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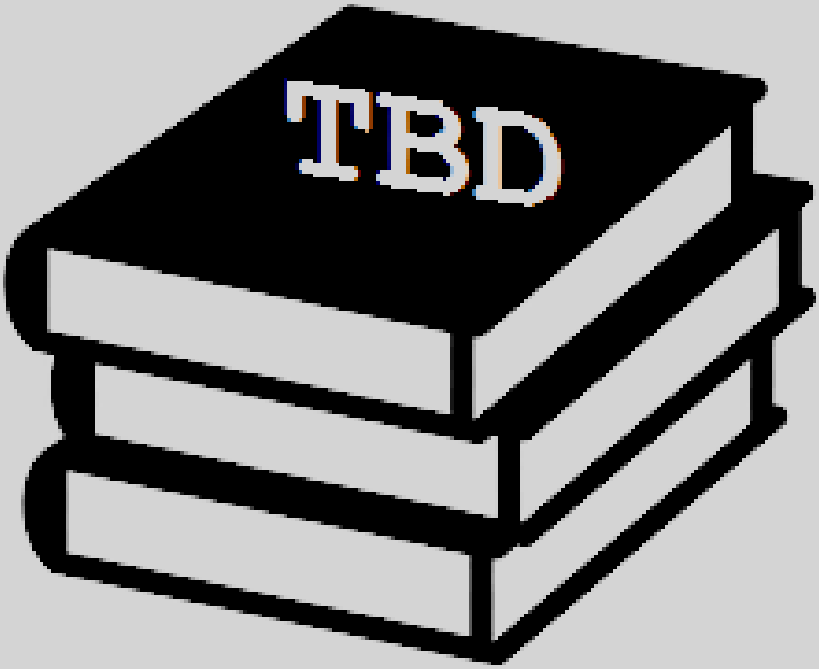

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IN THE FLORIDA FIRST DISTRICT COURT OF APPEAL

FINR II, INC.,

Petitioner,

Fla. 1st DCA Case No. 1D12-1308

vs.

DOAH Case No. 11-6495

CF INDUSTRIES, INC. and FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

FINR II, INC.'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Florida Rule of Appellate Procedure 9.300, Petitioner FINR II, Inc. moves on the following grounds for leave to file a supplemental brief:

1. The administrative case out of which this appellate proceeding arose involves FINR's challenges to DEP's proposed approval of Respondent CF Industries, Inc.'s ("**CF**") applications for South Pasture Extension Mine Environmental Resource Permit No. 0294666-001 (the "**SPEM ERP**"), South Pasture Extension Mine Conceptual Reclamation Plan No. CFI-SPE-CP, DEP File No. 0294666-002 (the "**SPEM CRP**"), South Pasture Mine Wetland Resource Permit Modification of WRP No. 252607909 (the "**SPM WRP Modification**"), and South Pasture Mine Conceptual Reclamation Plan Modification CFI-SP-CPD, DEP File No. 0151551-018 (the "**SPM CRP Modification**").

Filed June 12, 2012 9:57 AM Division of Administrative Hearings

2. On March 12, 2012, FINR filed its petition for writ of prohibition and/or review of non-final agency action in this Court. Two days later, the Court denied FINR's request for writ of prohibition, but issued an order to show cause concerning FINR's request for review, requiring CF and DEP to submit responses to FINR's petition. Both CF and DEP submitted their responses to the order to show cause on April 9, 2012, and on April 30, 2012, FINR filed its reply to these responses.

3. Also on April 30, 2012, the ALJ issued his recommended order recommending that all four of CF's permit applications be approved. On May 9, 2012, FINR filed a motion asking DEP to stay further proceedings pending a decision on FINR's petition by this Court. After two weeks elapsed without a ruling on FINR's motion for stay, FINR filed a motion for stay with this Court on May 23, 2012. Meanwhile, on May 15, 2012, FINR filed exceptions to the ALJ's recommended order.

4. On June 8, 2012, DEP issued (a) its final order, approving the ALJ's recommended order and denying FINR's exceptions, and (b) an order denying FINR's motion for stay. A copy of the final order is attached to this motion as "Exhibit A." A copy of the stay order is attached hereto as "Exhibit B." [1] In its final order, DEP has taken a position directly contrary to one of the arguments it has

[1] It is anticipated that CF will be filing an unopposed motion to supplement its appendix with DEP's final order and order denying FINR's motion for stay, both dated June 8, 2012.

advanced in this appellate proceeding. Specifically, with regard to the ALJ's February 16, 2012 order that is the subject of this appellate proceeding, DEP previously argued in its response to this Court's order to show cause that "the Department *does* have substantive jurisdiction over determining a party's standing (where based on application of rules and statues the Department implements), and in otherwise interpreting its own rules and statutes." DEP Response, at page 15 (italics in original). However, in its final order, DEP has taken exactly the opposite position. Contrary to its arguments to this Court, DEP holds in the final order that "the Department does not have the authority to modify or reject the ALJ's procedural and evidentiary rulings under the summary hearing provisions of Section 120.574, F.S. ... It is well established that evidentiary rulings are matters within the ALJ's substantive jurisdiction and may not be reversed on agency review." Exhibit A, at pages 14-15, 22. This inconsistency is directly relevant to this appellate proceeding, as it lends credence to FINR's argument that DEP's lack of substantive jurisdiction to correct the ALJ's erroneous ruling, renders a plenary appeal an insufficient remedy, and undermines DEP's arguments to the contrary. *See*, FINR's Petition at 44-45, and FINR's Reply brief at 14-15; DEP Response at 14-15. DEP's holding on this point also means that DEP did not ratify the ALJ's February 16, 2012 order, and that there is still no final order of dismissal of Counts III and IV of FINR's petition. *See*, Exhibit A.

5. FINR is being whipsawed and significantly harmed by DEP's attempts to stymie its case (both at DOAH and in this Court) by advancing whichever interpretation of its authority is convenient at the given time, and therefore, respectfully requests the opportunity to address the implications of DEP's final order. FINR proposes to submit a supplemental brief of no more than 10 pages in length within 10 days of an order granting this motion, or within such other time as the Court sees fit.

6. This Court has the inherent authority to grant leave to file supplemental briefs. *See, e.g., Latiif v. State*, 787 So.2d 834, 835 (Fla. 2001) (court granted appellant's request to file a supplemental brief); *York v. State*, 891 So.2d 569, 571 (Fla. 2d DCA 2004) (appellate counsel "could have filed a motion to file a supplemental brief" and that failure was "ineffective assistance of appellate counsel"); *Gisi v. State*, 848 So.2d 1278, 1281 (Fla. 2d DCA 2003) (appellate counsel "could have filed a motion to file a supplemental brief" and failure to do so was "ineffective assistance of appellate counsel"); *Blanton v. State*, 880 So.2d 798, 800 (Fla. 5th DCA 2004) (court granted leave for appellant to file supplemental brief).

7. FINR respectfully submits that a supplemental brief will be an aide to this Court's analysis and decision making process.

WHEREFORE, FINR respectfully requests this Honorable Court to grant leave for FINR to file a supplemental brief within 10 days, or within such other

time as the Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been served by U.S. Mail and Electronic Transmission this 11th day of June, 2012 to Justin G. Wolfe, Esq., and Brynna J. Ross, Esq., Department of Environmental Protection, 3900 Commonwealth Blvd., MS #35, Tallahassee, Florida 32399-3000, Justin.g.wolfe@dep.state.fl.us and brynna.ross@dep.state.fl.us; Frank Matthews, Esq., Susan Stephens, Esq., Michael Collazo, Esq., Thomas R. Philpot, Esq., Dan R. Stengle, Esq., and Amelia A. Savage, Esq., Hopping Green & Sams, 119 S. Monroe Street, Suite 300, Tallahassee, FL 32301, frankm@hgslaw.com, susans@hgslaw.com, mikeC@hgslaw.com, thomasp@hgslaw.com, dans@hgslaw.com, and amelias@hgslaw.com; and The Honorable Donald R. Alexander, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, FL 32399-3060, at http://www.doah.state.fl.us/ALJ/.

Respectfully submitted,

de la PARTE & GILBERT, P.A.

Edward P. de la Parte, Jr., FBN 236950
David M. Caldevilla, FBN 654248
Kristin Y. Melton, FBN 0037262

Michael R. Bray, FBN 58263
Post Office Box 2350
Tampa, Florida 33601-2350
Telephone: (813) 229-2775
Counsel for Petitioner

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

FINR II, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**OGC CASE NO. 11-1756**
	)	**DOAH CASE NO. 11-6495**
CF INDUSTRIES, INC. and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
	)	

FINAL ORDER

An Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), on April 30, 2012, submitted his Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or "Department") in the above captioned proceeding. A copy of the RO is attached as Exhibit A. The RO shows that copies were sent to counsel for the Petitioner, FINR II, Inc. ("FINR"), and to counsel for the Respondents, CF Industries, Inc. ("CF"), and the Department. The Petitioner FINR filed Exceptions to the RO on May 15, 2012.[1] The Respondents filed a joint response on May 25, 2012. This matter is now before the Secretary of the Department for final agency action.

[1] On May 9, 2012, FINR filed a Motion to Stay Proceedings Pending Outcome of Petition for Review of Non-Final Agency Action, seeking to stay entry of this Final Order. The Department denied the motion by separate order.

BACKGROUND

CF first began mining for phosphate in Hardee County in 1978 at what was then known as the North Pasture mine. Mining operations at the North Pasture mine concluded in the middle of the 1990s, and the lands associated with that mine were completely reclaimed. Pursuant to local, state, and federal permits, CF relocated its beneficiation plant (which separates the phosphate ore matrix into phosphate rock, waste clay, and sand) to its present location south of State Road 62 in 1993, and began operation of its South Pasture mine in 1995. The South Pasture mine encompasses about 15,390 acres. After the startup of the South Pasture mine, CF acquired three additional land parcels totaling approximately 7,512.8 acres with mineable reserves contiguous to and immediately south of the South Pasture mine. These parcels are collectively referred to as the South Pasture Extension tract or the Project site. CF applied to the Department for permits and approvals to conduct phosphate mining, reclamation, and associated activities on the South Pasture Extension tract. Approval of the applications for the Project will extend the life of the current South Pasture mine and beneficiation plant by ten years.

The Department issued proposed agency actions, on November 21, 2011, approving CF's applications for the Project's Environmental Resource Permit ("ERP") and Conceptual Reclamation Plan ("CRP"), the South Pasture Wetland Resource Permit Modification ("WRP"), and South Pasture Conceptual Reclamation Plan Modification. On December 12, 2011, FINR timely filed a Petition challenging the

proposed agency actions. FINR owns approximately 875 acres of land east of County Road 663 and immediately south of and adjacent to the Project site, which it leases to two affiliated companies, Florida Institute of Neurological Rehabilitation, Inc. (FINR I, Inc.) and FINR III, LLC. FINR I, Inc., operates the Florida Institute of Neurological Rehabilitation, which is a post-acute, state-licensed inpatient rehabilitation facility accredited by the Commission on Accreditation of Rehabilitation Facilities. It specializes in the treatment of children and adults who have sustained brain injury or some other form of neurologic trauma.

The Petition was referred by the Department, on December 29, 2011, to the DOAH. The ALJ granted CF's motion for a summary hearing under section 120.574, Florida Statutes, which it was authorized to request under Section 378.205(3), Florida Statutes ("F.S."). CF also filed a motion to strike portions of the petition and motion in limine. The ALJ granted the motions on February 16, 2012, ("the non-final order") and proceeded with the accelerated hearing schedule in Section 120.574, F.S. Prior to the final hearing, FINR sought review of the non-final order in the First District Court of Appeal (1D12-1308).[2]

On March 12, 2012, the Department issued a revised proposed agency action incorporating a new modeling report prepared by CF which provided further support for the Department's proposed action. FINR also submitted a written proffer on matters

[2] FINR's Petition for Review of Non-Final Agency Order remains pending as of the date of this Final Order.

previously excluded by the February 16, 2012, Order. The final hearing was held March 26-28, 2012, and on April 30, 2012, the ALJ entered his RO.

RECOMMENDED ORDER

In the RO the ALJ recommended that the Department enter a final order approving CF's applications. The ALJ determined that FINR did not offer credible evidence of adverse environmental or water resources impacts to its property as a result of mining or reclamation within the footprint authorized by the ERP or CRP. (RO at page 47). The ALJ concluded that a preponderance of competent substantial evidence, including the entirety of the application, engineering studies and reports, scientific testimony, and a voluminous application, all support the Department's determination of reasonable assurance of CF's entitlement to the approvals at issue. (RO ¶ 97).

The Project ERP

The ALJ found that CF and the Department thoroughly investigated the Project's potential for causing adverse flooding and dewatering impacts on adjacent properties. (RO ¶ 33). Event-based stormwater runoff modeling provided reasonable assurance that peak discharge rates and outflow volumes at exit points from the Project site under post-reclamation conditions would not cause adverse offsite flood impacts. (RO ¶ 34).

The ALJ also found that CF and the Department evaluated the Project's potential for causing adverse flooding and dewatering impacts on adjacent properties during mining. (RO ¶ 37). He found that CF's application contained during-mining water

balance analyses that specifically evaluated the biological integrity of on-site and off-site preserved areas, streams, and wetlands during mining and after reclamation. There will be no substantial change in the during-mining water balance as a result of the extension of mining into the Project site. The ALJ found that the application, past practices and experience, and evidence presented at hearing all indicate that CF has more than a sufficient amount of water available to conduct the Project while simultaneously maintaining or improving the biological integrity of downstream systems. (RO ¶¶ 38, 39). The ALJ concluded that CF demonstrated its ability to manage large amounts of water within its mine recirculation system and store or discharge water as required in order to maintain downstream flows or reduce flooding potential. Thus, the risk of adverse flooding during mining was minimal. (RO ¶ 40). The ALJ found that once CF constructs the proposed perimeter ditch and berm system, the area of the drainage basin contributing flow to FINR's property would be reduced by approximately one-half, resulting in significantly less water flowing onto FINR's property during flood events. In addition, a reroute ditch would be installed in concert with the ditch and berm system that will reduce peak flood flows downstream in Troublesome Creek. (RO ¶ 51).

The ALJ found that CF thoroughly assessed the ability of the recharge ditch to maintain recharge to wetlands and adjacent properties during active mining of the Project. CF demonstrated that it would meet the goal of the recharge ditch design to maintain the water table during mining operations, within the normal range of seasonal

high and seasonal low water along preserve and property boundaries, including FINR's property. (RO ¶¶ 52 – 58, 72).

The ALJ found that, in addition to the above analyses, CF and the Department also thoroughly evaluated potential on-site and off-site water quality issues associated with the Project. The ALJ found that discharges would occur only through permitted outfalls. Additional water quality protection for adjacent undisturbed surface waters and wetlands would be provided by the perimeter ditch and berm systems and other proposed best management practices ("BMPs"), such as silt fences and stormwater collection systems. The ALJ determined that during mining and reclamation, these practices would preclude uncontrolled releases of water to adjacent un-mined and downstream areas. (RO ¶¶ 60, 61). The ALJ found that CF prepared a Stormwater Pollution Prevention Plan ("SPPP") to identify BMPs and controls for the Project during land preparation, mining, backfilling, and reclamation. The SPPP also incorporated by reference other documents already in place on the South Pasture mine pursuant to CF's National Pollutant Discharge Elimination System ("NPDES") permit for the South Pasture mine. Among these documents are a Best Management Practices/Pollution/Prevention ("BMP3") Plan that generally describes BMPs for waste management, spill reporting and response, and other specific measures to prevent pollution, and a memorandum of agreement ("MOA") between CF and the Department that describes general design and construction BMPs. The ALJ found that by using these measures at the South Pasture mine, CF has never had any issues with

stormwater discharges causing water quality violations. (RO ¶¶ 62, 63). The ALJ also found that FINR failed to present any competent substantial evidence that the Project will cause adverse water quality impacts during mining. (RO ¶ 64, 88).

As to ecological issues, the ALJ found that the level of detail and analysis provided by CF in its application to the Department for the Project ERP and CRP, and the South Pasture WRP and CRP Modifications, was more than adequate. The ALJ determined that CF provided substantially more baseline information in terms of existing site conditions, wetland conditions, and wildlife information than is provided in typical ERP applications. (RO ¶ 65). The ALJ noted that CF's expert's evidence as to the local and regional ecological, hydrological, and wildlife benefits expected to result from the proposed reclamation was not disputed. Thus, he concluded that CF's wetlands reclamation activities maintained or improved the water quality and the function of the biological systems present at the site prior to the commencement of mining activities as required under Section 373.414(6)(b), F.S. (RO ¶¶ 66 – 68, 88).

The ALJ found that CF considered the potential impacts to off-site wetlands from the Project both during mining and after reclamation, particularly those wetlands that straddle CF's shared property boundary with FINR. The ALJ also found that the wetlands on FINR's property are similar to nearby wetlands on the Project site, in that historically they have been impacted by agricultural activities, including ditching. (RO ¶ 69, 70 - 72). The ALJ concluded that no dewatering would occur that would have an adverse ecological effect on FINR's wetlands. (RO ¶¶ 69 – 77).

The Project CRP

The ALJ found that CF analyzed whether it would have sufficient materials available to it to accomplish the objectives of the CRP, and sufficient capacity in the existing South Pasture mine and proposed Project site clay settling areas ("CSAs") to dispose of waste clays generated by phosphate matrix processing. (RO ¶ 78). The ALJ found that based upon CF's calculations as reflected in the Life of Mine Backfill Plan ("LOMBP"), information contained in the Mine Production Plan ("MPP"), and testimony from CF's expert witness, CF would have sufficient materials to achieve its mining and reclamation objectives; and sufficient capacity to dispose of waste clays in existing CSAs located on the South Pasture mine and proposed CSAs on the Project site. Thus, the ALJ concluded that CF would be able to accomplish the mining and reclamation as proposed. (RO ¶¶ 79 – 82).

The ALJ determined that with respect to phosphate mining reclamation criteria contained in chapter 378, F.S., and rule 62C-16.0051, Florida Administrative Code ("F.A.C."), CF provided reasonable assurances that the Project will meet the reclamation criteria contained in the rule. (RO ¶¶ 87, 89).

South Pasture WRP and CRP Modifications

The ALJ noted that, as set forth in the Order Granting the Motion to Strike and Motion in Limine issued on February 16, 2012, the Petition did not contain any factual allegations relative to the compliance with applicable regulatory requirements regarding, or potential for harm resulting from, the South Pasture Modifications (as opposed to the

ERP or CRP for the Project). Therefore, the allegations relating to the South Pasture Modifications were stricken. (RO ¶ 90). The ALJ found that the prima facie case provided by CF and the Department at the final hearing of CF's entitlement to the South Pasture mine Modifications was not refuted, and FINR did not make a proffer relative to the South Pasture mine Modifications prior to the close of the evidentiary proceedings. Thus, the ALJ reaffirmed his ruling at the final hearing to receive into evidence the permit application and the Department's proposed agency action on these two items. (RO ¶ 90).

Motion in Limine and Motion to Strike

The ALJ concluded and reaffirmed that FINR's assertions regarding Hardee County's quarter-mile setback requirement had no legal basis in any environmental factors that are cognizable under the ERP or CRP permitting programs. (RO ¶ 98). The ALJ further concluded that FINR did not offer any credible evidence of adverse environmental or water resources impacts to FINR's property as a result of mining or reclamation within the footprint authorized by the ERP or CRP. (RO ¶ 98).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2011); *Charlotte County v. IMC Phosphates Co.*, 18 So.3d

1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez,* 29 So.3d 1191, 1192 (Fla. 5th DCA 2010).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.,* 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.,* 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State,*

Dep't of HRS, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order. *See, e.g., Walker v. Bd. of Prof. Eng'rs,* 946 So.2d 604 (Fla. 1st DCA 2006); *Fla. Dep't of Corr. v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward County*, 746 So.2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001). If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So.2d 161, 168 (Fla. 5th DCA 1994). However, neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So.2d 1224 (Fla. 1st DCA 2007).

An agency's review of the legal conclusions in a recommended order is restricted to those that concern matters within the agency's field of expertise. *See, e.g., Charlotte County v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So.2d 1257, 1264 (Fla. 5th DCA 2004). An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

However, agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993);

Heifetz v. Dep't of Bus. Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio,* 622 So.2d at 609. Agencies do not have the authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. *See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140, 1142 (Fla. 2d DCA 2001).

RULINGS ON EXCEPTIONS

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So.2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So.2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. v. Bradley*, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So.2d 540, 542 (Fla. 4th DCA 2003). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2011);

Barfield v. Dep't of Health, 805 So.2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

Finally, in reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* § 120.57(1)(k), Fla. Stat. (2011). However, the agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

PETITIONER'S EXCEPTIONS

I. Exception concerning ALJ's February 16, 2012 Order.

FINR's first exception is to the ALJ's reaffirmation and/or incorporation by reference of the ALJ's February 16, 2012 Order granting CF's motion to strike and motion in limine (the "Order") as a conclusion of law. *See Exceptions* ¶ 11. FINR presents three arguments to support its contention that the Order was unauthorized and departed from the essential requirements of law because, (1) the ALJ lacked statutory authority to grant the motion to strike and motion in limine and to proceed in the manner contemplated by the Order; (2) the Order did not permit FINR to amend its Petition; and (3) the Petition was proper as pled. *See Exceptions* ¶ 14.

Contrary to FINR's contention in this exception, the Department does not have the authority to modify or reject the ALJ's procedural and evidentiary rulings under the summary hearing provisions of Section 120.574, F.S. Essentially, FINR is unhappy that

the ALJ complied with Section 373.205(3), F.S.; and in the context of conducting the summary hearing under section 120.574 he exercised his sole discretion to rule on procedural and evidentiary issues. *See Lee Cty. v. Mosaic Fertilizer, LLC,* DOAH Case No. 08-3886, 2009 WL 736931 (Fla. Dept. Env. Prot. February 1, 2009). It is well established that evidentiary rulings are matters within the ALJ's substantive jurisdiction and may not be reversed on agency review. *See, e.g., Barfield v. Dep't of Health,* 805 So.2d 1008, 1011-12 (Fla. 1st DCA 2001); *Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993).

Section 378.205(3), F.S., provides:

> Administrative challenges to proposed state agency actions regarding phosphate mines and reclamation pursuant to this chapter or part IV of chapter 373 are subject to the summary hearing provisions of s. 120.574, except that the summary proceeding must be conducted within 90 days after a party files a motion for summary hearing, regardless of whether the parties agree to the summary proceeding and the administrative law judge's decision is a recommended order and not a final order.

By motion CF requested a summary hearing, which the ALJ granted, and he conducted the final hearing within the 90 days as provided in the statute. FINR's first two arguments are that the ALJ's actions and rulings "departed from the essential requirements of law." *See Exception* ¶ 17. This agency does not have substantive jurisdiction, however, over the matters that comprise the essence of FINR's lengthy exception. *Id.*

As to FINR's third argument, the Department adopts in this Final Order the ALJ's ruling that allegations concerning local land use criteria, air impacts, noise, dust, odor, and airborne radioactive particles were immaterial and irrelevant in this proceeding. *See Exceptions at Appendix A and* RO ¶ 98.

Local land use criteria.

First, FINR asserts that the ALJ should have allowed evidence and testimony regarding local land use criteria. *See Exceptions* ¶¶ 25-34. FINR does not provide, however, any applicable statute or rule that would make the land use criteria relevant in the ERP and CRP context. When determining whether or not to issue a permit, an agency may only consider the proposed project and the statutes and rules applicable to the project. *See, e.g., Save the St. Johns River v. St. Johns River Water Mgmt. Dist.*, 623 So. 2d 1193, 1198 (Fla. 1st DCA 1993) ("compliance or noncompliance with another agency's permitting program should not be litigated in this administrative proceeding that must be conducted under statutes and rules relating solely to the District's permitting authority"). "[T]he Department is neither required nor authorized to deny or modify water pollution permits based on alleged noncompliance with local land use restrictions and long-range development plans, because the issuance of the permit must be based only on the applicable pollution control standards and rules." *Taylor v. Cedar Key Special Water & Sewerage Dist.*, 590 So. 2d 481, 482 (Fla. 1st DCA 1991); *see also Council of Lower Keys v. Charley Toppino & Sons, Inc.*, 429 So. 2d 67, 68 (Fla. 3d DCA 1983).

The Southwest Florida Water Management District Basis of Review (the "BOR") also provides that local land use criteria of the type alleged in the FINR Petition are not ERP regulatory criteria. The BOR expressly states that, "[t]he proposed land use to be served by a surface water management system for which an Environmental Resource Permit is requested is not required to be consistent with the affected local government's comprehensive plan and/or existing zoning for the site." *See* Joint Ex. 21 § 2.2.

Likewise, the reclamation rules governing CRP approval, at rule chapter 62C-16, F.A.C., do not contain any criteria concerning mine setbacks or buffers, and do not require the Department to consider local land use approvals in its decision-making. *See* Fla. Admin. Code R. 62C-16.003; *see also* Fla. Admin. Code R. 62C-16.0041 and 62C-16.0051. Contrary to FINR's contentions, the Department cannot, by including a statement in a permitting document, extend its permitting authority beyond what is authorized by statute. *See Save the St. Johns River,* 623 So. 2d at 1198.

Air impacts, noise, dust, odor, and airborne radioactive particles.

Second, FINR's allegations regarding air impacts, noise, dust, odor, and airborne radioactive particles are likewise beyond the scope of the Department's permitting criteria for ERPs and CRPs. *See, e.g., Fla. Chapter of the Sierra Club, et al v. Suwannee Am. Cement, Inc., et al.*, 2000 WL 1185499, at *16-17 (Fla. Dept. Env. Prot. 2000); *Royal Palm Beach Colony, L.P. v. South Fla. Water Mgmt. Dist.*, 21. F.A.L.R. 3663, 3674 (DOAH 1999); *In re Fla. Power & Light Co., Manatee Orimulsion Project*, 21 F.A.L.R. 2569, 2587-88 (Siting Board 1998).

FINR argues that the public interest test makes these allegations relevant. *See Exceptions* ¶¶ 36-37. When applying the public interest factors, the Department is limited to environmental impacts associated with the proposed activities in wetlands and surface waters. *See* § 373.414(1)(a), Fla. Stat. (2011); *see also Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So. 2d 113, 116 (Fla. 2d DCA 1997); *Miller v. State, Dep't of Envtl. Reg.*, 504 So. 2d 1325, 1327 (Fla. 1st DCA 1987).

WRP and CRP Modifications.

Third, FINR asserts that since CF is modifying its current South Pasture mine WRP and CRP to include the new ERP and CRP for the additional mine area, then its substantial interests are automatically affected by the South Pasture mine proposed agency actions. *See Exceptions* ¶ 39. FINR's argument, however, does not provide a basis to modify or reject the ALJ's factual finding in paragraph 90 of the RO that, "the Petition contained no factual allegations relative to the compliance with applicable regulatory requirements regarding, or potential for harm resulting from, the South Pasture Modifications (as opposed to the ERP or CRP for the Project)." *See, e.g., St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So.3d 1051, 1054 (Fla. 5th DCA 2011). Therefore, the allegations relating to the South Pasture Modifications were properly stricken. *See Exceptions at Appendix A.*

Due process.

FINR also argues that it has been "effectively denied ... an administrative hearing concerning the [South Pasture] WRP and CRP Modifications" and that its "statutory and

constitutional due process rights [have been] irreparably harmed." *See Exceptions* ¶¶ 21, 26. It is well established that administrative agencies lack jurisdiction to consider the alleged unconstitutionality of the actions of administrative officials. *See, e.g., Hays v. Dep't of Business Regulation*, 418 So.2d 331 (Fla. 3d DCA 1982); *Harmon Brothers Rock Co. v. Dep't of Envtl. Regulation*, 15 F.A.L.R. 2183, 2186 (Fla. DER 1993).

As to statutory due process, the record of this proceeding shows that issuance of the South Pasture Modifications (challenged in Counts III and IV of the Petition) were dependent upon issuance of the new ERP and CRP for the South Pasture Extension (Counts I and II of the Petition). A full evidentiary hearing was held and a recommended order was issued on all Counts. *See* Ruling on FINR's second exception below. Although FINR further complains that much of Counts I and II were stricken, the paragraphs that remained of those counts included a recitation of all the ERP and CRP regulatory criteria. *See Exceptions* at Appendix A and *FINR's Petition for Hearing* at pages 17 through 52. Thus, the record reflects that FINR had a full and fair opportunity to be heard on all of the relevant allegations related to its substantial interests that reasonably could be affected by the ERP and CRP proposed agency actions. *See Exceptions at Appendix A.*

Therefore, based on the foregoing reasons, FINR's first exception to the ALJ's reaffirmation and/or incorporation by reference of the ALJ's February 16, 2012 Order, is denied. FINR's request for a remand is also denied.

II. Exception to RO Paragraphs 90 and 97 (SPM WRP Modification and SPM CRP Modification Exceptions).

FINR takes exception to the findings in paragraph 90 of the RO, where the ALJ determined that the Petition failed to include "factual allegations relative to the compliance with applicable regulatory requirements regarding, or potential for harm resulting from, the South Pasture Modifications" and that FINR failed to refute "[t]he prima facie case provided by CF and the Department at hearing of CF's entitlement to the associated WRP and CRP Modifications for the South Pasture mine (South Pasture Modifications)." (RO ¶ 90). FINR also takes exception to the ALJ's conclusion in paragraph 97 that, "a preponderance of competent substantial evidence . . . all support the Department's determination of reasonable assurance of entitlement to the approvals at issue." (RO ¶ 97).

First, FINR contends that Counts III and IV of the Petition regarding the South Pasture WRP and CRP Modifications are in a "state of administrative limbo from which [the Department] cannot legally extract them without overturning the ALJ's February 16, 2012 Order and remanding the matter back to DOAH for a further administrative hearing." *See Exceptions* ¶¶ 45-47. FINR argues that the Department currently lacks jurisdiction to "take action" on the South Pasture WRP and CRP Modifications because the ALJ severed his own subject matter jurisdiction when he struck the Petition's immaterial and irrelevant allegations in his February 16, 2012 Order, but did not enter a separate order of dismissal within 30 days. *See Exceptions* ¶¶ 45-51.

FINR's confusing argument is based upon the premise that Sections 120.569(2)(p) and 378.205(3), F.S., required that the ALJ issue his RO as to Counts III and IV within 30 days from the February 16, 2012 Order. *See Exceptions* ¶ 46. Contrary to FINR's argument, it is Section 120.574(2)(f), F.S. – not Sections 120.569(2)(p) or 378.205(3), F.S. – that requires the ALJ to render his decision "within 30 days after the conclusion of the final hearing or the filing of the transcript thereof, whichever is later." § 120.574(2)(f), Fla. Stat. (2011). The RO in this case complied with that requirement. FINR did not cite any authority that prohibits the ALJ from entering a single RO with his recommendation to the Department regarding all four approvals challenged by the Petition (two of which he can rule upon because there are no longer valid challenges against them and two of which he can rule upon because a full evidentiary hearing was held on the cognizable challenges). In fact, the ALJ is required to provide the agency with all "information required by law to be contained in the final order." *See* § 120.57(1)(k), Fla. Stat. (2011)("The presiding officer shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order.").

In addition, FINR asserts that, "overturning the ALJ's February 16, 2012 Order and remanding the matter back to DOAH for a further administrative hearing" is necessary to solve the alleged "administrative limbo" problem. *See Exceptions* ¶ 47. A

remand, however, would not resolve any alleged problem with respect to the South Pasture WRP and CRP Modifications. As noted above, the South Pasture WRP and CRP Modifications (Counts III and IV) were entirely dependent upon issuance of the new ERP and CRP (Counts I and II), and FINR had a full and fair opportunity to be heard on the material and relevant allegations contained in those counts. A new hearing on remand regarding Counts III and IV would not yield new factual information regarding potential impacts to FINR. Thus, a remand is not necessary. *See infra* – Conclusion.

Second, FINR takes exception to RO paragraphs 90 and 97 because the ALJ "erroneously conclude[d] that CF successfully proved a prima facie case in support of the [South Pasture WRP and CRP Modifications] by introducing into evidence its permit applications and the [Department's] proposed agency actions." *See Exceptions* ¶ 53; *see also* T. 67-70 (indicating that Joint Exhibits 16-19 were received into evidence at hearing by the ALJ, notwithstanding Petitioner's objections based upon relevancy). In support of this claim, FINR argues that the ALJ's February 16, 2012 Order "prohibited all evidence related to FINR's stricken allegations regarding the [South Pasture WRP and CRP Modifications]; not just evidence tendered by FINR." *See Exceptions* ¶ 53. As described above, it is well established that procedural and evidentiary rulings are matters within the ALJ's substantive jurisdiction and may not be reversed on agency review. *See, e.g., Barfield v. Dep't of Health,* 805 So.2d 1008, 1011-12 (Fla. 1st DCA 2001); *Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993).

Therefore, based on the foregoing reasons, FINR's exception to RO paragraphs 90 and 97 is denied. FINR's remand request is also denied.

III. Exception to RO Paragraphs 84 and 86 (BOR 2.8 Exception).

FINR takes exception to the findings in paragraphs 84 and 86 of the RO, where the ALJ construed both expert testimony[3] and Section 2.8 of the BOR to determine that CF did not need to submit a separate document titled "Construction Surface Water Management Plan." *See Exceptions* ¶¶ 57-67.

FINR contends in this exception that the ALJ found "as a matter of law that CF does not have to provide reasonable assurance of compliance with BOR 2.8" *See Exceptions* ¶ 59. Contrary to FINR's contention, the ALJ found that the evidence presented by CF demonstrated reasonable assurance of compliance with Section 2.8 of the BOR. (RO ¶ 84). The ALJ rejected FINR's argument that CF's applications should be denied because CF failed to submit at hearing a separate document entitled "Construction Surface Water Management Plan. (RO ¶ 84). The ALJ recognized that although CF did not submit a separate document entitled "Construction Surface Water Management Plan," the primary goal of the BOR criteria is to meet water resource objectives, and to that end the criteria were designed to be flexible. *See* RO ¶ 86; *see also* Joint Ex. 21, BOR §§ 1.1, 1.3. The BOR provides:

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[3] Paragraph 84, relying on the ALJ's discussion of expert testimony in paragraph 64, opens by stating: "For the reasons expressed in Finding of Fact 64, a contention by Petitioner that the SPE mine application must be denied because CF failed to submit at hearing a separate document entitled 'Construction Surface Water Management Plan' is rejected."

> **1.1 Objectives** - Under Part IV of Chapter 373, Florida Statutes (F.S.) and Chapters 40D-4, 40, and 400, Florida Administrative Code (F.A.C.), the [Department] is responsible for permitting construction and operation of surface water management systems within its jurisdictional boundaries. The objective of this document is to identify the usual procedures and information used by the [Department] staff in permit application review. The objective of the review is to ensure that the permit will authorize activities or situations which are not harmful to the water resources of the District or inconsistent with the public interest.
>
> * * *
>
> **1.3 Criteria Flexibility** - The primary goal of the review criteria is to meet District water resource objectives. However, the criteria are designed to be flexible. Performance criteria are used where possible. Other methods of meeting overall objectives will be considered depending on the magnitude of specific or cumulative impacts. (Emphasis added.)

The ALJ's reading of the BOR's plain language is reasonable and is adopted in this Final Order. *See, e.g., Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

Based on the competent substantial evidence adduced at the hearing, the ALJ properly concluded that CF provided reasonable assurances that the Project will comply with Section 2.8 of the BOR. Expert witnesses for CF and the Department, testified that based upon their reviews of the entire application and the documents prepared and submitted in support of the application, CF demonstrated reasonable assurance that all stormwater discharges would satisfy state water quality standards. (RO ¶¶ 61, 62, 64;

Wuitschick at T. 187-190; Joint Ex. 8B, #96; CF Ex. 17; Durbin at T. 274-277; Owete at T. 324; Rivera at T. 370-371, 381-382).

Therefore, since the ALJ's determinations in paragraphs 84 and 86 are supported by competent substantial record evidence and correctly apply the BOR's plain language, FINR's exception is denied. FINR's request to remand this case back to DOAH to correct the ALJ's alleged "misinterpretation of BOR 2.8," is also denied. *See Exceptions* ¶ 75.

IV. Exception to RO Paragraph 64 (Water Quality Exception).

FINR takes exception to paragraph 64 of the RO, on the basis that the generic stormwater permit reference in Section 2.8.2(b) of the BOR ("Generic Permit for Stormwater Discharge from Construction Activities that Disturb Five or More Acres of Land" (effective October 22, 2000)) applies to CF; and that CF's SPPP failed to satisfy certain requirements contained in the generic stormwater permit concerning "the off-site generation of dust" and "local waste disposal, sanitary sewer or septic tank regulations." *See Exceptions*, ¶ 80.

The competent substantial record evidence established that CF is required to have (and does have) an individual NPDES permit for its mining operations. (T. 49-50, 117, 187-188, 274-275); *see also* FINR Ex. 52, at 2 (indicating that "[t]he following stormwater discharges from construction sites are not authorized by this permit: ... stormwater discharges associated with construction activity that are subject to an existing generic or individual permit that are issued pursuant to Section 403.0885,

F.S."); Fla. Admin. Code R. 62-621.100 (indicating that authorization under a generic permit is "[a]s an alternative to individual permits"); Fla. Admin. Code R. 62-620.100 (indicating, in the rule authorizing individual NPDES permits, that "[w]here there are conflicts with other existing specific or general rules of the Department, the requirements and procedures set forth in this chapter shall supersede all other procedures and requirements for wastewater facilities or activities").

Therefore, based on the foregoing reasons and the ruling on FINR's third exception above, this exception is denied. FINR's request to remand is also denied.

V. Exception to RO Paragraphs 50 and 58 (Dewatering Exception).

FINR takes exception paragraphs 50 and 58 of the RO, where the ALJ found that the reroute ditch would not cause adverse water quantity impacts to Wetland 10E-40 on FINR's property. FINR argues that CF's plans to armor the reroute ditch "bottom" and install an overland weir are not supported by competent substantial evidence in the record. *See Exceptions*, ¶¶ 82-83.

First, FINR argues that "there is no competent substantial evidence that the armoring of the reroute ditch bottom or the installation [of an] overland weir in the portion of the reroute ditch crossing Wetland 10E-40 is part of any plan submitted as part of the SPEM ERP." *See Exceptions* ¶ 83. FINR asserts, apparently based upon Mr. Burleson's testimony alone, that the "uncontroverted evidence indicates the overland weir is not part of the [Troublesome Creek Reroute Ditch Modeling and Conceptual Design Report ("RDMR")] and the RMDR only discusses the armoring of

sides, but not the bottom of the reroute ditch as it traverses Wetland 10E-40." *Id.* FINR also asserts that "[t]he overland weir was only mentioned in the RDMR Errata Sheet in describing the corrected modeling conducted by CF in support of the RDMR." *Id.*

As to FINR's argument that there is no competent substantial evidence in the record regarding armoring the reroute ditch "bottom," FINR has apparently misread the ALJ's findings in paragraph 50. *See Exceptions* ¶ 82. The entire finding of fact states that:

> CF assessed the potential that the reroute ditch could result in dewatering during non-flood events. To address this concern, CF designed the reroute ditch with a bottom elevation that would match the bottom elevation of the existing ditch, meaning the water table will intersect the reroute ditch in the same manner it currently intersects the Troublesome Creek ditch. Adjacent to Wetland 10E-40 in the southeast corner between Petitioner's property and the Project property, however, the reroute ditch received special design consideration because the reroute ditch bottom will be below the bottom of the wetland at that location. There, the reroute ditch will be armored, an overland weir will regulate flow, and an impermeable geotextile liner will be installed.

See RO ¶ 50 (emphases added). A plain reading of the entire finding of fact reveals that the ALJ generally found that "the reroute ditch will be armored," not that the reroute ditch "bottom" will be armored. *Id.* Competent substantial record evidence supports the ALJ's actual finding of fact. (T. 134, 241-243; Joint Ex. 8B, #105, § 1.0, at 3).

Second, as to FINR's assertion that the "uncontroverted evidence indicates the overland weir is not part of the RDMR," FINR seems to ignore the following language in the RDMR:

> An overland weir (S-3) (Figure TC4) will be constructed on the eastern edge of marsh bisected by the property line to allow flow to exit the marsh and spill over into the reroute ditch. This is necessary because the existing grade at that location is higher than the bottom by about three feet. ...

See Joint Ex. 8B, #105, § 1.0, at 3. CF's experts, Mr. Blitch and Mr. Beriswill, also testified at the hearing regarding the need for this overland weir, which was also referenced in the RDMR Errata Sheet as noted by FINR. (T. 134, 241-243; Joint Ex. 8B, #106).

Therefore, since the ALJ's findings in paragraphs 50 and 58 that the reroute ditch would not cause adverse water quantity impacts to Wetland 10E-40 on FINR's property are supported by competent substantial record evidence, this exception is denied.

VI. Exception to RO Paragraph 48 (Lettis Creek Exception).

FINR takes exception to paragraph 48 of the RO, where the ALJ rejected Mr. Burleson's modeling regarding alleged flooding at Lettis Creek. FINR argues that the ALJ's rejection was "on the basis the modeling assumed the County-maintained culverts would be closed," even though FINR contends that there is no competent substantial evidence to support that finding. *See Exceptions* ¶ 84.

FINR appears to mischaracterize the ALJ's finding of fact in paragraph 48. The ALJ did not reject Mr. Burleson's modeling regarding alleged flooding at Lettis Creek "on the basis the modeling assumed the County-maintained culverts would be closed" (*see Exceptions* ¶ 84), but because "Mr. Burleson's modeling assumed that County-

maintained culverts between the properties would be blocked during mining." RO ¶ 48 (emphasis added).

Mr. Burleson testified that his modeling assumed that "[t]he outfall from FINR across County Road 663 and the railroad track would be blocked by the ditch and berm system." *See* T. 492 (emphasis added). Further, when asked to describe the modeling he performed to assess the potential for off-site flooding in the Lettis Branch Basin during mining, Mr. Burleson indicated that he "cut[ ] off that outfall over by County Road 663 to where no flow could exit from FINR[,]" because his modeling was intended to evaluate existing and during-mining conditions "if the outfall was blocked, what would be the effect." *See* T. 493 (emphasis added). Thus, competent substantial record evidence supports the ALJ's finding. In addition, competent substantial record evidence establishes that CF is in fact "committed to maintaining the hydrologic connection through culverts at County Road 663 and Lettis Creek during mining" (T. 716). Mr. Burleson's modeling assumption that flow would be blocked was not credited by the ALJ. Therefore, based on the foregoing reasons, this exception is denied.

VII. Exception to RO Paragraph 89 (Reclamation Criteria Exception).

FINR takes exception to paragraph 89 of the RO, where the ALJ found that "[n]o evidence concerning the reclamation criteria was presented by Petitioner." *See Exceptions* ¶¶ 85-87. FINR contends that paragraph 89 is not supported by competent substantial evidence. *See id.*

FINR asserts that the testimony of Mr. Burleson and other evidence in support of its allegations that the SPPP did not "provide reasonable assurance that water quality standards would be met during construction," and that CF did not "take all reasonable steps to eliminate the risk of flooding on FINR's property caused by damming of the Troublesome Creek stream channel and Lettis Creek with the ditch and berm system;" constitutes the evidence concerning the reclamation criteria in Rule 62C-16.0051, F.A.C. (the "Reclamation Rule"). *See Exceptions* ¶¶ 85-87 (emphases added). This evidence, however, addressed mining and during mining activities, not the reclamation standards.

Applicable law clearly distinguishes "reclamation" activities from mining operations. "Reclamation" means "the reshaping of lands in a manner that meets the reclamation criteria and standards contained in this part." § 378.203(9), Fla. Stat. (2011). Those standards are contained in Rule 62C-16.0051, F.A.C. By contrast, mining operations are "those physical activities, other than prospecting and site preparation, which are necessary for extraction, waste disposal, storage, or dam maintenance prior to abandonment." § 378.203(6), Fla. Stat. (2011)(emphasis added). The Reclamation Rule governs reclamation activities, not mining operations. *See* § 378.207(1)-(2), Fla. Stat. (2011)(reflecting that the Department is only authorized to adopt rules containing "statewide criteria and standards for reclamation," which "shall govern performance of reclamation and not ... the manner in which mining and associated activities are conducted.") (Emphases added); *see also* § 378.205(1)(d), Fla.

Stat. (2011)(also authorizing the Department to adopt rules implementing the provisions of Chapter 378, Part II, F.S.).

Therefore, since the ALJ properly found that "[n]o evidence concerning the reclamation criteria was presented by Petitioner," this exception is denied.

VIII. Exception to RO Paragraph 29 (Environmental Impact Exception).

FINR takes exception to paragraph 29 of the RO, where the ALJ found that FINR was "permitted to pursue its water resource and environmental impact issues and express[ ] its concerns regarding the Project's impact on Petitioner's property and development potential as well as on the health, safety, and welfare of residents or inhabitants of Petitioner's property." *See Exceptions* ¶ 88. FINR contends that the February 16, 2012 Order prevented it from pursuing its claims related to "environmental impacts such as dust, noise, air pollution, and airborne radioactive particles" and prohibited the parties from introducing evidence related to those issues, and therefore the ALJ's finding is not based upon competent substantial evidence. *Id.*

For the reasons discussed in the ruling on FINR's first exception above, the ALJ properly struck FINR's immaterial allegations concerning dust, noise, air pollution, and airborne radioactive particles, and properly prohibited the introduction of evidence concerning same. FINR was permitted to pursue all of its relevant claims, including claims relating to all the ERP and CRP criteria. Therefore, for the reasons discussed in the ruling in FINR's first exception above, this exception to paragraph 88 is denied.

RULING ON PETITIONER'S REQUEST FOR REMAND

The Florida courts have held that there are some circumstances under which agency remand to DOAH is not only appropriate, but is actually "dictated." *See, e.g., Miller v. Dep't of Envtl. Regulation*, 504 So.2d 1325, 1327 (Fla. 1st DCA 1987); *Cohn v. Dep't of Envtl. Regulation*, 477 So.2d 1039, 1047 (Fla. 3d DCA1985). The subject proceeding does not constitute one of those circumstances where remand to DOAH is dictated. The ALJ fulfilled his role as to factual findings and the Department is able to enter a coherent final order. *Cohn,* 477 So.2d at 1047.

The ALJ recommended that the Department enter a final order granting CF's applications for the Project ERP and CRP, and the South Pasture mine WRP and CRP Modifications. He ultimately determined that CF established its entitlement to the requested approvals by a preponderance of the evidence in the administrative hearing, and that FINR failed to meet its burden of showing that the permits and approvals should not be issued. (RO ¶¶ 96 and 97). This Final Order adopts the ALJ's recommendation and denies FINR's remand request.

CONCLUSION

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised,

It is therefore ORDERED:

A. The ALJ's Recommended Order (Exhibit A) is adopted and incorporated by reference herein.

B. Petitioner FINR II, Inc.'s request for remand to DOAH is denied.

C. Respondent CF Industries, Inc.'s application for Environmental Resource Permit No. 0294666-001 is granted.

D. Respondent CF Industries, Inc.'s Conceptual Reclamation Plan Application No. 0294666-002 is approved.

E. Respondent CF Industries, Inc.'s application for Wetland Resource Permit Modification No. 0151551-017 is granted.

F. Respondent CF Industries, Inc.'s Conceptual Reclamation Plan Modification No. 0151551-818 is approved.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal.

The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 6th day of June, 2012, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

HERSCHEL T. VINYARD JR.
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Deputy CLERK Syndie Kinsey

6.8.12
DATE

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

Edward P. de la Parte, Jr.
de la Parte & Gilbert, P.A.
PO Box 2350
Tampa, FL 33601-2350

Frank E. Matthews, Esq.
Hopping Green & Sams, P.A.
PO Box 6526
Tallahassee, FL 32314-6526

by electronic filing to:

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Brynna R. Ross, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 8th day of June, 2012.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

FRANCINE M. FFOLKES
Administrative Law Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FINR II, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-6495
	)	
CF INDUSTRIES, INC., AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
	)	
Respondents.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its assigned Administrative Law Judge, D. R. Alexander, on March 26-28, 2012, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Edward P. De la Parte, Jr., Esquire
Kristin Y. Melton, Esquire
de la Parte & Gilbert, P.A.
Post Office Box 2350
Tampa, Florida 33601-2350

For Respondent: (CF) Frank E. Matthews, Esquire
Susan L. Stephens, Esquire
Miguel Collazo, III, Esquire
Thomas R. Philpot, Esquire
Hopping Green & Sams, P.A.
Post Office Box 6526
Tallahassee, Florida 32314-6526

EXHIBIT A

For Respondent: (Department)
Brynna J. Ross, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The issue is whether CF Industries, Inc. (CF), has provided reasonable assurance that its proposed mining and reclamation of the South Pasture Extension (SPE) mine in Hardee County can be conducted in a manner that complies with applicable statutes and rules so that an Environmental Resource Permit (ERP), SPE conceptual reclamation plan (CRP), South Pasture Wetland Resource Permit (WRP) Modification, and South Pasture Conceptual Reclamation Plan Modification should be issued by the Department of Environmental Protection (Department).

PRELIMINARY STATEMENT

On November 21, 2011, the Department issued proposed agency action approving an application by CF for the SPE ERP, SPE CRP, South Pasture Wetland Resource Permit Modification, and South Pasture Conceptual Reclamation Plan Modification. On December 12, 2011, FINR II, Inc. (FINR or Petitioner), which owns property adjacent to CF's property, timely filed a Petition challenging the proposed agency action. The matter was referred by the Department on December 29, 2011, to the Division of Administrative Hearings (DOAH) to be set for hearing. On January 3, 2012, CF filed a Notice of Request for Summary

Hearing pursuant to section 378.205(3), Florida Statutes. An Order approving that request was issued on January 4, 2012, and the matter was scheduled for final hearing on March 26-30, 2012, in Tallahassee, Florida. On March 12, 2012, the Department issued revised proposed agency action incorporating a new modeling report prepared by CF which provides further support for the Department's proposed action.

At the final hearing, FINR presented the testimony of Steve Freeley, Vice-President; Nicolas Katzaras, General Manager of CF; Phillip R. Davis, President of SDI Environmental, Inc. (SDI), and accepted as an expert; John E. Palmer, a hydrogeologist with SDI and accepted as an expert; Robert W. Burelson, a professional engineer with Water & Air Research, Inc., and accepted as an expert; and Dr. Jorge J. Villalba, Chief Medical Officer and Director of FINR and accepted as an expert. Also, it offered FINR Exhibits 1-9, 42-49, 52, 129 (pages 1-4 only), 130 (except pages 6-11), 131-135, 135A, 137-147, 149-151, 151A, 152-156, 159, 162, and 164-166. All were received except exhibit 52, upon which a ruling was reserved. The objection to that exhibit is overruled. FINR also submitted a written proffer on matters previously excluded by Order dated February 16, 2012. That Order granted CF's Motion to Strike and Motion in Limine.[1] CF presented the testimony of Gary Blitch, Senior Environmental Affairs Specialist; Dr. Douglas J. Durbin,

Technical Director and Senior Principal/Manager of Cardno Entrix and accepted as an expert; Dr. John Kiefer, a professional engineer with AMEC Environmental and Infrastructure, Inc. (AMEC), and accepted as an expert; Scott C. Wuitschick, a professional engineer with AMEC and accepted as an expert; and Jeffrey A. Beriswill, a professional engineer with AMEC and accepted as an expert. Also, it offered CF Exhibits 4, 6, 7, 14-17, and 19 which were received in evidence. The Department presented the testimony of Matt Wilson, an Environmental Specialist II; Orlando E. Rivera, Program Administrator of the Mandatory Phosphate Section and accepted as an expert; and Dr. Owete S. Owete, Program Administrator-Technical Support Section and accepted as an expert. Also, it offered Department Exhibits 1 and 2, which were received in evidence. Finally, CF and the Department jointly offered Joint Exhibits 1A, 1B, 2, 3, 4A, 4B, 5-7, 8A (Tabs 1-47, 49-53, and 55-79), 8B (Tabs 86-91, 93-98, 105, and 106), and 15-22, which were received in evidence.

A Transcript of the hearing (six volumes) was filed on March 29, 2012. Proposed Findings of Fact and Conclusions of Law were filed by Petitioner and jointly by Respondents on April 12, 2012, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. The Parties

1. CF is a Delaware corporation authorized to do business in the State of Florida and is the applicant in these proceedings. CF has applied for permits to conduct phosphate mining, reclamation, and associated activities on property in Hardee County known as the South Pasture Extension tract. These activities are referred to as the "Project," and the South Pasture Extension tract property is referred to as the "Project site."

2. The Department is a state agency with jurisdiction over ERP permitting under Part IV, chapter 373, for phosphate mining activities, and jurisdiction over phosphate mining reclamation under Part II, chapter 378. Pursuant to that authority, the Department reviewed the ERP, CRP, WRP Modification, and CRP Modification applications for the Project.

3. Petitioner is a Florida corporation in good standing, doing business in the State of Florida. Petitioner owns approximately 875 acres of land east of County Road 663 and immediately south of and adjacent to the Project site, which it leases to two affiliated companies, Florida Institute of Neurological Rehabilitation, Inc. (FINR I, Inc.) and FINR III, LLC. FINR I, Inc., operates the Florida Institute of Neurological Rehabilitation, which is a post-acute, state-

licensed inpatient rehabilitation facility accredited by the Commission on Accreditation of Rehabilitation Facilities. It specializes in the treatment of children and adults who have sustained brain injury or some other form of neurologic trauma.

4. The facility currently consists of 238 beds offering three levels of care and has approximately 135 to 140 inpatient clients, of which 115 reside on the property. The property has been used as a neurological rehabilitation center since 1986.

5. Among other things, patients participate in organized and individual recreational activities on the property, including fishing, nature walks, baseball, and basketball games. Outdoor activities are critical to patient care, especially those with frontal lobe damage.

6. The facility is only accessible by Vandolah Road (from the south) and that roadway serves as its only evacuation route. If the Project were to cause flooding on its property, as Petitioner alleges, it could reasonably be expected to prevent Petitioner from leasing its land to the related companies because the facility's employees or outside medical personnel could not enter the facility or evacuate the patients; it could interfere with the generators or electrical components required for patient care; it could deny the patients use of outdoor areas; and it could impede FINR I, Inc.'s ability to develop and expand facilities on the undeveloped part of the property.

B. General Background

7. Phosphorus is an essential element for plant and animal nutrition and is one of the primary nutrients necessary for plant growth. Phosphate rock is one, if not the only, known significant source of phosphorus, and there are no synthetic substitutes. Continued mining of phosphate rock is therefore critical to the agriculture industry as well as to the general population, both in the United States and globally. See § 378.202(1), Fla. Stat. ("[t]he extraction of phosphate is important to the continued economic well-being of the state and to the needs of society").

8. CF has been mining in northwest Hardee County for decades. CF first began mining for phosphate in 1978 at what was then known as the North Pasture mine. Mining operations at the North Pasture mine concluded in the mid 1990s, and the lands associated with that mine have been completely reclaimed.

9. Pursuant to local, state, and federal permits, CF relocated its beneficiation plant (which separates the phosphate ore matrix into phosphate rock, waste clay, and sand) to its present location south of State Road 62 in 1993, and began operation of its South Pasture mine in 1995. The South Pasture mine encompasses about 15,390 acres.

10. After the startup of the South Pasture mine, CF acquired three additional land parcels totaling approximately

7,512.8 acres with mineable reserves contiguous to and immediately south of the South Pasture mine. These parcels are collectively referred to as the South Pasture Extension tract or the Project site. The Project site is bisected by County Road 663, which runs north and south through the Project site, generally in a southeasterly direction. Immediately to the west is Mosaic Fertilizer, LLC's (Mosaic's) permitted Ona Fort Green Extension and to the south is Mosaic's Ona mine, for which applications for mining approvals are currently pending regulatory approval.

11. CF currently extracts phosphate rock at its South Pasture mine at a rate of 3.6 million tons per year. If the applications are approved, the Project will extend the life of the current South Pasture mine and beneficiation plant by ten years, permitting mining to continue at this same average rate through 2035.

12. CF has an excellent record of compliance with respect to permits issued under chapters 373 and 378. Petitioner has raised no enforcement or compliance issues relative to CF's operation of its mining activities.

13. In 1986, New Medico, Petitioner's predecessor in interest, established the neurological rehabilitation center on a 298-acre campus at the center of Petitioner's property and began accepting patients that same year. Petitioner actually

acquired the Hardee County property in 1996, after mining activities began on the South Pasture mine.

14. CF and Petitioner share a common boundary on three sides. The historic headwaters of Troublesome Creek are located within the Project site and along this common boundary, as well as within Petitioner's property, and they have been heavily ditched and degraded by agricultural activities. Troublesome Creek itself (as opposed to its headwaters) begins on the southeastern portion of the Project site, east of Petitioner's property, and has been reduced to a narrow, fairly incised conveyance flowing intermittently south-southeast to the Peace River.

15. Since 1995, when CF began mining operations at its South Pasture mine, and until the present time when Petitioner filed its Petition challenging CF's Project, the parties' respective operations have co-existed and are currently approximately a half mile apart.

C. Project Logistics

16. Over the last five years CF has relied upon a team of experts from several different consulting firms and disciplines to assist it with preparing and supporting its application.

17. CF will integrate materials handling on both the existing South Pasture mine and the Project site. Specifically, mining and reclamation operations at the Project site will

employ the same methods currently approved by the Department for use at the South Pasture mine, and will utilize the existing operational facilities and workforce.

18. The existing beneficiation plant at the South Pasture mine will separate the phosphate ore matrix mined at the Project site into phosphate rock, sand, and clay. Waste clays from the Project will be disposed of within existing clay settling areas (CSAs) at the South Pasture mine and new CSAs proposed for the Project site. The Project's mine water recirculation system will also be integrated with the South Pasture mine's recirculation system.

19. As it has done at the South Pasture mine, which is located only one-half mile north of Petitioner's property, CF must install a perimeter ditch and berm system (which includes a recharge ditch system) along the Project site's boundaries prior to any clearing to contain Project water within the CF site and to protect adjacent properties during mining operations. The ditch and berm system is installed approximately six months to one year prior to the extraction of material within a particular mine block.

20. Pursuant to Specific Condition 14 of the ERP, the recharge ditch system, which serves to provide groundwater recharge to preserved and off-site wetlands and surface waters during mining to avoid potential adverse impacts, must be

constructed before mining activities can occur within 1,800 feet of any preserve or property boundary. The recharge ditch systems in each mine block adjacent to such boundaries will be designed based upon additional site-specific hydrogeologic testing and analysis and installed prior to mining after the Department has approved the final design.

21. Specific Condition 14 also requires development and implementation of an Environmental Management Plan consistent with the requirements of that condition and with Appendix 14 of the ERP at least four years prior to mining of the Project site. Pursuant to this condition, CF must also conduct detailed baseline monitoring for at least four years prior to mining and conduct continuous during-mining monitoring, visual inspections, water table and stream flow analysis, and if necessary, implement hydrologic mitigative or remedial measures, to ensure that the recharge systems function as intended to protect unmined wetlands and other surface waters from adverse impacts by mining operations. These activities must continue until the area within 1,800 feet of the preserve or property boundary is backfilled and CF has documented that subsurface flows have achieved conditions hydrologically equivalent to those described in the Integrated Modeling Report (IMR) prepared for the Project.

22. CF's mine plan indicates the sequence of mining on the Project site. Preparatory mining activities are scheduled to begin in 2017, with actual mining scheduled to begin in 2019, but are not scheduled to begin adjacent to Petitioner's property until 2027, progressing along CF's shared property boundary with Petitioner in a counterclockwise fashion, and west of County Road 663 through 2031. Piezometer wells and rainfall gauges must be installed along all preserves and property boundaries at least four years prior to initiating mining of the Project site, allowing for collection of an ample amount of baseline reference data before mining begins adjacent to Petitioner's property.

23. As mining progresses within each mine block, backfilling with sand tailings and initial revegetation will follow mining almost immediately (three months) after mining, including in the vicinity of Petitioner's property. As each mine block is backfilled, within approximately three to five years after mining, the entire area will be completely backfilled, contoured, and revegetated. Within the same approximate timeframe, once the entire area is stabilized and following one year of water quality monitoring, the ditch and berm system will be dismantled and the area reconnected to its watershed.

24. CF has sufficient water available from multiple water inputs, including very clean water from its Aquifer Recharge and

Recovery Project (ARRP) on the South Pasture mine to support the proposed mining and reclamation activities on the Project site.

25. CF will also construct a reroute ditch adjacent to Petitioner's property. The purpose of the reroute ditch is to reroute existing surface water flow in the Troublesome Creek headwater ditches off of Petitioner's property, around active mining operations, and then into Troublesome Creek as it exits the Project site to the southeast. To specifically address Petitioner's concerns regarding flooding, CF submitted conceptual designs for a reroute ditch to the Department prior to final hearing in this matter, and the Department modified its ERP accordingly. Like the recharge system, the final design of the reroute must be based on an additional site-specific assessment conducted pursuant to the ERP, prior to actually severing flow.

26. CF's South Pasture mine has two permitted National Pollutant Discharge Elimination System (NPDES) outfalls located on Shirttail Branch and Doe Branch, both of which flow into Payne Creek, which is a tributary to the Peace River. While these existing NPDES outfalls will continue to meet all of CF's discharge needs for Project mining operations due to integration of the mine recirculation system, CF may obtain additional outfalls on the Project site to provide flexibility to supplement stream flows during mining in preserved and off-site

streams. One such potential discharge point was identified on the northern boundary at Petitioner's property, as "S-1."

D. Petitioner's Allegations

27. Conflicting testimony was presented by the parties on the issues raised by Petitioner. These conflicts have been resolved in Respondents' favor, who submitted the more credible and persuasive evidence. Where a specific allegation is not addressed in this Recommended Order, it has been considered and found to be without merit.

28. Petitioner alleges, on the one hand, that the Project will either cause flooding on its property so as to adversely impact its and its lessees' use and enjoyment of the property, and, on the other, will cause dewatering of its property so as to adversely affect its wetlands and other water resources.

29. While the undersigned did grant CF's Motion to Strike, Petitioner was permitted to pursue its water resource and environmental impact issues and expressed its concerns regarding the Project's impact on Petitioner's property and development potential as well as on the health, safety, and welfare of residents or inhabitants of Petitioner's property. These concerns were addressed by Steve Freeley, FINR II, Inc.'s former director of marketing and now a Vice President, and Dr. Jorge Villalba, FINR I, Inc.'s medical director.

30. Mr. Freeley, a fact witness, summarized Petitioner's concerns, as he understood them, to be the Project's potential for flooding, dewatering, and well contamination on Petitioner's property, particularly how these events might affect Petitioner's pocketbook and the future development potential of Petitioner's property. However, Mr. Freeley admitted that he had no knowledge of the Project application or supporting materials, had never been to the South Pasture mine, and had no familiarity with phosphate mining.

31. Dr. Villalba testified primarily on behalf of FINR I, Inc., patients at the rehabilitation facility, in particular his concerns regarding his patients' specific sensitivity to environmental stimuli. Dr. Villalba has no legal affiliation or association with Petitioner, being solely an employee of, and the medical director for, FINR I, Inc. Dr. Villalba also testified regarding the need to internally relocate some patients due to flooding caused by hurricanes in 2004. More specifically, Dr. Villalba testified that in 2004 residential cabins on-site experienced water levels rising up to the steps of the elevated residential facilities. Like Mr. Freeley, he admitted he had no knowledge of the application materials, phosphate mining, CF's South Pasture mine operations, or the materials submitted in support of the proposed agency action.

32. For all of the following reasons, the adverse environmental and water resource-related concerns of Petitioner are determined to be without merit and are therefore not credited.

E. Analysis of Hydrology

33. CF and the Department thoroughly investigated the Project's potential for causing adverse flooding and dewatering impacts on adjacent properties.

34. Event-based stormwater runoff modeling provided reasonable assurance that peak discharge rates and outflow volumes at exit points from the Project site under post-reclamation conditions would not cause adverse offsite flood impacts. The results of CF's flood modeling are summarized in a flood modeling report (FMR). The FMR demonstrated that the proposed post-reclamation land use, topography, and soil distributions will not result in any adverse changes in the peak discharge comparison to pre-mining conditions for flood flows; peak flood values will be maintained or improved by the reclamation design; and post-reclamation peak flood values along Petitioner's shared property boundary with CF will be lower than pre-mining conditions.

35. Three standard rainfall events were evaluated: (a) the mean annual 2.33-year, 24-hour event, (b) the 25-year, 24-hour event, and (c) the 100-year, 24-hour event. These storm events

are part of a standard suite of engineering design storms that the Department commonly relies upon to assess pre-mining versus post-reclamation flooding. CF utilized a one-dimensional surface water computer model, MIKE 11, to prepare the flood modeling report. MIKE 11 uses the Natural Resources Conservation Service's (formerly the United States Soil Conservation Service's) TR-55 based approach and applies a 1-D hydraulics component that represents Florida landscape conditions well. This modeling, and the resultant FMR, which is a part of the application, were not contested. It demonstrated that the proposed post-reclamation condition will not result in any adverse flooding. In fact, local flood hazards will likely be reduced due to the lowering of peak flood values.

36. CF also developed an integrated surface and groundwater model for the Project. Integrated modeling assesses long-term hydrologic conditions to ensure that the Project will result in hydropatterns that restore and sustain reclaimed wetlands and waterbodies on the Project site. The MIKE SHE model was used to perform the hydrologic simulations; the modeling results are contained in CF's IMR, as part of the application. It was also used to establish the normal seasonal high and seasonal low ranges for wetlands and surface waters that were used in other portions of the application, such as the Recharge Modeling Report (RMR). There was no objection to the

use of this model or its results. The IMR indicates that the proposed reclamation will restore on-site wetland functions, promote the maturation of on-site wetlands, and result in an overall water balance that maintains or improves regional hydrology. Off-site stream flows to Troublesome Creek will be enhanced, which will improve that system's capacity to support aquatic fauna.

F. During-Mining Hydrologic Analysis

37. In addition to performing pre-mining and post-reclamation condition hydrologic analyses, CF and the Department evaluated the Project's potential for causing adverse flooding and dewatering impacts on adjacent properties during mining. The existence of several factors inherent to the mining process, discussed below, typically makes during-mining flood event modeling unnecessary to provide reasonable assurances. See Lee Cnty. v. Mosaic Fertilizer, LLC, Case No. 08-3886, 2008 Fla. ENV LEXIS 171 (Fla. DOAH Dec. 18, 2008), adopted, OGC Case No. 08-1852, 2009 Fla. ENV LEXIS 14 (Fla. DEP Jan. 30, 2009).

38. The application contains during-mining water balance analyses that specifically evaluated the biological integrity of on-site and off-site preserved areas, streams, and wetlands during mining and after reclamation. CF prepared a mine and production plan (MPP) describing general mine planning and scheduling, as well as its proposed integration with the South

Pasture mine, that contained an operational during-mining water balance showing recirculation system inputs and outflows. The primary sources of water input into the mine recirculation system for the Project will continue to be direct rainfall capture, groundwater from existing permitted wells, water content of the mined matrix and overburden, and reclaimed water from the City of Wauchula. The primary sources of water consumption will be evapotranspiration and net waste clay entrainment; CF recycles and reuses 95 percent of its water. As described in the MPP, the primary sources of water discharge will be through its existing two (and possibly additional) permitted NPDES outfalls.

39. There will be no substantial change in the during-mining water balance as a result of the extension of mining into the Project site. Moreover, the application, past practices and experience, and evidence presented at hearing all indicate that CF has more than sufficient amount of water available to conduct the Project while simultaneously maintaining or improving the biological integrity of downstream systems.

40. CF has the demonstrated ability to manage large amounts of water within its mine recirculation system and store or discharge water as required to maintain downstream flows or reduce flooding potential. During mining, CF can either discharge stormwater treated to meet state water quality

standards, or store it in its recirculation system, depending on downstream conditions. Thus, even without a reroute ditch, the risk of adverse flooding during mining is minimal. CF has never caused any flooding of neighboring property in over 30 years of mining.

41. As noted earlier, upon construction of the perimeter ditch and berm system along its shared property boundary with Petitioner, CF will reroute existing water flow around active mining operations and the berm system to reconnect flow with Troublesome Creek.

42. CF's expert witness testified that, from an engineering perspective, a reroute ditch is not difficult to design or construct, and that CF has successfully constructed similar reroutes in the past and without causing flooding. Nevertheless, in light of Petitioner's concerns, CF directed its consultants to model the potential impacts from a reroute ditch to assist in sizing the reroute ditch and associated structures. The design objective was to ensure that no off-site increases in peak flows or stages would occur during mining as compared to existing conditions as a result of the Project during high rainfall events.

43. CF and Petitioner's consultants used the Interconnected Pond Routing (ICPR) model to evaluate the reroute ditch. CF analyzed the 25-year, 24-hour and the 100-year,

24-hour storm events. The model indicated that in many areas, where the presence or absence of a reroute ditch would not make a significant difference, water levels would remain unchanged, and that in some areas closest to the proposed reroute ditch, potential flood levels would actually be decreased by two-tenths of a foot. This would actually reduce the likelihood of localized flooding during significant storms over existing conditions, which has posed a concern to Dr. Villalba for his patients' safety during prior hurricane events.

44. The modeling results were summarized in a Troublesome Creek Reroute Ditch Modeling and Conceptual Design Report (RDMR). Dr. John Kiefer, the co-author of the RDMR, as well as Dr. Owete, a Department expert, opined that the Project, including implementation of the proposed reroute ditch, would not cause adverse flooding or water quantity impacts on Petitioner's property during mining. Dr. Kiefer subsequently identified and corrected some minor errors in the RDMR. These changes had no effect on his ultimate opinion or this finding.

45. According to Dr. Owete, the modeling was not necessary to provide the requisite reasonable assurances. In fact, the reroute ditch design drawings themselves were not requested by the Department to provide reasonable assurances, but were offered by CF as additional assurances in light of the concerns raised by Petitioner during these proceedings. This testimony

was echoed by Dr. Kiefer, who testified regarding the various intrinsic protections against during-mining flooding that are inherent to the Project. Further, the record establishes that the design and the model are very conservative. The 100-year event, for which the reroute ditch was designed, has only a one percent likelihood of occurring in any given year within a 100-year period.

46. The RDMR recommends that additional modeling be conducted immediately prior to implementation to confirm the design. The ERP specifically requires that the RDMR be implemented. This is similar to conditions throughout the ERP that require additional data gathering modeling or other analysis and revised designs based on this additional analysis. The ERP can provide for post-permit activities to be performed as part of reasonable assurances. See Fla. Admin. Code R. 62-4.070(3).

47. Petitioner's expert, Mr. Robert Burleson, opined that the Project will cause flooding of Petitioner's property during mining due to the construction of the perimeter berm. However, Mr. Burleson used a starting water elevation on Petitioner's property to run his model that was already commensurate with a 100-year flood elevation and then added a 100-year event to that elevation. Mr. Burleson's model also assumed that no reroute ditch would be constructed, and additionally assumed

artificially high surface water conditions caused by the recharge system which, conversely, Petitioner's expert, Mr. Davis, opined would not prevent dewatering. Therefore, his opinion on flooding is not credited.

48. Mr. Burleson also opined that flooding would nonetheless occur because of the construction of the perimeter berm across Lettis Creek headwater wetlands, notwithstanding the fact that there is no "stream" at this location, the landscape is relatively flat, and County Road 663 and the railroad line would lie between Petitioner's property and the perimeter berm. However, Mr. Burleson's modeling assumed that County-maintained culverts between the properties would be blocked during mining. Even under this assumed condition, his modeling showed only a slight increase in stage durations during significant 25-year and 100-year events. However, CF has committed to maintain flow from Petitioner's property onto the Project site at Lettis Creek through existing culverts under County Road 663.

49. Mr. Burleson also testified that in his view flooding occurs "if there's an increase in water levels above what has historically or naturally [occurred] for a given condition." Tr. 522. However, Mr. Burleson did not know whether the FINR property had ever been inundated in the way inundation was depicted in the figures he provided and did not know whether the inundation in the figures he provided could be a natural

condition for the property. Thus, Mr. Burleson could not testify, whether historically or naturally, the amount of water depicted on his figures would occur. It was established that the historic headwaters in this area have been heavily ditched and altered from their historic or natural condition.

50. CF assessed the potential that the reroute ditch could result in dewatering during non-flood events. To address this concern, CF designed the reroute ditch with a bottom elevation that would match the bottom elevation of the existing ditch, meaning the water table will intersect the reroute ditch in the same manner it currently intersects the Troublesome Creek ditch. Adjacent to Wetland 10E-40 in the southeast corner between Petitioner's property and the Project property, however, the reroute ditch received special design consideration because the reroute ditch bottom will be below the bottom of the wetland at that location. There, the reroute ditch will be armored, an overland weir will regulate flow, and an impermeable geotextile liner will be installed.

51. Several intrinsic factors, relating to both the reroute ditch design and the overall Project design, provide further assurances that adverse flooding will not occur on Petitioner's property during mining. Once CF constructs the perimeter ditch and berm system, the area of the drainage basin contributing flow to Petitioner's property will be reduced by

approximately one-half, resulting in significantly less water flowing onto Petitioner's property during flood events because the ditch and berm system will divert stormwater that normally reports to Troublesome Creek into CF's recirculation system. The conveyance capacity of the reroute ditch will be equivalent to or greater than that of the existing ditch that it would replace. The reroute ditch will be installed in concert with the ditch and berm system, which as noted above will reduce peak flood flows in Troublesome Creek, meaning a lower tailwater condition can be expected in Troublesome Creek downstream of its confluence with the reroute ditch.

52. CF thoroughly assessed the ability of the recharge ditch to maintain recharge to wetlands and adjacent properties during active mining of the Project. Specifically, CF evaluated the seepage characteristics of the areas scheduled to be mined and provided site-specific recommendations regarding recharge system design in variable subsurface conditions. CF evaluated the efficacy of treatment options that might be necessary to incorporate in the recharge ditch design in certain subsurface conditions to prevent potential adverse impacts. The goal of the recharge ditch design was to maintain the water table during mining operations, within the normal range of seasonal high and seasonal low water table elevations along preserve and property boundaries, including Petitioner's property. The normal

seasonal range used to develop the RMR was obtained from the IMR analysis.

53. In order to appropriately evaluate subsurface permeabilities at the Project site, CF's consultants first engaged in a rigorous geotechnical exploration program: they reviewed available prospect borings and design reports; they developed subsurface profiles along wetland and property boundaries within the study areas based on prospect boring data; they completed four Standard Penetration Test borings at locations selected based on the subsurface profiles; they installed a deep, intermediate, and shallow piezometer at each of the borehole locations; and they completed in-situ hydraulic conductivity tests in each of them.

54. This information resulted in a detailed subsurface profile that ran along the entire border of the mining areas and identified a range of subsurface conditions site-wide, with both low and high permeability values, consistent with regional data and Petitioner's findings.

55. Next, CF's consultant developed 14 design sections, including cross sections at each of the locations specifically requested by the Department, two adjacent to Petitioner's property, and conducted seepage analyses for each. For the two design sections nearest to Petitioner's property, no continuous layer of highly-permeable limestone or other high permeability

strata were encountered that were reasonably likely to affect performance of the recharge ditch, and thus no particular "add on" hydrologic mitigative measures to the recharge ditch appear reasonably likely to be needed. Nonetheless, the efficacy of those additional measures in higher permeability soils was fully evaluated.

56. Results of the seepage analyses on the 14 design cross sections are summarized in the RMR. The RMR concludes that, in most mine areas, sufficient recharge will be provided to preserved wetlands and adjacent properties during mining using a recharge ditch designed as proposed in the RMR. Nine of the 14 cross sections did not have a continuous highly permeable limestone layer, including the two near Petitioner's property; and a recharge ditch with the water level maintained at ground level was sufficient to maintain an adequate groundwater level in off-site and preserved wetlands at these nine cross sections, to the center of the wetland.

57. Only five of the 14 design cross sections contained a continuous, permeable limestone layer within the matrix layer. For areas where such high permeability layers do exist, additional hydrologic mitigative measures were recommended in addition to the recharge ditch, such as recharge wells, permeable trenches, localized grouting, and soil-bentonite cutoff walls, in order to maintain groundwater levels. In the

event a permeable limestone layer is encountered within the matrix layer, the RMR concludes that the utilization of recharge wells, sand trenches, or other treatment options will be effective in maintaining the normal range of seasonal groundwater levels. Pursuant to the RMR recommendations, decisions regarding which specific mitigative measure is appropriate to use to address a specific subsurface condition will be made based upon more detailed, site-specific data and design modifications determined through field investigations, to include additional test borings, piezometers, field measurements of hydraulic conductivities, and additional seepage analyses. These additional measures are required by the ERP conditions and the final design must be approved by the Department.

58. While the RMR did not assume the existence of a reroute ditch, Mr. Beriswill, a professional engineer, subsequently evaluated the potential impact of a reroute ditch on the RMR's recommendations and conclusions. Based upon this subsequent evaluation, Mr. Beriswill concluded that no significant changes in the design of the recharge ditch were necessary to account for the ditch, although he and other consultants did agree that addition of an impermeable geotextile liner to a portion of the reroute ditch would reduce the potential for dewatering adjacent to Wetland 10E-40 and should be implemented.

59. The RMR also evaluated the stability of the mine cut face seal embankment (construction of which is common in the industry) and provided recommendations to maintain adequate and stable slopes during mining activities. Based upon these analyses, CF's consultants recommended a one-foot (vertical) to five-foot (horizontal) (1:5) slope to ensure a 1.3 factor of safety for slope stability, which is within industry standards.

G. Water Quality Impacts

60. In addition to the above analyses, CF and the Department also thoroughly evaluated potential on-site and off-site water quality issues associated with the Project.

61. As noted earlier, discharges will occur only through permitted NPDES outfalls. Additional water quality protection for adjacent undisturbed surface waters and wetlands will be provided by the perimeter ditch and berm systems and other proposed best management practices (BMPs), such as silt fences and stormwater collection systems. During mining and reclamation, these practices will preclude uncontrolled releases of water to adjacent unmined and downstream areas. There are also detailed requirements in the ERP for monitoring water quality during mining and reclamation activities. All of these measures will be effective in preventing violations of water quality standards, and will ensure that the water quality of

preserved on-site systems will be protected during mining activities at the Project site.

62. A Stormwater Pollution Prevention Plan (SPPP) was prepared to identify BMPs and controls for the Project during land preparation, mining, backfilling, and reclamation. The SPPP also incorporates by reference other documents already in place on the South Pasture mine pursuant to CF's NPDES permit for the South Pasture mine. Among these documents are a Best Management Practices/Pollution/Prevention (BMP3) Plan that generally describes BMPs for waste management, spill reporting and response, and other specific measures to prevent pollution, and a memorandum of agreement (MOA) between CF and the Department that describes general design and construction BMPs. The MOA has also been attached to the ERP. The BMP3 Plan, which is updated annually, must be maintained on-site during mining operations.

63. Using these measures at the South Pasture mine, CF has never had any issues with stormwater discharges causing water quality violations.

64. Petitioner failed to present any competent substantial evidence that the Project will cause adverse water quality impacts during mining. Its expert, Mr. Robert Burleson, opined only that certain requirements specified for generic stormwater permits associated with construction activities were missing

from the SPPP. However, it is unclear whether he reviewed or considered the sufficiency of the MOA or BMP3 Plan, and these contain specific BMPs to be utilized for the Project's stormwater. Additionally, Mr. Burleson admitted that he had no familiarity with preparing SPPPs for industrial facilities with NPDES permits. Dr. Durbin, a CF expert, who has such experience and reviewed all of these materials as well as South Pasture mine water quality data, opined that implementation of these practices and the existence of the NPDES permit ensure that water quality of downstream systems will be protected during mining and that no adverse water quality impacts will occur. The application is therefore consistent with applicable ERP permitting requirements. The generic stormwater permit proffered by Petitioner does not apply, and is not available, to facilities like CF that are required to obtain individual NPDES permits that address stormwater discharges. See Fla. Admin. Code R. 62-620.100(2).

H. Ecological Issues

65. The level of detail and analysis provided by CF in its application to the Department for the ERP, CRP, and WRP and CRP Modifications is more than adequate. Indeed, CF provided substantially more baseline information in terms of existing site conditions, wetland conditions, and wildlife information than is provided in typical ERPs.

66. CF expert witnesses Dr. Kiefer and Dr. Durbin both testified as to the local and regional ecological, hydrological, and wildlife benefits expected to result from the proposed reclamation. This testimony was not disputed.

67. Pursuant to section 373.414(6)(b), wetlands reclamation activities for phosphate mining undertaken pursuant to chapter 378 are considered appropriate mitigation if they maintain or improve the water quality and the function of the biological systems present at the site prior to the commencement of mining activities. CF's reclamation achieves that mitigation goal. It provides for an acre-for-acre, type-for-type, and foot-for-foot restoration, as appropriate, of the wetlands and other surface waters proposed for impact on the Project site. The application indicates that the proposed reclamation will restore on-site wetland functions and promote the maturation of on-site wetlands. Specifically, CF is proposing to enhance 126 acres of wetlands and 57 acres of uplands, create approximately 1,711 acres of wetlands and other surface waters, and grant perpetual conservation easements to permanently preserve 1,095 acres of unmined (avoided) and 1,789 acres of reclaimed habitat, including wetlands, streams, and associated native upland habitat in the Brushy Creek, Lettis Creek, and Troublesome Creek corridors on the Project. In addition, CF will grant a perpetual conservation easement to permanently

preserve an additional 915 acres of unmined wetland and native upland habitat associated with the Horse Creek and Payne Creek corridors in the South Pasture mine.

68. Ultimately, the Project will represent a substantial improvement in the Troublesome Creek headwater system, which has been degraded by ditching. Based upon the uniform mitigation assessment method analysis, the proposed mitigation plan will more than offset proposed impacts, resulting in a net increase in wetland functions on the Project site. While mining activity is temporary, this "surplus" improvement will be permanent.

69. CF considered the potential impacts to off-site wetlands from the Project both during mining and after reclamation, particularly those wetlands that straddle CF's shared property boundary with Petitioner. Wetlands on Petitioner's property are similar to nearby wetlands on the Project site, in that historically they have been impacted by agricultural activities, including ditching.

70. None of Petitioner's experts provided testimony of adverse impacts to wetlands or surface waters that would be reasonably likely to occur as a result of the Project. In contrast, Dr. Durbin testified that the wetlands on Petitioner's property are degraded and dehydrated due to the prevalence of agricultural alterations and that a modicum of additional water might actually benefit them.

71. The application indicates that the proposed reclamation will result in an overall water balance that is consistent and compatible with the region's surface and sub-surface hydrology, and the combined groundwater and surface water outflow volumes from the Project site will be similar to pre-mining conditions.

72. As noted earlier, the proposed recharge ditch system will maintain off-site water table levels within the normal range of seasonal high and seasonal low values, which is the range of fluctuation the water table level currently experiences pursuant to the IMR. Therefore, no dewatering will occur that will have an adverse ecological effect on Petitioner's wetlands. Dr. Durbin and Dr. Kiefer opined that the improvement in ecological conditions post-reclamation on the Project site can reasonably be expected to improve the ecological condition of the immediately adjacent wetlands on Petitioner's property.

73. Petitioner's expert, Mr. Davis, opined that CF failed to provide reasonable assurances that the Project would not cause dewatering of wetlands on Petitioner's property. He presented model results using those high permeabilities that purported to show that, at some distance proximate to the property boundary, some drawdown would occur with maximum predicted drawdown approximately 80 feet or less from the property boundary. However, Mr. Davis selected the high end of

the range of the subsurface permeabilities estimated in the RMR and assumed they were present continuously along the property boundary. Although the highly permeable conditions are not continuously present along the boundary line of Petitioner's property, measures to address those conditions have been identified and recommended, should they occur.

74. Moreover, Mr. Davis' modeling did not use the existing conditions established in the IMR as a baseline and did not evaluate any of the mitigative options recommended in the RMR for use if high permeability layers are encountered. Rather, his modeling looked at only two scenarios that were not recommended in the RMR in such cases, namely, the recharge ditch alone, and charging the recharge ditch five feet above ground surface. He admitted that the options recommended in the RMR for high permeability subsurface conditions were all widely-used options capable of being implemented. Mr. Davis' assertions regarding the potential for a half-foot of drawdown near the property line are based on a series of assumptions and conditions which are not supported by competent substantial evidence. Therefore, his testimony does not rebut the prima facie case of CF and the Department regarding reasonable assurances and is not credited.

75. Mr. Palmer criticized the adequacy of the monitoring contained in Specific Condition 14. However, he admitted that

monitoring of the proposed piezometers would detect any water table changes, and the ERP requires comparison against the baseline data as well as long-term rainfall records. He also acknowledged that he reviewed only a portion of the condition. Thus, Mr. Palmer's criticisms are not credited.

76. CF's reclamation also consists of a Stream Restoration Plan (SRP). Implementation of the SRP will result in replacing lower-functioning streams and lotic systems, like the ditched headwaters of Troublesome Creek, with higher quality systems post-mining pursuant to state reclamation requirements. Dr. Kiefer opined that this is reasonably likely to result in both localized and regional improvements to Troublesome Creek by restoring its headwaters to a more natural condition. This evidence was not refuted.

77. Petitioner provided no testimony regarding the ecological effect of the Project on Petitioner's wetlands and water resources. FINR witnesses Burleson, Davis, and Palmer claimed no expertise as ecologists. In fact, Mr. Davis admitted that he normally provides his modeling reports to others with expertise regarding whether a modeled water level drop could actually be expected to cause harm. This was not done here. There was no credible testimony that adverse environmental or water resource impacts would result to Petitioner's property from the Project.

I. Materials

78. CF has analyzed whether it will have sufficient materials available to it to accomplish the objectives within the CRP, and sufficient capacity in existing South Pasture mine and proposed Project site CSAs to dispose of waste clays generated by the phosphate matrix processing.

79. For this purpose CF prepared a Life of Mine Backfill Plan (LOMBP). The LOMBP describes how on-site materials will be utilized by CF, during both mining and reclamation activities, over the life of the mine.

80. Based upon CF's calculations as reflected in the LOMBP, information contained in the MPP, and testimony from CF's expert witness, CF will have sufficient materials to achieve its mining and reclamation objectives, and sufficient capacity to dispose of waste clays in existing CSAs located on the South Pasture mine and proposed CSAs on the Project site. CF will be able to accomplish the mining and reclamation as proposed.

81. Petitioner's expert, Mr. Palmer, opined that CF had not provided reasonable assurances of sufficient overburden to create the overburden soil slopes on mine faces discussed in the RMR. For the following reasons, his testimony is not credited. He admitted no experience with mining, dragline booms, how draglines cast overburden, or how cast overburden slopes are created, and he mistakenly assumed CF was limited in the

transport of overburden to a distance of 330 feet, a figure not supported by the record. Additionally, Mr. Palmer incorrectly assumed that CF would be mining to an average depth of 73.3 feet, when in fact as reflected in the MPP, CF will be mining to an average depth of 40.4 feet, which means the average overburden thickness will be 18.9 feet, far greater than the 11.5 feet he assumed in his calculations.

82. On the other hand, CF witness Wuitschick testified that there would be sufficient overburden to create the overburden seals called for in the RMR. Mr. Blitch, a CF employee with extensive mining experience and familiarity with the Project, testified that transportation of overburden is not limited to 330 feet and confirmed that CF will have more than enough overburden to create the overburden slopes, which are needed only along preserve and property boundaries and the ability to move it where it is required.

J. Rules Requirements

83. With respect to the ERP criteria contained in section 373.413 and rule 40D-4.301, CF has demonstrated, by a preponderance of the evidence, reasonable assurances that the Project:

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 including aquatic and wetland dependent species, by wetlands, other surface waters and other water related resources.

e. Will not adversely affect the quality of receiving waters such that the water quality standards 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.

h. Is capable, based on generally accepted engineering and scientific principles, of being effectively performed and of functioning as proposed.

i. Will be conducted by an entity with financial, legal, and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued.

84. For the reasons expressed in Finding of Fact 64, a contention by Petitioner that the SPE mine application must be denied because CF failed to submit at hearing a separate document entitled "Construction Surface Water Management Plan" is rejected. This is because this requirement does not apply to facilities like CF that are required to obtain individual NPDES permits that address stormwater discharges. Assuming arguendo that it did apply, the Southwest Florida Water Management District Basis of Review for Environmental Resource Permit Applications (BOR) criteria are designed to be flexible, and other methods can be used to meet the rule objectives. Here, CF submitted numerous reports and studies which have been accepted as being the most persuasive on these issues, and collectively they show that reasonable assurances have been provided that all rule criteria have been satisfied.

85. With respect to the additional public interest and other criteria contained in section 373.414 and rule 40D-4.302 for the protection of water resources and which are applicable to projects located "in, on, or over wetlands or other surface waters," CF has provided, by a preponderance of the evidence, reasonable assurances that the Project will:

a. Not adversely affect the public health, safety, or welfare or the property of others.

b. Not adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats.

c. Not adversely affect the flow of water.

d. Not adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity.

e. Be temporary in nature.

f. Not adversely affect the current condition and relative value of functions being performed by areas affected by the Project.

g. Not cause unacceptable cumulative impacts.

h. Will maintain or improve the water quality and the function of the biological systems present at the Project site prior to the commencement of mining activities.

86. The primary goal of the BOR is to meet District water resource objectives of ensuring that the permit will not authorize activities that are harmful to water resources or inconsistent with the public interest. As noted above, however, the criteria are designed to be flexible, and other methods of meeting those objectives will be considered. See BOR §§ 1.1 and 1.3.

87. With respect to phosphate mining reclamation criteria contained in chapter 378 and rule 62C-16.0051, CF has provided, by a preponderance of the evidence, reasonable assurances that the Project will meet the reclamation criteria contained in the rule.

88. The prima facie case provided by CF and the Department at hearing of CF's entitlement to the ERP for the Project was not successfully refuted, as discussed in the foregoing Findings of Fact.

89. The prima facie case provided by CF and the Department at hearing of CF's entitlement to the CRP for the Project was unrefuted. No evidence concerning the reclamation criteria was presented by Petitioner.

90. As set forth in the Order Granting the Motion to Strike and Motion in Limine issued on February 16, 2012, the Petition contained no factual allegations relative to the compliance with applicable regulatory requirements regarding, or potential for harm resulting from, the South Pasture Modifications (as opposed to the ERP or CRP for the Project). Therefore, the allegations relating to the South Pasture Modifications were stricken. The prima facie case provided by CF and the Department at hearing of CF's entitlement to the associated WRP and CRP Modifications for the South Pasture mine (South Pasture Modifications) was not refuted, and Petitioner

made no proffer relative to the South Pasture Modifications prior to the close of the evidentiary proceedings. The ruling at hearing to receive in evidence the permit application and the Department's proposed agency action on these two items is reaffirmed.

CONCLUSIONS OF LAW

91. Petitioner has standing to participate in this proceeding. Although Petitioner did not prevail on the merits of its claims, it presented evidence to prove that its substantial interests could reasonably be expected to be affected by the agency's action. See, e.g., St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011).

92. Section 120.569(2)(p), as amended in 2011, is applicable to this case. It establishes a new order of presentation and burden of proof in permit challenge cases. Permit cases under chapters 373, 378, and 403 now proceed in three phases: Phase I is the submittal by the applicant and agency of the application, notice of intent to approve the permit, and other relevant material submitted to the agency which constitute a prima facie case demonstrating entitlement to the proposed permits; Phase II is the submittal by the challenger of evidence supporting the challenge of the proposed permits; and Phase III is the submittal by the applicant and

agency of any rebuttal evidence demonstrating that the application meets the conditions of issuance.

93. The burden of proof in permit challenge cases is now on the challenger, who has the "burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the [permit] by competent and substantial evidence." § 120.569(2)(p), Fla. Stat.

94. Section 120.569(2)(p) provides that CF can make a prima facie case of entitlement to the permits by entering the applications, materials supporting the applications, and the proposed Department approvals. CF and the Department submitted these materials and presented additional factual and expert opinion testimony and evidence to supplement the prima facie case.

95. Because this is a de novo proceeding, and not merely a review of the prior agency action, the parties may present additional evidence not included in the permit application and other documents previously submitted to the Department during the permit application review process. See, e.g., Hamilton Cnty. Bd. of Cnty. Comm'rs v. State Dep't of Envtl. Reg., 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 785 (Fla. 1st DCA 1981). Thus, what CF did or failed to do during the process of the agency review of the applications is not the dispositive issue

in these de novo proceedings. The dispositive issue is whether the evidence presented at the hearing provides reasonable assurance that CF's proposed activities on the Project site will comply with applicable environmental and phosphate mine reclamation standards. See McDonald v. Dep't of Banking and Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977); Clarke v. Melton, Case No. 89-6051, 1990 Fla. ENV LEXIS 186 (Fla. DOAH Oct. 16, 1990), adopted, OGC Case No. 89-1250 (Fla. DER Nov. 30, 1990); Peace River/Manasota Reg. Water Supply Auth. v. IMC Phosphates Co., Case No. 03-0791, 2005 Fla. Div. Adm. Hear. LEXIS 736 (Fla. DOAH May 9, 2005, R.O on Remand, June 16, 2005), adopted, OGC Case No. 03-0205 (Fla. DEP July 31, 2006).

96. Petitioner has failed to meet its burden of showing that the permits should not be issued. Conversely, by a preponderance of the evidence, CF has demonstrated that reasonable assurances have been given that all applicable permitting criteria have been met. Reasonable assurances means "a substantial likelihood that the project will be successfully implemented." See Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). It does not require absolute guarantees that the applicable conditions for issuance of the permit have been satisfied. See, e.g., Crystal Springs Recreational Pres., Inc. v. S.W. Fla. Water Mgmt. Dist., Case No. 99-1415, 2000 Fla. ENV LEXIS 41 at *98 (Fla. DOAH Jan. 27,

2000, SWFWMD Feb. 23, 2000). Speculations of future harm, of what "might" occur, and a party's subjective beliefs, are not sufficient to carry the burden of presenting contrary evidence or to demonstrate material facts to support its claim. See Chipola Basin Protective Grp., Inc. v. Dep't of Envtl. Reg., Case No. 88-3355, 1988 Fla. Div. Adm. Hear. LEXIS 4765 (Fla. DOAH Nov. 14, 1988), adopted, OGC Case No. 88-0587, 1988 Fla. ENV LEXIS 112, (Fla. DER Dec. 30, 1988)(petitioner cannot carry the burden of presenting contrary evidence by mere speculations concerning what "might" occur). See also Hoffert v. St. Joe Paper Co., Case No. 89-5053, 1990 Fla. ENV LEXIS 194 (Fla. DOAH Oct. 26, 1990), adopted, OGC Case No. 89-1304 (Fla. DER Dec. 6, 1990); Menorah Manor, Inc. v. Agency for Health Care Admin. 908 So. 2d 1100, 1104 (Fla. 1st DCA 2005)(conclusory allegations of speculative future harm are insufficient to demonstrate that a party's substantial interest will be affected).

97. In sum, a preponderance of competent substantial evidence, including the entirety of the application, engineering studies and reports, scientific testimony, and a voluminous application, all support the Department's determination of reasonable assurance of entitlement to the approvals at issue.

98. Finally, as set forth in undersigned's Order Granting CF's Motion in Limine and Motion to Strike, Petitioner's assertions regarding Hardee County's quarter-mile setback

requirement had no legal basis in any environmental factors that are cognizable under the ERP or CRP permitting programs. Nonetheless, as noted above, Petitioner offered no credible evidence of adverse environmental or water resources impacts that would occur to Petitioner's property as a result of mining or reclamation within the footprint authorized by the ERP or CRP.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Environmental Protection enter a final order approving the applications of CF Industries, Inc.

DONE AND ENTERED this 30th day of April, 2012, in Tallahassee, Leon County, Florida.

D. R. Alexander

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2012.

ENDNOTE

1/ On March 12, 2012, FINR filed a Petition for Writ of Prohibition and/or Review of Non-Final Agency Order with the First District Court of Appeal seeking a review of that Order. See FINR II, Inc. v. CF Indus., Inc., Case No. 1D12-1308. The Petition for Writ of Prohibition was denied on March 14, 2012. The Petition for Review of Non-Final Agency Order remains pending as of the date of this Recommended Order.

COPIES FURNISHED:

Herschel T. Vinyard, Jr., Secretary
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

Thomas M. Beason, General Counsel
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

Lea Crandall, Agency Clerk
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

Edward P. de la Parte, Jr., Esquire
de la Parte & Gilbert, P.A.
Post Office Box 2350
Tampa, Florida 33601-2350

Frank E. Matthews, Esquire
Hopping Green & Sams, P.A.
Post Office Box 6526
Tallahassee, Florida 32314-6526

Brynna R. Ross, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

FINR II, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**OGC CASE NO. 11-1756**
	)	**DOAH CASE NO. 11-6495**
CF INDUSTRIES, INC. AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
	)	

ORDER DENYING MOTION TO STAY PROCEEDINGS

This issue comes before the Department of Environmental Protection ("Department") on the Petitioner FINR II, Inc.'s ("FINR" or "Petitioner") "Motion to Stay Proceedings Pending Outcome of Petition for Review of Non-Final Agency Action," filed on May 9, 2012. In its Motion, FINR seeks to stay the entry of the final order in the above-styled case.

This case concerns the Department's proposed approval of environmental resource permits and conceptual reclamation plans for CF Industries, Inc. ("CF Industries"). FINR filed a petition challenging those permits and plans. CF Industries then moved for a summary hearing under section 120.574, Florida Statutes, which it was authorized to request under section 378.205(3), Florida Statutes ("F.S."). CF Industries also filed a motion to strike portions of the petition and motion in limine. An Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") granted the motions on February 16, 2012, ("the Order") and proceeded with the

accelerated hearing schedule in section 120.574, F.S. Prior to the final hearing, FINR appealed the Order to the First District Court of Appeal (1D12-1308).

The final hearing was held March 26-28, 2012, and on April 30, 2012, the ALJ entered his Recommended Order ("RO"). On May 9, 2012, FINR filed the Motion to Stay. CF Industries filed its response in opposition on May 16, 2012. Because this case involves a license, section 120.60(1), F.S., requires that the Department enter the final order within 45 days of the RO (i.e., on or before June 14, 2012).

Section 120.68(3), F.S., and Florida Rule of Appellate Procedure 9.190(e) give agencies broad discretion to stay their decisions pending appeal, but those provisions generally contemplate staying the effect of final agency action. Here, FINR seeks something different: a delay in entering final agency action. Florida Rule of Appellate Procedure 9.130(f) expressly precludes the lower tribunal from entering a final order pending the appeal of non-final administrative orders that are listed in that rule. *See* Fla. R. App. P. 9.130(a). The ALJ's Order striking portions of FINR's petition is not included in the list. Thus, the Department is not precluded by that rule from entering a final order in this case.

In general, the Florida Supreme Court has long held that a party to an appeal has the right to a stay of an order of the lower tribunal, if it can be demonstrated that a stay is necessary to provide meaning to a party's appeal. *Hathaway v. Monroe,* 119 So. 149 (Fla. 1929). This broad articulation of a stay's purpose is later refined by several courts that looked at factors to consider when reviewing a motion to stay. Factors that an agency should consider include: the petitioner's likelihood of ultimate success on the

merits, the likelihood of irreparable harm if no stay is granted, and the remediable nature of the harm. *White Constr. Co. v. Dep't of Transp.*, 526 So. 2d 998 (Fla. 1st DCA 1988); *State ex rel. Price v. McCord*, 380 So. 2d 1037, 1038, n.3 (Fla. 1980); *Perez v. Perez*, 769 So. 2d 389, 391, n.4 (Fla. 3d DCA 1999). For non-final administrative orders, these factors should be considered in the context of section 120.68(1), F.S., which provides that, "[a] preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Florida courts have interpreted this provision to mean that mere delay does not deprive a petitioner of an adequate remedy, especially when the non-final order is not listed in the appellate rule 9.130(a). *See, e.g., Fla. Leisure Acquisition Corp. v. Fla. Comm'n on Human Relations*, 639 So. 2d 1028, 1029 (Fla. 5th DCA 1994); *O'Donnell's Corp. v. Ambrose*, 858 So. 2d 1138, 1139 (Fla. 5th DCA 2003); *Ford v. Agency for Persons with Disabilities*, 932 So. 2d 294, 296 (Fla. 4th DCA 2005).

Here, FINR did not demonstrate that review of the final order would not provide an adequate remedy. Given the accelerated time schedule for this summary proceeding, there is no substantive difference between staying the entry of the final order and staying its effect once entered. FINR is free to file a motion for stay after entry of the final order, should it choose to do so. FINR's claim of irreparable harm is based on the extra expense incurred by the potential for pursuing two appellate proceedings simultaneously if the final order is adverse to its interests. This extra expense, however, does not form the basis for a finding of irreparable harm.

Having considered the ALJ's RO, the Motion to Stay and the response in opposition, and being otherwise duly advised:

IT IS ORDERED:

The Petitioner's Motion to Stay Proceedings Pending Outcome of Petition For Review of Non-final Agency Action is DENIED.

DONE AND ORDERED this 6th day of June, 2012, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

HERSCHEL T. VINYARD JR.
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Deputy CLERK

6.8.12
DATE

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Order has been sent by e-mail to:

Edward P. de la Parte, Jr., Esq.
Kristin Y. Melton, Esq.
Michael R. Bray, Esq.
de la Parte & Gilbert, P.A.
PO Box 2350
Tampa, FL 33601-2350
edelaparte@dgfirm.com
mbray@dgfirm.com
lfoy@dgfirm.com

Frank E. Matthews, Esq.
Susan Stephens, Esq.
Miguel Collazo, Esq.
Thomas R. Philpot, Esq.
Hopping Green & Sams; P.A.
PO Box 6526
Tallahassee, FL 32314-6526
frankm@hgslaw.com
susans@hgslaw.com
MikeC@hgslaw.com
thomasp@hgslaw.com

Brynna R. Ross, Esq.
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Brynna.Ross@dep.state.fl.us

this 8th day of June, 2012.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

DAVID THULMAN
Assistant General Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242

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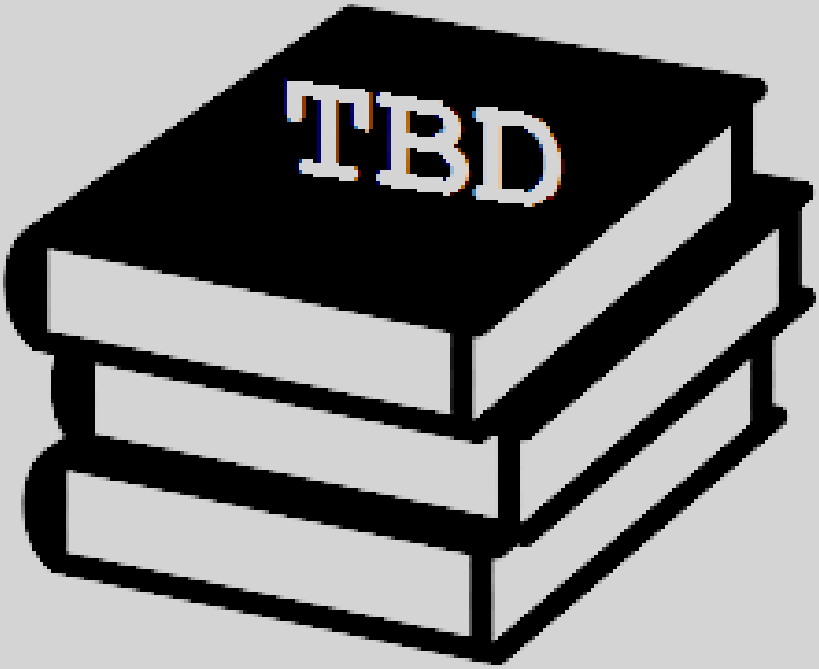

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