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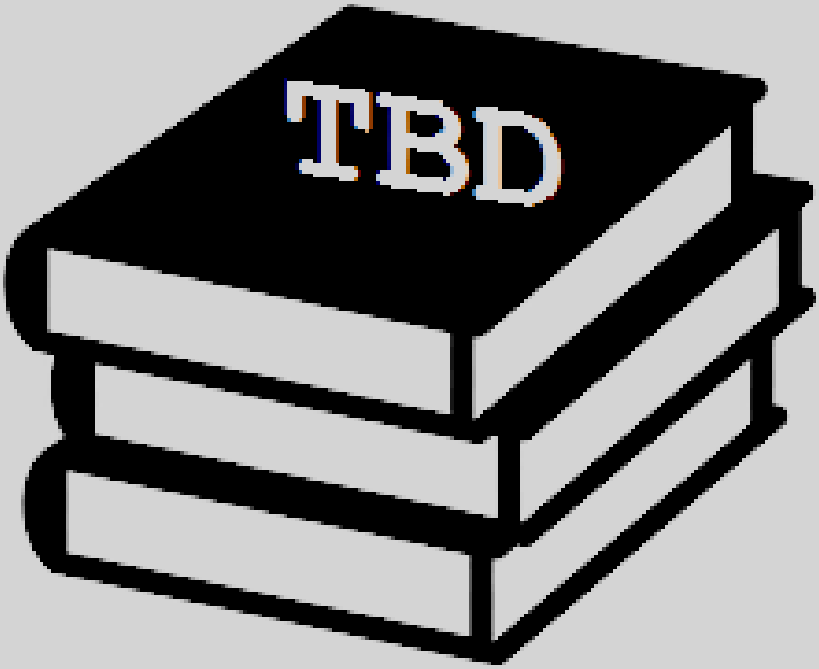

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IN THE FLORIDA FIRST DISTRICT COURT OF APPEAL

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 RESPONSE TO RESPONDENTS' JOINT MOTION FOR RECONSIDERATION OF ORDER GRANTING LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Florida Rule of Appellate Procedure 9.300(a), Petitioner FINR II, Inc. ("FINR") replies as follows to the Respondents' joint motion for reconsideration of the Court's order granting FINR leave to file a supplemental brief, filed on June 15, 2012:

1. On June 8, 2012, the Florida Department of Environmental Protection ("DEP") filed its final order in the administrative proceedings below. On June 11, 2012, FINR filed its motion for leave to file a supplemental brief to address certain issues in that final order arising from an inconsistency between DEP's final order and the response it filed in this appellate proceeding to the Court's order to show cause. On June 14, 2012, the Court granted FINR's motion. The next day, June 15,

2012, the Respondents filed their joint motion for reconsideration of the Court's June 14 order.

2. In their motion, the Respondents argue that FINR's motion for leave to file a supplemental brief incorrectly characterizes the position that DEP articulated in its response to the Court's order to show cause on whether the agency possessed substantive jurisdiction to correct the ALJ's February 16, 2012 non-final order that is the subject of this appellate proceeding, as being different from the position DEP took on the same issue in the final order. The Respondents' motion is without merit, and should be denied.

3. In its April 9, 2012 response to this Court's order to show cause, DEP asserted, with respect to the ALJ's February 16, 2012 non-final order, that:

> while the Department does not have substantive jurisdiction over an ALJ's rulings that are purely evidentiary, 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 15 (italics in original; bold and underline added). Thus, DEP clearly told this Court that it does not have substantive jurisdiction over purely evidentiary matters, but it does have substantive jurisdiction over issues concerning standing and the interpretation of its own rules and statutes. What the Respondents' motion for reconsideration fails to mention is that DEP went on to tell this Court that the issues in the ALJ's February 16, 2012 non-final order are not purely

evidentiary or purely procedural, and instead, involve issues like standing and rule and statute interpretation:

> ...the evidentiary rulings in the cases FINR cites were purely procedural, and thus distinguishable from **the rulings made here, where the ALJ interpreted and applied Department rules and statues in making the non-final rulings, for example, regarding standing and rule interpretation.**
>
> ...Moreover, even if the ALJ's non-final rulings adverse to a third-party petitioner were purely procedural (which, here, **they were not**)...

DEP Response, at 14 fn.3, and 15 (emph. added). Thus, DEP clearly and obviously took the position that the ALJ's rulings in the February 16, 2012 non-final order "interpreted and applied Department rules and statutes." DEP Response, at 14 fn.3. By its own assertion, "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 15 (italics in original). In short, in the response filed with this Court, DEP explained the law concerning the boundaries of its substantive jurisdiction, and plainly claimed the order at issue in this appellate proceeding was within those boundaries. In contrast, in its final order, DEP took the following contrary position concerning the ALJ's February 16, 2012 non-final order:

> **I. Exception concerning ALJ's Febnuary 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...
>
> 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... 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. Dept. of Health*, 805 So.2d 1008, 1011-12 (Fia. 1st DCA 2001); *Martuccio v. Dept. of Prof. Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993)...
>
> This agency does not have substantive jurisdiction, however, over the matters that comprise the essence of FINR's lengthy exception.

DEP Final Order, at 14-15. Later, on page 22 of the final order, DEP repeats its stance that it lacks substantive jurisdiction to address the ALJ's February 16, 2012 non-final order:

> 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. Dept. of Health*, 805 So.2d 1008, 1011-12 (Fla. 1st DCA 2001); *Marluccio v. Dept. of Prof. Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993).

DEP Final Order, at 22.

4. Thus, DEP has unmistakably taken inconsistent positions concerning its substantive jurisdiction in this case – first telling this Court in the show cause response that DEP does have jurisdiction, and second, contending in the final order that it lacks such jurisdiction. The Respondents' assertions to the contrary are incorrect, bordering on frivolous. Worse still, not only has a state agency taken inconsistent positions against a party in the same litigation for the sake of expediency, it then filed a third pleading denying the inconsistency.

5. The remainder of the Respondents' motion amounts to nothing more than their own supplemental brief disguised as a motion for reconsideration. The Respondents' so-called "motion" essentially addresses each of the issues raised in FINR's supplemental brief. FINR relies on its supplemental brief in responding to those issues.

6. The Respondents' motion is without merit and should be denied. Moreover, because their so-called "motion" is actually a supplemental brief in disguise, no additional supplemental briefing should be permitted.

WHEREFORE, FINR respectfully requests this Honorable Court to deny the Respondents' motion for reconsideration of the Court's June 14, 2012 order granting FINR leave to file a supplemental brief. Further, because the Respondents' motion is actually a supplemental brief in disguise, FINR respectfully requests that no additional supplemental briefing be permitted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been served by U.S. Mail and Electronic Transmission this 25th 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,

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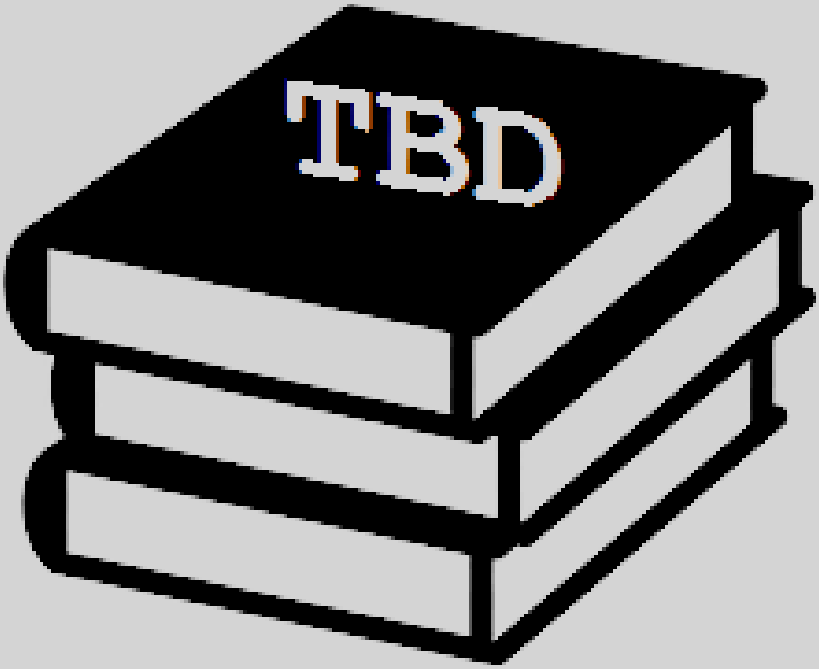

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