorney's fees and costs from the non-prevailing Party.

VII. LIABILITY.

- A. The Parties agree that by execution of this Agreement, neither Party will be deemed to have waived its statutory defense of sovereign immunity or increased its limits of liability, as provided in §768.28, Florida Statutes.
- B. The Parties agree to use only licensed and insured contractors for any work on the Project. Any contractor so engaged by the Parties during the term of this Agreement must provide the other Party with a Certificate of Insurance naming that Party as a third-party loss payee, on an insurance policy meeting the County's minimum insurance requirements, a copy of which is attached hereto as ***Exhibit "A.3"***, as those requirements may be revised.

VIII. FORCE MAJEURE.

Neither the City nor the County will be liable to the other for any failure to perform under this Agreement to the extent such performance is prevented by an act of God, war, riots, natural catastrophe, or other event beyond the control of the non-performing Party and which could not have been avoided or overcome by the exercise of due diligence, provided that the Party claiming the excuse from performance has (a) promptly notified the other Party of the occurrence and its estimated duration, (b) promptly remedied or mitigated the effect of the occurrence to the extent possible, and (c) resumed performance as soon as possible.

IX. TIME AND NOTICES.

- A. Time is of the essence in the performance of all obligations under this Agreement.
- B. All notices required pursuant to the terms hereof may be sent by first class United States Mail, facsimile transmission, hand delivery or express mail and will be deemed to have been received by the end of five (5) business days from the proper sending thereof, unless proof of prior actual receipt is provided. Unless otherwise notified in writing, notices must be sent to the following addresses:

If to City of Fort Myers:

Public Works Director
City of Fort Myers
2200 2nd Street
Fort Myers, Florida 33901

With a copy to the City Attorney and the City Clerk.

If to Lee County:

Director, Division of Natural Resources
Lee County Board of County Commissioners
Post Office Box 398
Fort Myers, Florida 33902-0398

With a copy to the County Attorney.

X. TERM OF AGREEMENT.

The term of this Agreement will be from the date first written above, and will continue until terminated pursuant to the provisions herein.

XI. NO THIRD PARTY BENEFICIARIES.

Nothing in this Agreement may be construed as creating any rights or entitlement that inure to the benefit of any person or entity not a Party to this Agreement.

XII. ASSIGNMENT.

Neither Party will have the right to assign or transfer this Agreement, in whole or in part, without the prior written agreement of the other Party.

XIII. TERMINATION.

This Agreement may be terminated by mutual agreement of the parties. If the system will continue to be operated after termination of this Agreement, the agreement to terminate will include a mutual agreement concerning responsibility for operation and maintenance of the L-3 Canal BMP. If the Parties contemplate that the project will no longer be operated and maintained upon termination of this Agreement, then such agreement to terminate will be subject to the consent of any and all State and Federal agencies with jurisdiction over the project.

Further, this Agreement is contingent upon funding and budget approval by the County for the initial construction and maintenance of the L-3 Canal BMP. The failure of the County to obtain sufficient funding to cover its respective obligations pursuant to the terms of this Agreement will be a cause for the County to terminate this Agreement.

XIV. AMENDMENTS.

This Agreement may only be amended by written amendment approved with the same formalities as this Agreement. Such amendments will be incorporated into the body of this original Agreement and attached hereto. All other provisions of the original Agreement will remain in full force and effect.

XV. GOVERNING LAWS.

This Agreement will be controlled and interpreted according to the laws, rules and regulations of the State of Florida. The Parties consent to the exclusive jurisdiction and venue of the state or federal courts of Lee County, Florida. Any provision hereof found to be unlawful or unenforceable will be severable and will not affect the validity of the remaining provisions hereof.

XVI. EFFECTIVE DATE.

This Agreement will become effective on the date written above, or when signed by both Parties, whichever is later. This Agreement, and any subsequent amendments thereto, will be filed with the Clerk of the Circuit Court for Lee County.

(End of provisions – signature page follows.)

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their duly authorized officers and their official seals affixed hereto.

ATTEST:

CITY OF FORT MYERS, FLORIDA

BY: _____
[Signature]
Gwen Carlisle, MMC
City Clerk

BY: _____
[Signature]

[Type or print name]
Mayor

BY: _____
[Signature]
Saeed Kazemi, P.E.
City Manager

APPROVED AS TO LEGAL FORM:

BY: _____
[Signature]

[Type or print name]
City Attorney

ATTEST:
LINDA DOGGETT, CLERK

**BOARD OF COUNTY COMMISSIONERS
OF LEE COUNTY, FLORIDA**

BY: _____
Deputy Clerk

[Type or print name]

By: _____
[Signature]

[Type or print name]
Chair/Vice-Chair

APPROVED AS TO FORM FOR THE
RELIANCE OF LEE COUNTY ONLY:

By: _____
[Signature]

[Type or print name]
Lee County Attorney's Office

Attached Exhibits: **Exhibit "A.1"** – Project Limits Map
Exhibit "A.2" – Post Improvement Maintenance
Exhibit "A.3" – County Insurance Requirements

(091120/145510)

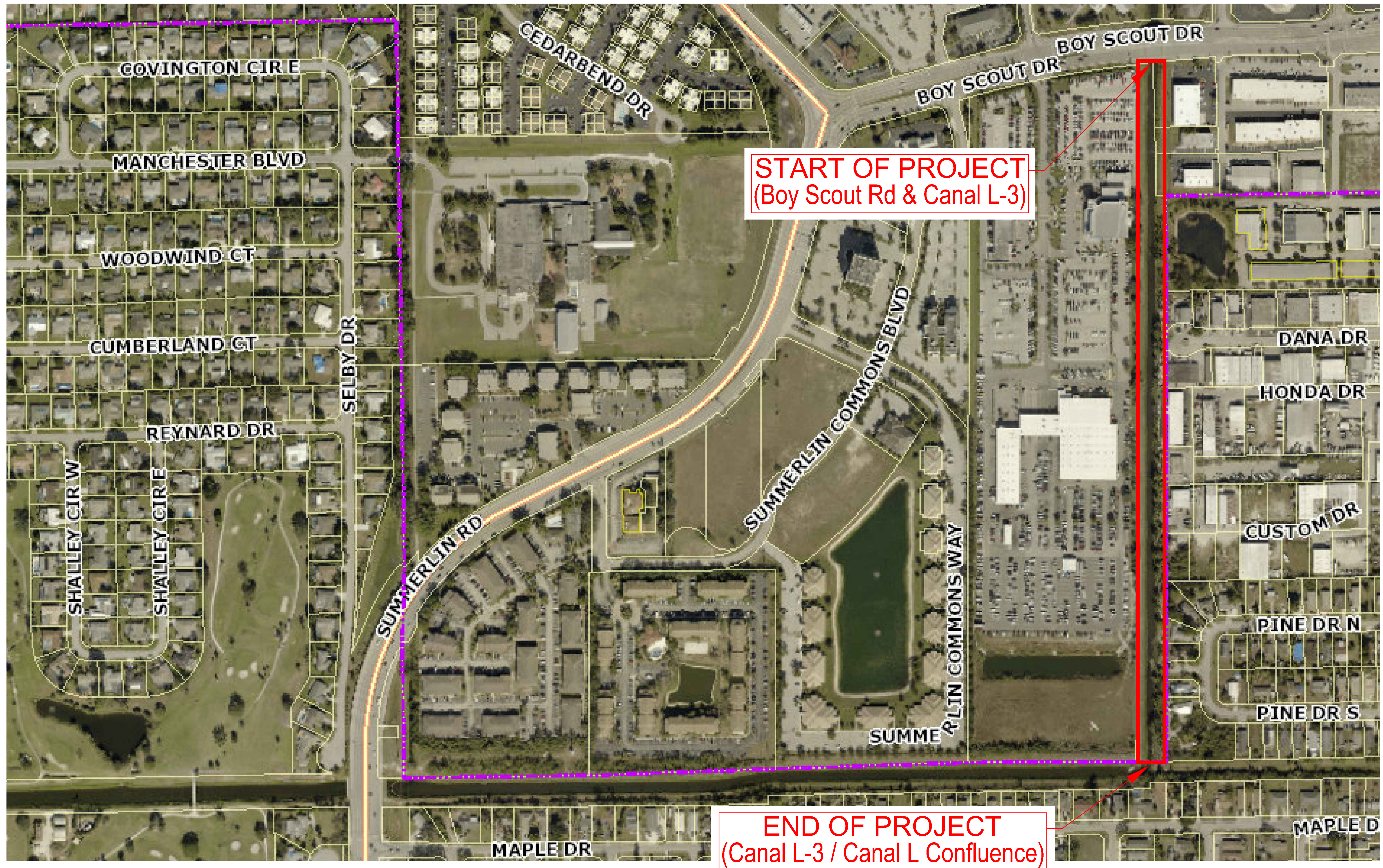


EXHIBIT A.1 - PROJECT LIMITS MAP

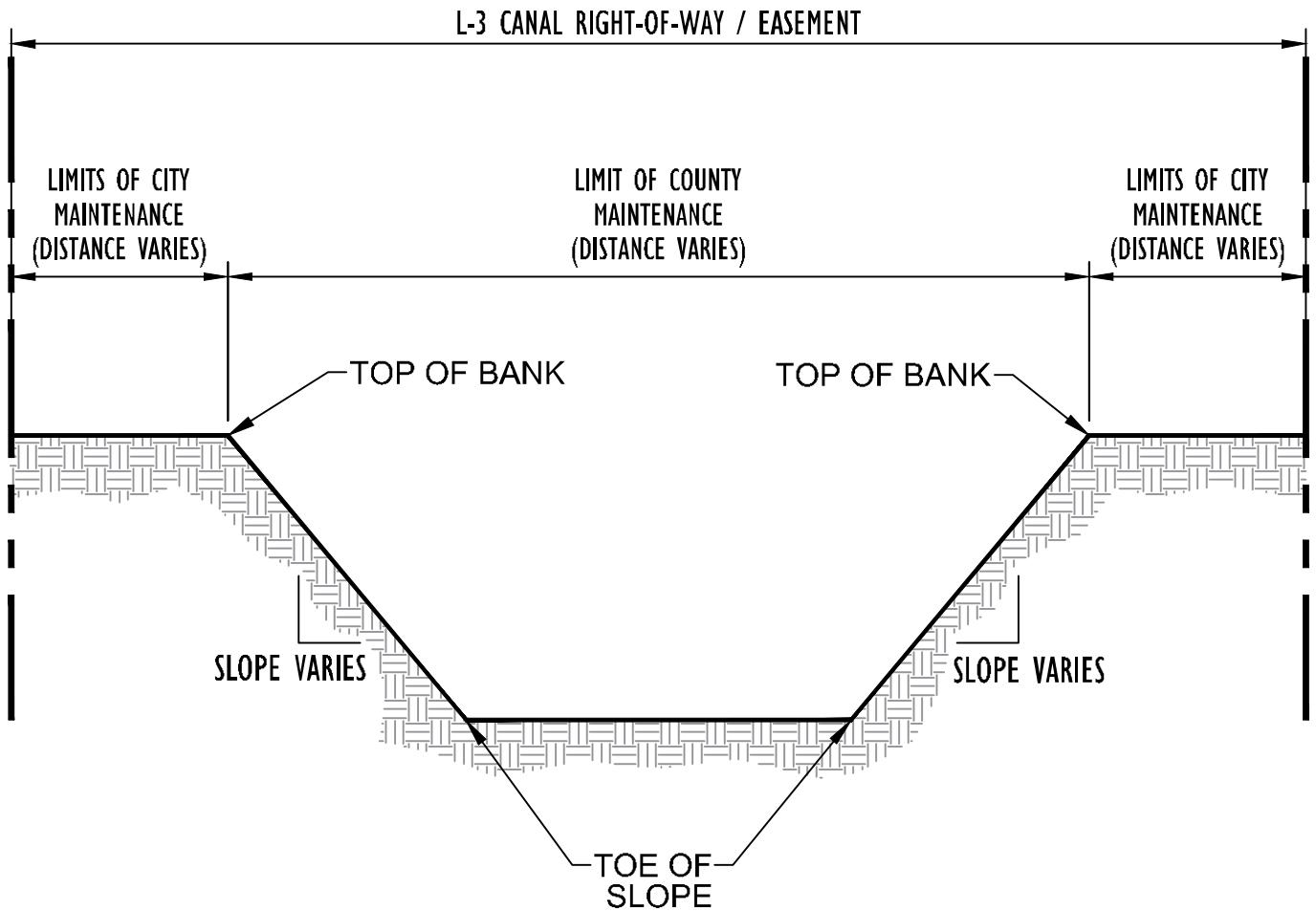


EXHIBIT A.2

L-3 CANAL BMPs

POST IMPROVEMENT MAINTENANCE

Standard Insurance Requirements

Minimum Insurance Requirements: *Risk Management in no way represents that the insurance required is sufficient or adequate to protect the vendors' interest or liabilities. The following are the required minimums the vendor must maintain throughout the duration of this contract. The County reserves the right to request additional documentation regarding insurance provided*

- a. **Commercial General Liability** - Coverage shall apply to premises and/or operations, products and completed operations, independent contractors, contractual liability exposures with minimum limits of:

\$500,000 per occurrence
\$1,000,000 general aggregate
\$500,000 products and completed operations
\$500,000 personal and advertising injury

- b. **Business Auto Liability** - The following Automobile Liability will be required and coverage shall apply to all owned, hired and non-owned vehicles use with minimum limits of:

\$500,000 combined single limit (CSL)
\$300,000 bodily injury per person
\$500,000 bodily injury per accident
\$300,000 property damage per accident

- c. **Workers' Compensation** - Statutory benefits as defined by FS 440 encompassing all operations contemplated by this contract or agreement to apply to all owners, officers, and employees regardless of the number of employees. Workers Compensation exemptions may be accepted with written proof of the State of Florida's approval of such exemption. Employers' liability will have minimum limits of:

\$100,000 per accident
\$100,000 disease limit
\$500,000 disease – policy limit

**The required minimum limit of liability shown in a and b. may be provided in the form of "Excess Insurance" or "Commercial Umbrella Policies." In which case, a "Following Form Endorsement" will be required on the "Excess Insurance Policy" or "Commercial Umbrella Policy."*



Verification of Coverage:

1. Coverage shall be in place prior to the commencement of any work and throughout the duration of the contract. A certificate of insurance will be provided to the Risk Manager for review and approval. The certificate shall provide for the following:

a. **The certificate holder shall read as follows:**

**Lee County Board of County Commissioners
P.O. Box 398
Fort Myers, Florida 33902**

b. ***“Lee County, a political subdivision and Charter County of the State of Florida, its agents, employees, and public officials” will be named as an "Additional Insured" on the General Liability policy, including Products and Completed Operations coverage.***

Special Requirements:

1. An appropriate "Indemnification" clause shall be made a provision of the contract.
2. It is the responsibility of the general contractor to insure that all subcontractors comply with all insurance requirements.