DEP06-1088

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PEACE RIVER/MANASOTA REGIONAL WATER SUPPLY AUTHORITY,		
Petitioners,	**OGC Case Nos.**	**03-0205** **03-0206** **03-0250** **03-0287** **03-0295** **03-0297** **03-1661** **04-0465** **04-0466** **04-0485**
and		
LEE COUNTY,		
Intervenor,		
vs.	**DOAH Case Nos.**	**03-0791** **03-0792** **03-0804** **03-0805** **03-1610** **04-1062**
IMC PHOSPHATES COMPANY AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,		
Respondents.		

FINAL ORDER

On May 9, 2005, the Division of Administrative Hearings ("DOAH") submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP") in these administrative proceedings, a copy of which is attached hereto as Exhibit A. Copies of the RO were furnished to the Petitioners, Peace River/Manasota Regional Water Supply Authority (the "Authority"), Charlotte County, Sarasota County, Alan R. Behrens, Desoto Citizens Against Pollution, Inc. ("DCAP"), and the Intervenor, Lee County. A copy of the RO was also furnished to the Co-Respondent, IMC Phosphates Company ("IMC").[1]

The Petitioners and Intervenor filed a joint Unopposed Motion for Time

[1] In the interest of consistency with the agency review process and the DOAH proceedings, the abbreviation "IMC" will be used in this Final Order to refer to both the former entity, IMC Phosphates Company, and it current successor by merger, Mosaic Fertilizer LLC.

Enlargement ("Motion") requesting extensions of the normal time periods for filing Exceptions to the RO and Responses to Exceptions, and the entry of the agency final order in these consolidated proceedings. IMC filed a separate pleading agreeing to the requested extensions and waiving the statutory time period in § 120.60(1), Florida Statutes ("Fla. Stat."). An order was entered by DEP on May 18, 2005, granting the Motion and extending the deadlines for filing Exceptions to the RO until June 8, 2005, and for filing Responses to Exceptions until June 23, 2005. In addition, the deadline for entry of the DEP final order was extended until August 7, 2005. Specific Exceptions to the RO were timely filed on behalf of all the parties to these proceedings, except for Lee County which filed a one-sentence "Joinder and Adoption of Charlotte's Exceptions." Responses to the Petitioners' Exceptions were filed on behalf of DEP and IMC, and each of the Petitioners filed Responses to the Exceptions of DEP and IMC.

On August 5, 2005, a Limited Remand Order ("LRO") was entered in these proceedings, a copy of which is attached hereto as Exhibit B. The LRO remanded these proceedings back to DOAH for additional findings of fact to be made by Administrative Law Judge, Robert E. Meale (the "ALJ"), on specific matters set forth in detail in the Conclusion portion of the LRO. The ALJ held an evidentiary hearing on remand on October 10-14, 2005, and entered his Recommended Order on Remand ("ROR") on June 16, 2006, a copy of which is attached hereto as Exhibit C.

Exceptions to the ROR were filed by DEP, IMC, and Sarasota County on June 30, 2006, and by Charlotte County and the Authority on July 3, 2006. On July 10, 2006, Charlotte County filed its Responses to DEP's and IMC's Exceptions; and DEP and IMC filed their Responses to Sarasota County's Exceptions on the same date. On July 13,

2006, DEP and IMC filed their Responses to the Exceptions of the Authority and Charlotte County.[2] The matter is now before the DEP Secretary for final agency action.

BACKGROUND

In April of 2000, IMC filed a Consolidated Development Application (the "CDA") with DEP. The CDA requested DEP to issue an Environmental Resource Permit/water quality certification (the "ERP") and approve a Conceptual Reclamation Plan (the "CRP"), authorizing IMC to conduct phosphate mining and related activities. The site of these proposed mining and related activities was a 20,675-acre tract of land located in the northwestern quadrant of Hardee County, Florida (the "Ona Tract").

In March of 2001, DEP approved a related modification of the CRP for IMC's existing Ft. Green Mine in anticipation of the proposed mining activities on the Ona Tract located immediately east and southeast of the Ft. Green Mine site. This Ona Tract related CRP modification at the existing Ft. Green Mine was not challenged by Charlotte County or any other party.

In April of 2001, IMC also filed a related application with DEP for modification of a Wetland Resource Permit ("WRP") previously issued by DEP in the 1990's authorizing phosphate mining and related activities by IMC at the Ft. Green Mine. IMC's FT. Green Mine WRP modification application ("WRP Modification") requested authority to relocate and install three clay-settling areas ("CSAs"), extend the life of the beneficiation plant at the Ft. Green Mine to process the matrix from the proposed phosphate mining on the Ona Tract, and extend the reclamation schedule at Ft. Green.

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[2] On July 26, 2006, Charlotte County also filed a Reply to IMC's and DEP's Responses to Charlotte County's Exceptions to Recommended Order on Remand ("Reply"). On the following day, IMC filed a Motion to Strike this Reply correctly noting that there is no authority under the Administrative Procedure Act and the Uniform Rules of Procedure for the filing of such a pleading. See § 120.57(1)(k), F.S., and Rule 28-106.217, F.A.C.

In January of 2003, DEP executed an Intent to Issue the ERP, a proposed approval of the CRP, and issuance of the WRP Modification requested by IMC for the Ona Tract mining and related activities. The Petitioners (Charlotte County, the Authority, Behrens, and DCAP) then filed timely challenges to these proposed agency actions, and DEP forwarded the petitions to DOAH for formal administrative proceedings.[3] The four DOAH cases were subsequently consolidated by order of the Administrative Law Judge ("ALJ") and Lee County was allowed to intervene in the consolidated cases.

In September of 2003, DEP issued a final order denying IMC's application for proposed phosphate mining and related activities on the Altman Tract located a short distance northwest of the Ona Tract (the "Altman Final Order"). See Charlotte County v. IMC Phosphates Company, 25 F.A.L.R. 4707 (Fla. DEP 2003), *aff'd*, 896 So.2d 756 (Fla. 2d DCA 2005) (mem.). DEP staff was then directed by Deputy Secretary Bedwell to do an additional review of IMC's pending CDA pertaining to the Ona Tract in an attempt to achieve consistency with the Altman Final Order. This additional staff review of the Ona Tract CDA resulted in requests for additional information from IMC and requests by DEP that IMC make substantial changes to the Ona Tract ERP and CRP previously approved in January of 2003.

As the result of this additional DEP staff review, IMC filed extensive amendments to its prior Ona Tract CDA in January of 2004 (the "Revised CDA"). IMC's Revised CDA proposed revisions to the ERP, CRP, and WRP Modification given preliminary approval by DEP in January of 2003. The most prominent of these proposed revisions was the

[3] Hardee County also filed a petition challenging DEP's proposed actions granting IMC's requested ERP, CRP, and WRP Modification. However, in August of 2003, Hardee County filed a voluntary dismissal of its petition with prejudice.

decrease of the total project size at the Ona Tract from 20,675 acres to 4,197 acres, an approximate 80% reduction of the original project size previously approved by DEP. This reduced phosphate mining and reclamation area, consisting of the westernmost 20% of the original Ona Tract, will be referred to hereafter as the "Ona Ft. Green Extension Mine" and will be abbreviated as "OFG." In addition, the Revised WRP Modification reduced the number and size of the CSAs proposed in the WRP Modification application originally filed by IMC in 2001.

Accordingly, in February of 2004, DEP executed a revised Notice of Intent to Issue an Environmental Resource Permit ("Revised ERP"), a revised Approval of the Conceptual Reclamation Plan ("Revised CRP"), and a revised Ft. Green Mine Wetland Resource Permit Modification ("Revised WRP Modification"). These revised agency actions would authorize IMC's proposed OFG mining and reclamation activities as set forth in its Revised CDA. In March of 2004, the parties filed a stipulation acknowledging the major changes embodied in DEP's Revised ERP, CRP, and WRP Modification and the creation of a new point of entry to challenge these revised agency actions. This stipulation of the parties also contained an agreement that the prior allegations of the Petitioners and Intervenor in their respective petitions would apply in all respects to DEP's revised agency actions in February of 2004.

In March of 2004, the Petitioner, Sarasota County, filed a petition challenging DEP's revised agency actions pertaining to IMC's proposed activities at OFG. Sarasota County's petition was forwarded to DOAH and was consolidated with the other pending cases relating to the proposed OFG mining and related activities. The ALJ held an extensive final hearing in these consolidated proceedings, which lasted approximately

eight weeks and concluded on July 13, 2004. The ALJ submitted his RO to DEP on May 9, 2005, almost 10 months after the final hearing ended.

INITIAL RECOMMENDED ORDER

The ALJ's RO submitted on May 9, 2005, is 418 pages long and contains numerous factual findings and legal conclusions of the ALJ. In his "Summary of Final Conclusions," the ALJ noted that the proposed mining and reclamation activities at OFG are complex and extensive and concluded that IMC's application "reflects a substantial effort on the part of the applicant to conform to the permitting approval criteria and the application is close to satisfying the permitting and approval criteria."

The ALJ ultimately recommended that DEP issue a Final Order granting the [Revised] ERP and approving the [Revised] CRP with the suggested additional permit conditions set forth in paragraphs 884 and 919 of the RO. The ALJ further recommended that the DEP Final Order approve the [Revised] WRP Modification "when the [Revised] ERP and CRP approvals become final and the time for appeal has passed or, if an appeal is taken, all appellate review has been completed." Nevertheless, the ALJ acknowledged in paragraphs 925-926 of the RO that a remand of these proceedings to DOAH for "supplemental factfinding" may be necessary due to the complexity of some of the additional ERP and CRP conditions recommended in the RO.

RECOMMENDED ORDER ON REMAND

The Recommended Order on Remand ("ROR") submitted on June 16, 2006, includes the following significant findings of the ALJ:

> 1. The ALJ invited the remand to permit the development of new or strengthened conditions to the ERP or CRP approval, not to allow IMC another opportunity to produce evidence in support of already-existing ERP or CRP specific conditions. (ROR, pages 12-13)

2. The ALJ, not the [DEP] Secretary, allowed IMC to modify its application at the remand hearing to present a consolidated [dragline/pipeline/road/ utility] crossing at Stream 1ee. If the Secretary . . . decides not to allow IMC to modify its application to incorporate this change, she may do so in the FO. (ROR, page 15)

3. IMC Exhibit 2f-R (Figure A-lf) accurately identifies the Stream 1e series, its connected wetlands, 25-year floodplain, and places these areas in the "no-mine" area of the OFG Project; and also accurately identifies the Stream 1ee consolidated crossing. (ROR, Finding of Fact 1).

4. The consolidated crossing [at Stream 1ee] reduces the impacts to the water resources when compared to the prior proposed multiple crossings at Stream 1ee and Stream 2e. . . The transfer of the crossing impacts from Stream 2e to Stream 1ee also offers greater protection to Horse Creek because Stream 2e is closer to Horse Creek than Stream 1ee. (ROR, Finding of Fact 4)

5. The mined area [at OFG] will yield 67 million tons of sand tailings . . . [and IMC] will need only 6.992 million tons of sand tailings to restore the pre-mining topography underlying the wetlands and surface waters. . . . Based on the foregoing, LRO 5.a does not require any adjustment to Table B (Wetlands Mitigation Financial Summary) for costs associated with the sand tailings underlying the wetlands and surface waters to be reclaimed at OFG. (ROR, Finding of Facts 22-28)

RULING ON CHARLOTTE COUNTY'S REQUEST FOR ORAL ARGUMENT

On June 24, 2005, Charlotte County filed with the DEP agency clerk a "Request for Oral Argument Concerning Exceptions to Recommended Order." However, there are no provisions in the Chapter 120, Fla. Stat., or in Chapter 28, F.A.C., granting to a party the right to present oral argument to a state agency head in connection with the filing of exceptions to a DOAH recommended order in a pending administrative proceeding.[4] The applicable statutes and rules only authorize the filing of written

[4] Charlotte County's suggestion that the Secretary of DEP is now the "presiding officer" of these consolidated administrative proceedings is rejected. Rule 28-106.101, F.A.C., defines a presiding officer as a DOAH administrative law judge or an agency head "who conducts a hearing or proceeding on behalf of the agency." All of the hearings and proceedings in these consolidated cases were conducted by the ALJ, not the Secretary of DEP.

exceptions to a DOAH recommended order and written responses to the exceptions. See § 120.57(1)(k), Fla. Stat., and Rule 28-106.217, F.A.C.

In any event, I conclude that the issues now before me for consideration are adequately addressed in the extensive written Exceptions and Responses to Exceptions filed by the various parties. Consequently, oral argument is not needed for purposes of further clarification of the issues in these proceedings. Charlotte County's Request for Oral Argument Concerning Exceptions to Recommended Order is thus DENIED.

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Fla. Stat., prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an administrative law judge, "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." 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. Scholastic Book Fairs, Inc. v. Unemployment Appeals Commission, 671 So.2d 287, 289n.3 (Fla. 5th DCA 1996).

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. Belleau v. Dept. of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); Dunham v. Highlands County School Board, 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. Heifetz v. Dept. of Business 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. Collier Medical Center v. State, Dept. of HRS, 462 So.2d 83, 85 (Fla. 1st DCA 1985); Florida Chapter of Sierra Club v. Orlando Utilities Commission, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

A reviewing agency thus has no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. Brogan v. Carter, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such factual finding in preparing this Final Order. Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987). In addition, an agency head has no authority to make independent or supplemental findings of fact in the course of reviewing a DOAH recommended order. See, e.g., North Port, Fla. v. Consolidated Minerals, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Fla. Stat., also authorizes an agency to reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." If an administrative law judge 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. Battaglia Properties v. Fla. Land and Adjudicatory Commission, 629 So.2d 161, 168 (Fla. 5th DCA 1994).

An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987, 989 (Fla. 1985); Florida 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." Falk v. Beard, 614 So.2d 1086, 1089 (Fla. 1993); Dept. of Environmental 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. Suddath Van Lines, Inc. v. Dept. of Environmental Protection, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

RULINGS ON EXCEPTIONS TO THE RECOMMENDED ORDER (RO)

I. THE AUTHORITY'S EXCEPTIONS

Exception I. Preliminary Statement

The Authority's Exception I, titled "Preliminary Statement," is merely a preface to the Authority's succeeding substantive Exceptions. This Preliminary Statement does not identify any disputed portion of the RO by page number or paragraph as required by § 120.57(1)(k), Fla. Stat., and no ruling thereon is made in this Final Order.

Exception II. Standing

This Exception disputes the correctness of the ALJ's Conclusions of Law 774 and 777 dealing with the issue of the Authority's standing in these administrative proceedings. I conclude, at the outset, that the issue of whether a party's "substantial

environmental interests" have been affected or determined by a proposed DEP permitting action so as to confer standing to participate as a party in an administrative proceeding challenging such agency action is a matter within DEP "substantive jurisdiction" under § 120.57(1)(k), Fla. Stat. This conclusion is warranted because the Florida courts have ruled that the "zone of interest" standing test (also referred to as the "type or nature of injury" test) enunciated in the seminal case of Agrico v. Dept. of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981), *rev. denied*, 415 So.2d 478 (Fla. 1982), requires looking beyond the Administrative Procedure Act (APA) to the "regulatory statutes or other pertinent substantive law." See, Sickon v. Alachua County School Board, 719 So.2d 360, 363 (Fla. 1st DCA 1998), and cases cited therein at footnote 3; accord Dilliard & Assoc. Consulting Engineers v. Dept. of Environmental Protection, 893 So.2d 702, 704 (Fla. 1st DCA 2005).

In paragraph 774, the ALJ concluded that § 120.569(1), Fla. Stat., is the only basis for the Authority to establish standing in these administrative proceedings. The Authority contends that the ALJ erred by seemingly limiting the applicability of § 120.569(1) to persons whose substantial interests are "determined" by an agency. The Authority argues that the definition provisions of current § 120.52(12)(b), Fla. Stat., also extend standing under § 120.569(1) to persons whose substantial interests will be "affected" by agency action.

I agree that the Florida case law construing § 120.52(12)(b) holds that persons whose substantial interests will be affected by an agency action have "party" standing to participate in an administrative proceeding in which the substantial interests of another party is being determined by an agency. See Philbro Resources Corp. v. Dept. of

Environmental Regulation, 579 So.2d 118 (Fla. 1st DCA 1991); Society of Ophthalmology v. Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988). Nevertheless, I do not construe Conclusions of Law 774 and 777 to be a statutory interpretation by the ALJ denying standing to the Authority on a technical distinction that the Authority's substantial interests were only "affected," rather than "determined" by the challenged agency actions of DEP. Instead, I construe the ALJ's legal conclusions to state that the Authority lacks "substantial interests" standing to participate in these proceedings because the Authority failed to prove at the final hearing that it will sustain a specific injury to any substantial interests protected by the environmental laws administered by DEP.

The established case law of this state holds that the allegations of the petition must be examined to determine whether a third-party petitioner has demonstrated actual or imminent injury "under the protection of pertinent substantive law" so as to confer standing to file a petition challenging an agency action (emphasis added). Sickon, 719 So.2d at 363; Agrico, 406 So.2d at 482. In paragraphs 20-32 of its Petition, the Authority describes its substantial Environmental interests in these proceedings as arising out of its existing consumptive use permit to withdraw potable water from the Peace River to supply the needs of the residents of Charlotte, DeSoto, Manatee, and Sarasota Counties.

The Authority alleges in its Petition that the proposed mining and reclamation activities at OFG will adversely impact the water quantity and water quality of the Peace River at its Ft. Ogden withdrawal site and will thus impair its capacity to withdraw

sufficient volumes of potable water.[5] The Authority claims that IMC's proposed activities at OFG will contravene various provisions of Chapter 373, 378, and 403, Fla. Stat., and Chapters 28, 40D-1, 40D-4, 62-4, 62-110, 62-302, 62-312, 62-343, and 62C-16, F.A.C. I conclude that these allegations in the Authority's Petition are legally sufficient to assert a potential injury to its substantial environmental interests under the Agrico rationale sufficient to support the filing of a petition for administrative hearing challenged IMC's proposed activities at the OFG site.

The Agrico court also concluded, however, if the standing of third-party petitioners is challenged in formal administrative proceedings and the petitioners are "then unable to produce evidence to show that their substantial environmental interests will be affected by the permit grant, the agency must deny standing and proceed on the permit directly with the applicant." Id., 406 So.2d at 482. The Authority's standing was challenged by IMC in these proceedings.

Paragraph 777 of the RO contains the following conclusions and findings of the ALJ concerning the issue of the Authority's standing:

> Considered under Section 120.569(1), Florida Statutes, the Authority's standing is based on the impact, if any of OFG, during mining or post-reclamation, on the streamflow of the Peace River. The concern of the Authority is the availability of treatable water to allow continued withdrawals. However, the evidence fails to establish more than negligible impacts to [stream]flow during mining or reclamation. The Authority's thus lacks standing to participate in these cases.

Upon a review of the record, I find that there is substantial competent evidence supporting the ALJ's finding that the Authority failed to prove at the final hearing its primary claim challenged by IMC, that the proposed activities at OFG will cause a

[5] These allegations of the Authority are discussed in detail by the ALJ on pages four through seven of the RO.

significant reduction of the streamflow of the Peace River and thus adversely impact the Authority's capacity to withdraw sufficient volumes of potable water. The conclusions of the ALJ in paragraph 777 are supported by competent substantial evidence of record, including the expert testimony of Dr. John Garlanger and Richard Cantrell. I would also note that the dictionary definition of "negligible" adverse impacts as found by the ALJ is "not significant or important enough to be worth considering."

In addition, the Authority did not take exception to the ALJ's critical Finding of Fact 9 stating that the "Authority's permit to withdraw water from the Peace River is dependent upon flows at a point upstream of the confluence of Horse Creek and the Peace River." This same significant factual finding was adopted in a DEP final order in a prior case where the Authority and Charlotte County unsuccessfully contested another IMC phosphate mining application at a Manatee County site not far from the OFG location (the Manson-Jenkins Final Order). See Manasota-88, Inc. v. IMC Phosphates Company, 25 F.A.L.R. 868, 918, *aff'd. per curiam*, 865 So.2d 483 (Fla. 1st DCA 2004) (any reductions in the flow of water entering Horse Creek due to IMC's proposed mining activities at the Manson-Jenkins site could not adversely affect the Authority's legal right to withdraw water from the Peace River, since Horse Creek flows into the Peace River downstream of the Arcadia gauging station where measurements are taken to determine the volume of water the Authority is allowed to withdraw).

In the following rulings, I also reject the Authority's other claims that have been challenged by IMC. Since the Authority failed to demonstrate at the DOAH hearings that it will suffer specific injury to its substantial environmental interests as the result of IMC's proposed activities at OFG, its standing to participate in these cases should

technically be denied at this stage of these proceedings under the Agrico rationale.

Nevertheless, the DOAH record reflects that the ALJ afforded the Authority all the rights provided by the APA to a party claiming its substantial interests would be adversely affected by the DEP actions being challenged in these cases. The Authority presented argument of counsel, documentary evidence, and testimony in support of the merits of its claims at the lengthy formal hearing in 2004 and at the remand hearing on remand in 2005.[6] Some of the same issues raised by the Authority were also raised by Charlotte County and were considered by the ALJ in addressing the County's claims. The Authority filed Proposed Recommended Orders with the ALJ in August of 2004 and November of 2005. The Authority also filed Exceptions to the RO and the ROR, and these Exceptions have been addressed on their merits in this Final Order.

Consequently, since the Authority's claims were litigated on their merits in the DOAH hearings and are addressed in this Final Order, the issue of its standing is essentially moot at this administrative review stage of these proceedings. See Hamilton County Commissioners v. Dept. of Environmental Regulation, 587 So.2d 1378, 1383 (Fla. 1st DCA 1991) (concluding that the issue of Hamilton County's standing to challenge a DER permitting action was moot on appellate review because the "issues were fully litigated in the proceedings below"); Okaloosa County v. Dept. of Environmental Regulation, ER F.A.L.R. 1992: 032, p. 6 (Fla. DER 1992) (concluding that, from a practical standpoint, the issue of Okaloosa County's standing was moot on

[6] In Agrico, 406 So.2d at 481 n.2, the court observed that the hearing officer conducted a "mini-trial' on the standing issue before taking testimony on the substantive technical issues. No such preliminary evidentiary hearing on the issue of the Authority's standing was held by the ALJ in these proceedings prior to the commencement of the formal hearing on the substantive issues raised by the parties.

administrative review because the County's substantive claims had been litigated on their merits at the DOAH final hearing).

In view of the above rulings, the Authority's Exception II is denied.

Exception III. Application Completeness

This third Exception cites to various paragraphs in the RO, which the Authority contends support a conclusion that IMC's applications related to the proposed mining and reclamation activities at OFG should not be approved because they are "not substantially complete." The Authority correctly points out that the ALJ stated in the RO that DEP may determine that "supplemental factfinding" is required in these proceedings. Such supplemental factfinding was determined to be necessary in DEP's Limited Remand Order. The ALJ responded by holding an additional evidentiary hearing on remand and making the requested supplemental factual findings in his RO on Remand. I thus conclude that the Limited Remand Order and the ALJ's supplemental findings of fact in his RO on Remand have rendered moot the Authority's contention that IMC's applications are not substantially complete.

I further conclude that the Authority's focus at this stage of these proceedings on the purported incompleteness of IMC's OFG applications is misplaced. A formal administrative proceeding is not merely a review of prior agency action, but is a *de novo* proceeding intended to formulate final agency action; and the parties are allowed to present additional evidence to the ALJ not included in the permit application and other documents previously submitted to DEP during the permit application review process. See, e.g., Hamilton County Commissioners v. State Dept. of Environmental Regulation, 587 So.2d 1378, 1387 (Fla. 1st DCA 1991); Florida Dept. of Transportation v. J.W.C.

Company, Inc., 396 So.2d 778, 785 (Fla. 1st DCA 1981).

What IMC did or failed to do during the process of the agency review of IMC's applications is not the dispositive issue in these *de novo* proceedings. The dispositive issue is whether the evidence presented at the DOAH hearings provide reasonable assurance that IMC's proposed activities at OFG will not violate applicable environmental and phosphate mine reclamation standards. See McDonald v. Dept. of Banking and Finance, 346 So.2d 569, 584 (Fla. 1st DCA 1977); Clarke v. Melton, 12 F.A.L.R. 4946, 4949 (Fla. DER 1990). Much expert testimony and numerous additional documents supporting IMC's proposed activities at OFG were admitted into evidence and considered by the ALJ in these formal proceedings that were not available to the DEP staff during their prior agency review of IMC's applications at issue.

For the above reasons, Exception III is denied.

Exception IV. Presumption of Entitlement to Permits

The Authority's fourth Exception appears to object to Conclusion of Law 924 and underlying factual findings of the ALJ in the RO. In paragraph 924, the ALJ concludes that IMC has substantially complied with the permitting and approval criteria applicable to the proposed OFG project. The Authority contends that the ALJ's challenged conclusion and related factual findings "improperly create a presumption of entitlement to permits." I find this contention to be unfounded.

There is nothing in the RO that rejects or violates the administrative law principle that, when an agency decision is challenged in a *de novo* administrative proceeding, this decision becomes preliminary agency action carrying no presumption of correctness before the ALJ or the agency head reviewing a recommended order. See

J.W.C. Company, 396 So.2d at 789. Instead, I construe the ALJ's RO to affirm the long-established evidentiary requirement that IMC, as the permit applicant, was required to provide reasonable assurance by a preponderance of evidence that its proposed activities at OFG will not violate applicable regulatory standards. IMC presented the testimony of 12 expert witnesses in support of the OFG project at the final hearing and had in excess of 700 exhibits admitted into evidence. At the remand hearing, IMC called three expert witnesses and had in excess of 40 exhibits admitted into evidence.

The Authority's related argument that it was improper for DEP officials to work with IMC representatives in an effort to improve the quality of its applications and reduce adverse impacts to the environment of the proposed mining and reclamation activities at OFG is likewise unfounded. It is undisputed that, IMC's proposed OFG project is within the boundaries of the Southwest Florida Water Management District ("SWFWMD"). Thus, in order to be entitled to issuance of the Revised ERP, IMC must demonstrate compliance with those applicable conditions for issuance of ERPs, identified by the Petitioners as being in controversy, located in Rules 40D-4.301 and 40D-4.302, F.A.C., and the portions of SWFWMD's related Basis of Review for ERP Applications ("BOR") adopted by reference in DEP Rule 62-330.200(3), F.A.C.

BOR 3.2.1 directs that design modifications to reduce or eliminate adverse impacts of a proposed ERP project "must be explored." BOR 3.2.1 also expressly authorizes DEP to "suggest mitigation, to offset the adverse impacts which would cause the [proposed] system to fail to meet the conditions for issuance." Furthermore, BOR 3.2.1.3 clearly charges both DEP and IMC with the duty of "mutual consideration of modification and mitigation" that would "result in a permittable system."

These cited BOR provisions seem to properly implement the legislative and judicial preference noted by the ALJ that, before denying an ERP application, DEP take the initiative and advise a permit applicant of specific changes and/or mitigation that might make the proposed activity permittable. See § 373.414 (9), Fla. Stat., and 1800 Atlantic Developers v. Dept. of Environmental Regulation, 552 So.2d 946, 954-955 (Fla. 1st DCA 1989).

In view of the above rulings, the Authority's Exception IV is denied.

Exception V. Elimination and Reduction of Impacts

The Authority's fifth Exception takes issue with Conclusions of Law 864, 867, and 868 in the RO dealing with the issue of "elimination and reduction of impacts" to the environment at OFG as posited in the provisions of BOR 3.21 through 3.2.1.3. The ALJ correctly observed in paragraph 868 that, unlike most other activities regulated by DEP, the extraction of phosphate ore inevitably results in some disturbance to the environment at the mine site. Phosphate mining is expressly sanctioned by statute, even though the Legislature acknowledges that it is not possible to extract phosphate "without disturbing the surface areas and producing waste materials." See § 378.202, Fla. Stat. Thus, proof of the "elimination" of all adverse impacts to the environment due to phosphate mining at the OFG site is not required in order for IMC to be entitled to the issuance of the Revised ERP and approval of the Revised CRP.

With respect to the BOR requirement of "reduction" of adverse impacts to the environment at OFG, the ALJ concludes in paragraphs 864 and 866 that IMC's revision of the OFG project design to delineate the "no-mine area" within OFG and the adoption of other safeguards, such as the ditch and berm system, satisfies this requirement "to

the extent practicable." I find the ALJ's challenged conclusions to be supported by competent substantial evidence of record, including the expert testimony at the final hearing of Deidre Allen, Richard Cantrell, Robert Kinsey, and Janet Llewellyn. I decline to reweigh the expert testimony of record and draw factual inferences supporting the Authority's contentions as suggested in this Exception when the ALJ did not do so.

The ALJ made the unchallenged findings that IMC reduced the adverse impacts of its proposed mining activities at OFG during the application review process by enlarging the no-mine area to include not only Horse Creek proper, but "nearly all of the portions of the natural stream channel tributaries to Horse Creek present in the portions of the Parcel that have not been converted to improved pasture. The amendments thus avoid disturbing four additional natural stream segments." (RO, ¶ 76)

At the time DEP issued its Notices of Intent to issue the Revised ERP, CRP, and WRP, this "no-mine" area was initially approximately 720 acres in size and constituted about 17 percent of the entire OFG site. (RO, ¶ 104) However, subsequent changes during the course of these proceedings, including IMC's agreement to not mine the Stream 1e area (approximately 46 acres) has increased the size of the OFG no-mine area to approximately 789 acres. (Table 12A1-1) Further reductions of adverse impacts of the mining activities at OFG occurred as the result of IMC's agreements to restore Stream 3e and to utilize a consolidated crossing at Stream 1ee, rather than the multiple crossings initially proposed at Stream1ee/Stream 2e. (ROR, ¶¶ 1-8, 32-33)

Based on the above, the Authority's Exception V is denied.

Exception VI. Cumulative Impacts

Exception VI appears to object to Conclusion of Law 863 of the RO where the ALJ concludes:

> Unmitigated, the proposed activities [at OFG] would require the analysis of adverse cumulative impacts; however, the proposed mitigation is in the Peace River basin, so, if DEP deems the mitigation adequate, cumulative impacts are irrelevant by statute. If DEP deems the mitigation inadequate, cumulative impacts are irrelevant because DEP must deny the ERP anyway.

The statute being construed by the ALJ in paragraph 863 is § 373.414(8)(b), Fla. Stat., which reads in pertinent part that:

> If an applicant proposes mitigation within the same drainage basin as the adverse impacts to be mitigated and the mitigation offsets these adverse impacts, the . . . department shall consider the regulated activity to meet the cumulative impact requirements of paragraph(a).

I find the ALJ's interpretation of § 373.414(8)(b) to be entirely consistent with prior agency interpretations of this statute by DEP and the St. John's River Water Management District, which interpretations have been upheld by two Florida appellate courts. See Manasota-88, Inc. v. IMC Phosphates Company, 25 F.A.L.R. at 868, 873, *aff'd. per curiam*, 865 So.2d 483 (Fla. 1st DCA 2004); Sierra Club v. St. Johns River Water Management Dist., 816 So.2d 687, 692-694 (Fla. 5th DCA 2002). I thus concur with the ALJ that the plain language of § 373.414(8)(b) renders unnecessary a review of the cumulative impacts of the OFG project located in the Peace River Basin, if IMC's proposed mitigation in the same Peace River Basin is determined to be sufficient. The issue of the sufficiency of IMC's mitigation is addressed later in this Final Order.

The argument that a cumulative impacts review of the OFG project should have been conducted, notwithstanding the provisions of § 373.414(8)(b), is also raised in

Charlotte County's Exception III. The subsequent rulings denying Charlotte County's Exception III are incorporated by reference herein.

In light of the above rulings, the Authority's Exception VI is denied.

Exceptions VII. Acre-for-Acre, Type-for-Type and Revegetation

This Exception objects to the ALJ's Conclusion of Law 903 construing the "acre-for-acre and type-for-type" provisions of Rule 62C-16.0051(4), F.A.C. The arguments raised by the Authority herein are also raised in more detail in Charlotte County's Exceptions V and VI. The subsequent rulings in this Final Order denying Charlotte County's Exceptions V and VI are adopted and incorporated by reference herein, and the Authority's Exception VII is also denied for the same reasons.

Exception VIII. Maintain or Improve Water Quality

This Exception of the Authority objects to the ALJ's Conclusions of Law 850-852 dealing with the interpretation of the "maintain or improve water quality" provisions of § 373.414(6)(b), Fla. Stat. The Authority argues that Conclusions of Law 850-852 are erroneous, to the extent they suggest the "will not be harmful to the water resources" provisions of § 373.414(1), Fla. Stat., cover the same subject as § 373.414(6)(b).

The Authority essentially argues that the provisions of § 373.414(6)(b) should be interpreted to disallow any impacts of IMC's proposed wetlands restoration activities that would lower the water quality of the Class III wetlands and other surface waters at issue in these proceedings, even if these wetlands and other surface waters are still in compliance with applicable Class III water quality standards. In their Responses to Exceptions, DEP and IMC suggest that this statutory construction should be rejected because it would require DEP to apply the "antidegradation" standards of Rule 62-

4.242(2), F.A.C., limited by rule to Outstanding Florida Waters ("OFWs"), to all other classes of waters affected by wetlands reclamation activities within the purview of § 373.414(6)(b).

The Authority has not cited to any administrative or judicial decisions holding that the OFW "antidegradation" standards of Rule 62-4.242(2) should be applied to the mitigation provisions of § 373.414(6)(b), in a factual situation where no OFWs are located within the area involved in the proposed wetlands reclamation activities. I am also unaware of any precedent for such "heightened" agency scrutiny of impacts to non-OFW wetlands.

The established agency interpretation of § 373.414(6)(b), as explicated at the final hearing by DEP Deputy Director of Water Resource Management, Janet Llewellyn, is that an applicant can meet the "maintain or improve water quality" provisions of this mitigation statute, so long as the water quality of the wetlands at issue will not be degraded below the applicable water quality standards for that class. (Tr. Vol. 28, pp. 03850-53, 03874) I find this DEP agency interpretation of a statute within its regulatory jurisdiction to be a permissible interpretation that is not clearly erroneous, and it is adopted. This agency interpretation of § 373.414(6)(b) is also discussed in more detail in the subsequent rulings on DEP's Exception I and IMC's "Exceptions to Conclusions of Law Regarding 373.414(6)(b)," which rulings are incorporated by reference herein.

Based on the above rulings, the Authority's Exception VIII is denied.

Exception IX. Conditions for Issuance

In this Exception, the Authority contends that the ALJ failed to consider all the "conditions for issuance" of the Revised ERP. However, the Authority does not clearly

identify the disputed portion of the RO by page number or paragraph as required by § 120.57(1)(k), Fla. Stat. Moreover, most of the arguments raised by the Authority are also raised in much more detail by Charlotte County in its 20-page long Exception II. The subsequent rulings denying Charlotte County's Exception II are adopted and incorporated by reference herein and the Authority's similar arguments are rejected.

I also reject the Authority's suggestion that the ALJ failed to consider its "property interest" arising out of the Authority's claim that the OFG project will reduce the streamflow of the Peace River and impair its right to withdraw water from the Peace River. In Findings of Facts 661 and 687 of the RO, the ALJ found that any adverse impact of the proposed activities at OFG to the streamflow of the Peace River will be negligible, representing the same reduction in streamflow cause by a decrease in average rainfall of less than 0.01 inches of rain. These factual findings of the ALJ, unchallenged by the Authority, are supported by the testimony of IMC's hydrology expert, Dr. Garlanger.

In Finding of Fact 692, the ALJ also cites with approval to Dr. Garlanger's opinion testimony that the reduction in streamflow of the Peace River in recent years is "mostly due to reduced rainfall," not phosphate mining in the region. In Finding of Fact 693, the ALJ also expressly discredits the opposing expert testimony of Charlotte County's hydrologist, Phillip Davis. The decision of the ALJ to accept the expert testimony of Dr. Garlanger over that of Mr. Davis is an evidentiary matter beyond the substantive jurisdiction of this agency under § 120.57(1)(l), Fla. Stat.

Finally, I would note that this is not the first case in which the Authority has claimed that its "property interest" in withdrawing potable water from the Peace River

would be adversely affected by proposed phosphate mining activities in the Manatee/Hardee Counties region where Horse Creek and its tributaries are located. The same property interest claim was asserted by the Authority and rejected in the Manson-Jenkins case where the Authority and Charlotte County unsuccessfully challenged an IMC phosphate mining application at another site in the Horse Creek vicinity. See Manasota-88, Inc. v. IMC Phosphates Company, 25 F.A.L.R. at 896, 933, *aff'd. per curiam*, 865 So.2d 483 (Fla. 1st DCA 2004) (approving DEP's issuance of the phosphate mining permit to IMC).

For the above reasons, the Authority's Exception IX is denied.

Exception X. Adoption of Exceptions Filed by Other Petitioners

The Authority's final Exception consists of an adoption of and joinder in "all exceptions filed by all other petitioners and intervenors, but only to the extent that such exceptions are not contrary to the Authority's exceptions." I conclude that this generic "adoption by reference" Exception fails to comply with § 120.57(1)(k), Fla. Stat., requiring exceptions to: clearly identify the disputed portion of the recommended order by page number or paragraph; identify the legal basis for the exception; and to include appropriate and specific citations to the record. I thus decline to rule on the Authority's Exception X as authorized by § 120.57(1)(k). In any event, all the Exceptions filed by other Petitioners and the Intervenor deemed to be critical to the ultimate reasonable assurance determination in these proceedings are denied in this Final Order.

RULINGS ON CHARLOTTE COUNTY'S EXCEPTIONS TO THE RO

Preface

As a preface to the rulings on Charlotte County's Exceptions to the RO, I would note two recurring themes in the County's attacks on the ALJ's RO. The first theme is that the RO does not adequately analyze the standards set forth in various ERP rules because the ALJ may have failed to cite to specific rules by name and number, even though the substantive matters set forth in the respective rules are addressed at length in the RO. Examples of this course of attack on the legal sufficiency of the RO are the County's contentions that the ALJ did not adequately address compliance with Rules 40D-4.301(1)(a) and 40D-4.301(1)(b), F.A.C., proscribing adverse water quantity impacts and adverse flooding.

Nevertheless, the RO now on administrative review contains a comprehensive 50-page hydrological analysis by the ALJ of the proposed OFG project, in which the substantive issues of potential adverse impacts to water quantity and adverse flooding are thoroughly addressed. (RO, ¶¶ 619-753) I find no reversible error on the part of the ALJ in not citing to every arguable applicable rule by number. I am not aware of any Florida appellate decision holding a DOAH recommended order to be defective because it did not contain specific citations to applicable rules by number, when the substance of the rule provisions were addressed on their merits by the administrative law judge. Compare Accardi v. Dept. of Environmental Protection, 824 So.2d 992, 996 (Fla. 4th DCA 2002) (concluding that a petition for administrative hearing containing the substance of the rules allegedly at issue was sufficient, even though the rule provisions were not identified by rule numbers).

A second recurring theme is Charlotte County's implicit assumption that it is the ultimate responsibility of the ALJ to ensure that each of the many ERP criteria and performance standards set forth in Rules 40D-4.301 and 40D-4.302 and the BOR are specifically addressed in the RO. In its seminal J.W.C. Co. opinion on Florida administrative law, the court concluded that a permit challenger can not, by filing a petition for administrative hearing, require the applicant to "completely prove anew" every item in a permit application down to the last detail. J.W.C. Co., 396 So.2d at 778. The J.W.C. Co. court also ruled that the burden is on the permit challenger to "identify the areas of controversy." Id. at 789.

Due to the length of the final hearing (eight weeks) and the RO (418 pages), and the extensive oral and documentary evidence in the record, it is difficult to determine what specific "areas of controversy" were actually identified by Charlotte County and properly presented to the ALJ for his consideration at the final hearing. I would note that the portion of the parties' Joint Prehearing Stipulation titled, "A Concise Statement of Those Issues of Law on Which There is Agreement," identifies Chapters 373, 378 and 403, Fla. Stat., and the rules and case law pursuant thereto. Chapter 373, alone, covers almost 150 pages of the Florida Statutes and deals with such diverse topics as regulation of wells and finance and taxation. Also, the portion of the Prehearing Stipulation titled, "A Concise Statement of Those Issues of Law That Remain for Determination by the Administrative Law Judge," contains a generic statement by Charlotte County and the other Petitioners that they contend the issue in this case is whether IMC's applications for the ERP, CRP, and WRP "should be granted by DEP."

Exception I. The ALJ Employed the Wrong Standard of Review.

Charlotte County's first Exception objects to Conclusions of Law 783 through 791 of the RO. In these legal conclusions, the ALJ analyzes the Florida case law defining the respective roles of DOAH hearing officers (now "administrative law judges") and DEP and its predecessor agency, the Department of Environmental Regulation ("DER"), regarding the issue of the sufficiency of mitigation offered by a permit applicant to offset adverse environmental impacts of a proposed project.

I find Charlotte County's title of this Exception, "The ALJ employed the wrong standard of review," to be misleading. As discussed above, it is a basic rule of Florida administrative law that a formal proceeding before a DOAH administrative law judge is not a review of prior agency action, but is a *de novo* proceeding. See, e.g., Hamilton County Commissioners, 587 So.2d at 1387; McDonald, 346 So.2d at 584 (concluding that a formal proceeding is intended to formulate final agency action and not to review action "taken earlier and preliminarily"). Thus, the ALJ did not function in a "review" capacity at the DOAH hearings in the cases now on administrative review.

I also conclude that the ALJ's references in his Conclusion of Law 786 to the language in the last sentence of former § 403.92, Fla. Stat. (1985), and the fifth sentence of current § 373.414(9), Fla. Stat., are legal dicta because DEP has not issued a "notice of intent to deny or a permit denial" in these consolidated proceedings. Accordingly, the portion of Charlotte County's Exception I dealing with the ALJ's interpretations of former § 403.92, Fla. Stat. (1985), and current § 373.414(9), Fla. Stat., are irrelevant to the disposition of this case. See, e.g., Adult World, Inc. v. Div. of Alcoholic Bev. and Tobacco, 408 So.2d 605, 607 (Fla. 5th DCA 1982); Conservancy,

Inc. v. A. Vernon Allen Builder, 12 F.A.L.R. 2582, 2589-90 (Fla. DER 1990).

Finally, I agree with the ALJ's ultimate legal conclusion in paragraph 791 that he is only responsible for any subordinate factual disputes involving the mitigation offered by IMC; and the ultimate determination of the adequacy or sufficiency of this mitigation is a matter to be decided by this agency. See Save Anna Maria, Inc. v. Dept. of Transportation, 700 So.2d 113, 116 (Fla. 2d DCA 1997); 1800 Atlantic Developers, 552 So.2d at 955 (concluding that DEP has "exclusive final authority" to determine the sufficiency of mitigation proposed by a permit applicant). Charlotte County's suggestion that the seminal 1800 Atlantic Developers opinion, defining the respective mitigation evaluation responsibilities of DOAH hearing officers and the referring environmental agencies, has been at least partially superceded due to differences in the language between former § 403.92, Fla. Stat. (1985), and current § 373.414(9), Fla. Stat. is not persuasive. Although the language of the first sentence of former § 403.92 and the fifth sentence of current § 373.414(9) are not identical, I construe these two statutory provisions to be substantively equivalent.

In view of the above rulings, Charlotte County's Exception I is denied.

Exception II. The ALJ Failed to Adequately Address the Conditions for Issuance.

In this omnibus Exception, containing 12 subsections and extending over 22 pages, Charlotte County contends that the ALJ "failed to adequately address the conditions for issuance" of the OFG Revised ERP and CRP. I conclude at the outset that Charlotte County's Exceptions II (a) through (l) are subject to denial on the procedural basis they do not comply with subsection 120.57(1)(k), Fla. Stat., requiring an exception to identify the disputed portion of the recommended order by page number

or paragraph. In its Exceptions II (a) through (l), the County does not take exception to any specific findings or conclusions of the ALJ in the existing RO. Rather, these Exceptions all assert that the ALJ purportedly erred by not making additional rule interpretations, which the County argues are essential to the determination of whether IMC has provided the necessary reasonable assurances in these proceedings.

Under the Florida APA, an agency has the authority to adopt the recommended order as the agency final order, modify or reject specific findings or conclusions of the ALJ under certain conditions, or remand the matter to DOAH for further proceedings, if necessary. See § 120.57(1)(l), Fla. Stat.; Collier Development Corp. v. Dept. of Environmental Reg., 592 So.2d 1107 (Fla. 2d DCA 1991); Cohn v. Dept. of Professional Reg., 477 So.2d 1039 (Fla. 3d DCA 1985). In these Exceptions, Charlotte County does not request that the RO be adopted as the DEP final order or that any specific findings or conclusions of the ALJ be modified or rejected. Thus, these Exceptions actually support the need for a remand of these proceedings to DOAH for further findings of fact by the ALJ as was done pursuant to my LRO entered on August 5, 2005.

In any event, in order to facilitate a possible appellate determination that Charlotte County is entitled to rulings on the substance of these Exceptions, they are considered on their merits as follows:

IMC must demonstrate in these proceedings that the OFG project will comply with those applicable Revised ERP conditions for issuance, which were timely identified by the Petitioners in the DOAH proceedings as being in controversy. As discussed in the above ruling denying the Authority's Exception IV, the OFG project is located within the boundaries of the SWFWMD. Consequently, the pertinent conditions for issuance

at issue here are found in Rules 40D-4.301 and 40D-4.302, F.A.C., and the portions of SWFWMD's related BOR adopted by reference by DEP pursuant to Rule 62-330.200(3), F.A.C.

(a) Introduction - Charlotte County first argues that the BOR does not address all the requirements of Rules 40D-4.301 and 40D-4.302. There appears to be no indication in the record that the County raised this issue in the DOAH proceedings, and I decline to find error on the part of the ALJ for not addressing an issue not presented for his consideration. In any event, Rule 40D-4.301(3) expressly states that the "standards and criteria contained in the BOR shall determine whether the reasonable assurances required by subsection 40D-4.301(1) and Section 40D-4.302, F.A.C., have been provided." Also, there is no indication in the record that all the provisions of Rules 40D-4.301 and 40D-4.302 are applicable to the OFG project. For instance, the parties' Joint Prehearing Stipulation contains an agreement that Rules 40D-4.301(1)(k) and 40D-4.301(1)(a)6, F.A.C., do not apply to IMC's Revised ERP application. In addition, the County's reliance on BOR 1.1 is misplaced because this BOR provision has not been adopted by DEP. See Rule 62-330.200(3)(e), F.A.C.

(b) & (c) Water quantity impacts and flooding - Charlotte County's contentions that the RO does not adequately address compliance with Rules 40D-4.301(1)(a) and 40D-4.301(1)(b), proscribing adverse water quantity impacts and adverse flooding, are not compelling. The RO contains an extensive hydrological analysis of the proposed OFG project by the ALJ exceeding 50 pages in length. (RO, ¶¶ 619-753) In this detailed analysis, the ALJ frequently favors the expert testimony of IMC's hydrologist, Dr. John Garlanger, over the opposing expert testimony of Charlotte County's

hydrologists, Philip Davis and John Loper. In paragraph 646, the ALJ observed: "Dr. Garlanger has vast experience in the phosphate mining industry and thus [has] a clear advantage in projecting, as he has since 1974 at several hundred projects, peak discharges and streamflow."

The ALJ thus frequently found Dr. Garlanger to be the more credible expert witness and often placed more weight on his hydrological testimony than that of Davis and Loper. (RO, ¶¶ 642, 644, 663, 689, 692, 693, 733, 745) As noted above, the resolution of conflicting expert testimony is an evidentiary matter generally within the substantive jurisdiction of the DOAH administrative law judges, rather than agency heads reviewing recommended orders.

Relying heavily on Dr. Garlanger's expert testimony, the ALJ found that:

> a. Dr. Garlanger reasonably concluded that mining would not adversely affect the flow of Horse Creek at State Road 64 or dehydrate wetlands in the no mine area . . . . Farther downstream at State Road 72, Dr. Garlanger calculated projected streamflow reductions during mining . . . and after reclamation . . . to be too small to measure. . . . Downstream at the confluence of Horse Creek and the Peace River at Ft. Ogden, Dr. Garlanger calculated that the reduction in streamflow would be equivalent to the reduction caused by a decrease of 0.01 inches of rainfall in the Peace River Basin. (RO, ¶¶ 685-687)
>
> b. Dr. Garlanger makes a good case that the streamflow of the Peace River is down about 500 cfs, mostly due to reduced rainfall amounts. . . . By contrast, Mr. Davis unconvincingly attributed a three-inch reduction in streamflow at the South Prong Alafia River to phosphate mining. (RO, ¶¶ 692-693)
>
> c. Examining the evidence in the backdrop of a record almost devoid of failures that have resulted in flooding, it proved impossible not to credit Dr. Garlanger's assurances about peak discharges. (RO, ¶ 644)
>
> d. IMC's proposed ditch and berm system will prevent adverse flooding during mining . . . . and the failure of the ditch and berm system is highly improbable. (IRO, ¶¶ 744-745)

(d) Surface water storage and conveyance - Charlotte County next asserts that the RO does not adequately address the "adverse impacts to surface water storage and conveyance" provisions of Rule 40D-4.301(1)(c), F.A.C. The implementing language of BOR 4.4 disallows a "net encroachment into the flood plain, up to that encompassed by the 100-year event, which will adversely effect either conveyance, storage, water quality or adjacent lands." As discussed in the preceding ruling, however, the ALJ found that IMC's ditch and berm system at OFG will not cause flooding or create adverse water quantity impacts during or after reclamation. The ALJ also found in paragraphs 752-753 of the RO that the very small increases in post-reclamation peak discharges downstream of where Horse Creek leaves the OFG site "could not be characterized as adverse"; and "there will be no [post-reclamation] loss of floodplain storage, especially at the lower elevations."

Charlotte County's argument assumes that Rule 40D-4.301(1)(c) requires IMC to provide reasonable assurance that its mining activities at OFG will not cause any temporary adverse surface water storage and conveyance impacts to the 100-year floodplain of Horse Creek and its on-site tributaries, even during the phosphate-mining phase. I would note that the ALJ's significant finding that IMC has agreed not to mine any portion of Horse Creek and its associated 100-year floodplain located on the OFG site has not been challenged by any party. (RO, ¶ 437)

In any event I reject Charlotte County's assertion that I must conclude that IMC failed to provide reasonable assurances that the OFG project will comply with Rule 40D-4.301(1)(c) because the RO does not address all temporary on-site surface water storage and conveyance impacts to the 100-year floodplain of Horse Creek and its

tributaries during the mining phase at OFG. Such rule interpretation would be inconsistent with the plain language of § 378.202, Fla. Stat., where the Legislature has approved phosphate mining subject to mandatory land reclamation, yet acknowledging that the mining will temporarily "disturb the surface areas." This rule interpretation would also be inconsistent with the wetlands mitigation provisions of § 373.414(6)(b), Fla. Stat., which are predicated on the assumption there will be some temporary adverse impacts to wetlands resulting from approved phosphate mining.

(e) Impacts to fish and wildlife - Charlotte County's contention that the RO does not adequately analyze Rule 40D-4.301(1)(d), F.A.C., ignores significant unchallenged factual findings of the ALJ in the portion of the RO titled "Wildlife Management and Habitat." The ALJ found that: (1) IMC's wildlife management plans are reasonable accommodations of wildlife that presently use OFG; (2) in general, the reclamation of OFG will improve the value of the area for wildlife; (3) the increased breadth of riparian wetlands [at OFG] will improve wildlife utilization; and (4) IMC's reclamation plan also serves the often-overlooked needs of amphibians. (RO, ¶¶ 758-761) Charlotte County also concedes that, in paragraph 912 of the RO, the ALJ concluded that "all water within wetlands and other surface waters [at OFG] will be of sufficient quality to allow recreation and support fish and wildlife."

Neither Charlotte County nor any other party filed Exceptions to Findings of Fact 758-761 and Conclusion of Law 912 of the RO. These findings and conclusion of the ALJ thus arrive on administrative review with a presumption of correctness and they are deemed to constitute the necessary reasonable assurance for compliance with the fish and wildlife provisions of Rule 40D-4.301(1)(d).

(f) Impacts to water quality - Charlotte County claims that the RO does not analyze the "water quality" standards provisions of Rule 40D-4.301(1)(e), F.A.C., while quoting from the ALJ's Conclusion of Law 912 asserting in part that "IMC will not violate water quality standards for waters leaving OFG or waters of the State within OFG." This ultimate conclusion of the ALJ in paragraph 912 is amply supported by his related water quality findings in paragraphs 754-757 of the RO, none of which were objected to by Charlotte County or any other party. I thus conclude that these unchallenged factual findings of the ALJ, which I must assume to be correct, and his related Conclusion of Law 912 that necessarily flows from these unchallenged findings, are sufficient to support a determination that IMC has provided the necessary reasonable assurance for compliance with the water quality provisions of Rule 40D-4.301(1)(e).

Charlotte County relies on the ALJ's other legal conclusions that water quality standards would be violated, if not mitigated; and IMC's proposed mitigation is insufficient primarily because of its intention to mine the relatively pristine Stream 1e series in the northern portion of the OFG site. However, these mitigation concerns of the ALJ have been eliminated due to IMC's subsequent agreements to comply with the ALJ's recommendations to move the Stream 1e series, its related wetlands and 25-year floodplain (approximately 46-acres) into the OFG "no-mine" area; and to reclaim Stream 3e. (LRO, pages 8-9; ROR, ¶¶ 1, 19, 32)

The former water quality and other concerns of the ALJ related to IMC's initial proposal to mine this Stream 1e area of the OGF site and to not reclaim Stream 3e have been resolved in favor of considerably more protection for the environment. I thus conclude that IMC's mitigation/reclamation plans for the OFG Project as modified during

these proceedings, including remand, comply with the requirements of §§ 373.414(6)(b) and 373.414(8)(b), Fla. Stat., and they are approved.

(g) Secondary impacts - Charlotte County's argument that the RO does not analyze the "secondary impacts" provisions of Rule 40D-4.301(1)(f), F.A.C., is rejected on its merits for the reasons set forth in more detail in the subsequent ruling denying Charlotte County's Exception VIII, which ruling is incorporated by reference herein.

(h) Minimum flows and levels - In this Exception, Charlotte County suggests that, with respect to the Peace River, the RO is deficient in not analyzing Rule 40D-4.301(1)(g), F.A.C., proscribing activities that adversely impact surface or ground water flows or levels. However, the ALJ correctly found in paragraphs 635 and 797 of the RO that the SWFWMD has not established any minimum flows or levels for Peace River to date; and this critical fact is not even contested by Charlotte County or any other party to these proceedings.

Instead, Charlotte County argues that SWFWMD has officially established a minimum flow for the Peace River based on a permit condition in a prior water use permit issued to the Authority. This "minimum flow by permit" argument has been twice presented by Charlotte County and twice rejected by DOAH administrative law judges, this agency, and the appellate courts in prior challenges to other proposed IMC phosphate mining projects in the region. See Charlotte County v. IMC, 25 F.A.L.R. at 4710-4711, *aff'd*, 896 So.2d 756 (Fla. 2d DCA 2005); Manasota-88, Inc. v. IMC, 25 F.A.L.R. at 934, *aff'd*, 865 So.2d 483 (Fla. 1st DCA 2004). I find no compelling reason to recede from the rulings in the above-cited cases, both of which have been affirmed

on appeal, that minimum flows and levels authorized by § 373.042, Fla. Stat., must be established by duly adopted agency rules, not on a case-by-case permit basis.

(i) Works of the District - This contention that the RO is deficient in not addressing the "works of the District" provisions of Rule 40D-4.301(1)(h), F.A.C., as they relate to Horse Creek, is a modified version of another Charlotte County argument that has been twice-rejected in the above-cited cases. Charlotte County v. IMC, 25 F.A.L.R. at 4712; Manasota-88, Inc. v. IMC, 25 F.A.L.R. at 934-935. I agree with the Responses of DEP and IMC asserting that a proper consideration of the water quality and quantity impacts of the OFG project on Horse Creek and the Peace River under Rule 40D-4.301, F.A.C., does not require a separate "Works of the District" analysis.

It is correct that the ALJ did conclude that Horse Creek is "probably" a Work of the District. Nevertheless, I again note that the Revised ERP application for the OFG project excludes any mining of Horse Creek and its associated 100-year floodplain. Furthermore, the water quality and water quantity impacts on Horse Creek of IMC's proposed activities at OFG were thoroughly addressed in the RO, as discussed in my prior rulings rejecting the County's contentions in Exceptions II.b, II.c, and II.e. This contention is likewise rejected.

(j) Capability of the project to be effectively performed - Charlotte County contends here that the RO does not adequately analyze Rules 40D-4.301(1)(i), and 40D-4.301(1)(j), F.A.C. Rule 40D-4.301(1)(i) requires a proposed ERP activity to be "capable, based on generally accepted engineering and scientific principles of being effectively performed and functioning as proposed." Rule 40D-4.301(1)(j) requires the proposed ERP activity to "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."

I find that the ALJ's major concerns expressed in the RO over whether the OFG Project could be effectively performed and function as proposed were subsequently resolved on remand and codified in the ROR by: (1) IMC's agreements to comply with the ALJ's recommendations to move the Stream 1e system into the OFG "no-mine" area and to reclaim Stream 3e; (2) the ALJ's findings in the ROR on the consolidated crossing at Stream 1ee; and (3) clarification of the OFG closed basin/open basin and recharge well system issues.

I further find that the ALJ's primary concern over whether IMC had the financial capability of ensuring that the OFG Project will be undertaken in accordance with the permit conditions was based on Charlotte County's contention that IMC had the legal obligation to provide up-front financial assurances to ensure that the sand necessary to backfill all the mine cuts at OFG, including upland areas, would be available when needed. However, as discussed in the LRO, the phosphate land reclamation provisions of Ch. 16C-16, F.A.C., define sand tailings generated at and removed from the mine site as "waste" and treat their ultimate disposition as "waste disposal."

I thus reaffirm my interpretation of these DEP rules to exclude from the costs for which IMC must provide ERP financial responsibility, the estimated costs of sand tailings generated from the normal OFG mining operations, transported to Ft. Green Mine for separation from the phosphate ore, and returned to OFG for reclamation and restoration purposes. I have no current statutory or rule authority to order IMC to provide up-front financial assurance for such waste disposal activities.

Based on my rulings in the LRO, the ALJ found in the ROR that: (1) ten times as much sand tailings will be excavated at OFG as will be required to reclaim wetlands and surface waters at OFG; (2) the OFG sand tailings will be reasonably available for use as backfill at OFG; and (3) no adjustments will need to be made to the Wetlands Mitigation Financial Summary previously submitted by IMC for the costs associated with sand tailings underlying the wetlands and surface waters to be reclaimed at OFG. (ROR, ¶¶ 22-28)

In view of the above, Charlotte County's contentions related to Rules 40D-4.301(1)(i), and 40D-4.301(1)(j), F.A.C., are rejected.

(k) The Public interest criteria - This portion of Charlotte County's Exception II contends that the RO does not adequately address the seven "public interest" criteria set forth in § 373.414(1)(a), Fla. Stat., Rule 40D-4.302(1)(a), F.A.C., and implemented in BOR 3.2.3. However, the only specific public interest criterion discussed in Exception II(k) is the second criterion dealing with "fish and wildlife." Charlotte County's assertion that the RO does not adequately address the issue of potential adverse impacts to "fish and wildlife" has been previously considered and rejected in the above ruling on Exception II(e).

Charlotte County again cites to a series of statutory and rule provisions and concludes that the RO is deficient because the ALJ failed to address each and every provision. Yet, there has been no serious contention in Charlotte County's Exceptions that the OFG project would: "adversely affect the public health, safety, and welfare" (first criterion); "adversely impact navigation" (third criterion); or "adversely affect fishing or recreational values" (fourth criterion). Charlotte County quotes from paragraph 875 of the

RO where the ALJ concludes that, if unmitigated, the proposed mining activities at OFG would fail the public interest test because "the unmitigated condition of the land would be permanent." However, as discussed above, due to the remand to DOAH and the ALJ's supplemental factual findings in his ROR, this Final Order does not determine that IMC's proposed mining activities at OFG will be "unmitigated." Consequently, the ALJ's stated public interest concerns in his RO have been subsequently rendered moot and are thus purely hypothetical.

(l) Conclusion – In its conclusion to Exception II, Charlotte County requests alternative relief. The County first requests that IMC's Revised ERP be denied as a matter of law. This request is denied because all of the County's above contentions have been rejected on both procedural and substantive grounds. The County requests, in the alternative, that this case be remanded to the ALJ for additional determinations based on the existing evidence. This request was granted, in part, and rejected, in part, by my remand of these proceedings to the ALJ for additional specified findings.

Based on the above rulings, Charlotte County's Exceptions II.(a)-(l) are denied, except the County's alternative request that these proceedings be remanded to the ALJ, which remand was ordered in my LRO and has already been implemented by the ALJ.

III. The ALJ Erroneously Failed to Apply the Cumulative Impact Requirements

Charlotte County's third numbered Exception deals with the issue of whether the proposed OFG Project would have any adverse cumulative impacts upon surface water and wetlands. The County contends that the "ALJ erroneously failed to apply the cumulative impact requirements for the ERP." This same "cumulative impacts" contention was raised by the Authority and was rejected for the reasons set forth in

detail in the above ruling denying the Authority's Exception VI, which ruling is incorporated by reference herein.

I again conclude that the ALJ's interpretations of BOR Section 3.2.8 and the related cumulative impacts provisions of § 373.414(8)(b), Fla. Stat., are correct interpretations of the plain language of the cited rule and statute based on the material facts found by the ALJ. Those material facts, adopted in this Final Order, are that the adverse impacts to wetlands resulting from the proposed mining activities at OFG and the proposed mitigation to offset these adverse wetlands impacts are all situated within the same drainage basin, the Peace River Basin. The ALJ is thus correct in his conclusion in paragraph 863 of the RO that the cumulative impacts issue is irrelevant, if IMC's proposed mitigation is deemed to be sufficient in this Final Order. See Sierra Club, 816 So.2d at 692 (concluding that, once § 373.414(8)(b), F.S., is satisfied, "no further consideration of cumulative impacts is either necessary or allowed"). I have determined in this Final Order that IMC's proposed mitigation/reclamation plans for the OFG Project, as modified in these administrative proceedings, comply with the cumulative impact provisions of § 373.414(8)(b), Fla. Stat.

A major portion of this Exception consists of attempts to persuade the Secretary of DEP to overrule the ALJ on purely evidentiary matters, such as the admissibility of other evidence proffered by Charlotte County concerning purported cumulative impacts. This proffered evidence was excluded as the result of the ALJ's ruling granting IMC's motion *in limine* pertaining to the cumulative impacts issue. However, the Florida case law holds that the issue of admissibility of evidence in a formal administrative proceeding is a matter not within the "substantive jurisdiction" of a reviewing agency,

and an administrative law judge's ruling denying or granting evidence should not be rejected in an agency final order. Barfield v. Dept. of Health, 805 So.2d 1008, 1011-1012 (Fla. 1st DCA 2001).

Accordingly, Charlotte County's Exception III is denied.

Exception IV. Some of the ALJ's Proposed Permit Conditions for the ERP are not Supported by Sufficient Findings of Fact, and/or Require Additional Fact-finding.

This is another lengthy Exception by Charlotte County subdivided into several subsections. The substance of these multiple Exceptions set forth in the various subsections is that the additional permit conditions recommended by the ALJ in paragraph 884 of the RO were not supported by sufficient findings of fact and thus cannot be adopted in a DEP final order without additional factual findings being made. I agree with this basic conclusion of Charlotte County.

I conclude, however, that the concerns expressed in this Exception have been rendered moot by my rulings in the LRO, the additional evidence submitted at the hearing on remand, and the ALJ's supplemental factual findings in his 55-page ROR. I conclude in particular that the purported flaws in the Revised ERP and CRP related to IMC's initial plans to mine the Stream 1e series and to not reclaim Stream 3e, the dragline crossing issue, the closed basin-open basin issue, the proposed OFG recharge well system, the lack of hydrologist's fees for post-backfilling engineering work, and the sand tailings financial responsibility issue were remedied by my rulings in the LRO and by the subsequent DOAH proceedings on remand.

I also reaffirm my prior rule interpretations in the LRO that sand tailings excavated from the OFG site as a part of normal mining operations, transported to the Ft. Green Mine for separation from the phosphate ore, and returned to OFG for

reclamation and restoration purposes are included within the purview of "waste disposal" under Rule 62C-16.0051(8)(b), F.A.C. I thus have no authority to order IMC to provide financial responsibility for such "waste" materials under BOR 3.3.7.7.

Some of Charlotte County's concerns in this Exception IV are also addressed and resolved in my subsequent rulings on DEP's and IMC's Exceptions to the ALJ's Additional ERP and CRP Conditions, which rulings are adopted and incorporated by reference herein. In view of the above, Charlotte County's Exception IV is denied.

Exceptions V. and VI. The ALJ Erroneously Applied the Acre-for-Acre and Type-For-Type Restoration Requirements.

These related Exceptions object to the ALJ's Conclusions of Law 899-904 and 910. The primary issue addressed in these paragraphs of the RO and in Charlotte County's Exceptions is the ALJ's analyses of the "acre-for-acre and type-for-type" restoration provisions of Rule 62C-16.0051(4), F.A.C. In Conclusion of Law 910, the ALJ ultimately concludes that IMC's proposed wetlands restoration plans at OFG will comply with these acre-for acre and type-for type rule provisions.

Exception V.

Charlotte County first contends that the ALJ erred by not properly applying the "acre-for-acre" standard with respect to the Revised CRP plan for reclamation of streams at OFG. Charlotte County suggests that the ALJ's approval of IMC's proposal to reclaim disturbed streams at OFG, utilizing a "linear foot" restoration concept endorsed by DEP staff, does not comply with Rule 62C-16.0051(4), F.A.C. This contention is rejected for the following reasons:

1. The ALJ's unchallenged Finding of Fact 114 of the RO asserts in part that:

> As noted in Table 13A1-5, reclamation of streams, which is discussed in detail below, is based on length, not acreage, and under the circumstances, a linear measure is superior to an areal measure. (emphasis added)

Neither Charlotte County nor any other party to these proceedings has filed an Exception objecting to paragraph 114 of the RO. Consequently, these significant factual findings of the ALJ arrive on administrative review unchallenged and are presumed to be correct. See Couch v. Commission on Ethics, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); Dept. of Corrections v. Bradley, 510 So.2d. 1122, 1124 (Fla. 1st DCA 1987) (concluding that a party must alert a reviewing agency to any perceived defects in the findings of fact in a DOAH recommended order; and the failure to file exceptions with the agency precludes the party from arguing on appeal that the agency erred in accepting the facts in its final order).

2. Even if Charlotte County had filed a timely Exception to Finding of Fact 114 asserting that a linear measurement is superior to a measure by area in stream reclamation at OFG, this finding is supported by the expert testimony at the final hearing of Richard Cantrell, Deputy Director of DEP's Division of Water Resource Management. (Tr. 4144-4145, 4191) Furthermore, to the extent that this linear measurement approach to stream reclamation at OFG could be characterized as "incipient agency policy" or "non-rule policy," it is adequately explicated in the record by the expert testimony of DEP representative, Cantrell, and was appropriate for the ALJ to consider. See St. Francis Hospital v. Dept of Heath & Rehab. Services, 553 So.2d 1351, 1354 (Fla. 1st DCA 1989) (concluding that an agency may apply incipient or developing policy in an administrative proceeding, provided the agency "explicates, supports and defends

such policy" with competent, substantial evidence of record). Accord Anglickis v. Dept of Professional Reg., 593 So.2d 298, 300 (Fla. 2d DCA 1992).

3. The ALJ found that Horse Creek, the upper reaches of which are located within the boundaries of OFG, is the only long-term, reliable flowing water system between the Manatee River on the west and the Peace River on the east. (RO, ¶ 43) It is undisputed that IMC has agreed not to mine Horse Creek and its associated 100-year floodplain. (RO, ¶ 437) Thus, the only streams proposed to be mined and reclaimed by IMC in its Revised ERP were certain Horse Creek tributaries found by the ALJ to be intermittent streams, which cease to flow at times due to low rainfall. (RO, ¶ 231)

4. In addition, the ALJ found that the most ecologically important stream at the OFG site proposed to be mined in the Revised ERP application is the Stream 1e series located in the northern portion of the OFG tract. (RO, ¶¶ 878-879) In its Exceptions to the RO and other subsequent pleadings filed in these proceedings, IMC has agreed to accept the ALJ's recommendation that this Stream 1e series, its associated wetlands, and 25-year flood plain be moved to the "no-mine" area at OFG and not be disturbed. This recommendation of the ALJ to not mine the Stream 1e Series, its associated wetlands, and 25-year flood plain (as specifically identified in numbered ¶ 1 of the ROR) is adopted in this Final Order as an additional permit condition to the OFG Revised ERP. Thus, the potential adverse impacts of disturbances to streams and wetlands at the OFG site will be even less than originally projected in the ALJ's RO.

Exception VI.

This Exception deals primarily with the "type-for-type" wetlands restoration provisions of Rule 62C-16.0051(4), F.A.C. Charlotte County essentially contends that

the ALJ erred by not properly applying the Florida Land Use Cover Forms and Classification System ("FLUCFCS") in his consideration of IMC's mapping protocol of "wetlands" communities in connection with its proposed reclamation plan at OFG.

I disagree with the assertion of Charlotte County that the portion of Conclusion of Law 899 stating that the FLUCFCS Level II coding, distinguishing between herbaceous wetlands and forested wetlands, "does not work too well" is erroneous. I construe this portion of paragraph 899 of the RO to be nothing more than an observation by the ALJ that the utilization of the FLUCFCS Level II coding, by itself, is insufficient for determining compliance with applicable wetlands restoration requirements. The FLUCFCS Level II coding was expressly approved as the "starting point" for determining compliance with these Rule 62C-16.0051(4) type-for-type wetlands restoration provisions in two prior DEP final orders affirmed *per curiam* on appeal involving challenges by Charlotte County to other IMC phosphate mining applications in the region. See Charlotte County v. IMC Phosphates Company, 25 F.A.L.R. at 4725-4726, *aff'd*, 896 So.2d 756 (Fla. 2d DCA 2005); Manasota-88, Inc. v. IMC Phosphates Company, 25 F.A.L.R. at 881, *aff'd*, 865 So.2d 483 (Fla. 1st DCA 2004).

The issue raised by Charlotte County, and specifically rejected by the ALJ in his Conclusion of Law 901, is whether the next level of type-for-type wetlands restoration analysis should be FLUCFCS Level III. The ALJ concluded that the focus of the next level of analysis should be on the "function" of the wetlands system, rather than on the sub-categories of wetlands designated in FLUCFCS. Nevertheless, to the extent that the challenged portion of Conclusion of Law 899 could be construed as a total rejection by the ALJ of a FLUCFCS Level II analysis, even as starting point, it is rejected and

deemed to be "harmless error." I concur with the ALJ's ultimate conclusion in paragraph 910 of the RO that IMC's plan for restoration of disturbed wetlands at OFG will comply with the type-for-type standard of Rule 62C-16.0051(4), F.A.C.

The remainder of Charlotte County's contentions are rejected. I agree with the ALJ's disapproval of the County's continuing efforts to have FLUCFCS Level III classifications (further subdividing wetlands communities into subcategory levels) sanctioned as the basis for determining compliance with phosphate mining wetlands restoration requirements. The suggestion that a FLUCFCS Level III analysis should be required for determining compliance with wetlands restoration standards was also advocated by Charlotte County and expressly rejected by DEP in the 2002 Manson-Jenkins Final Order. See Manasota-88, Inc., 25 F.A.L.R. at 880-881, *aff'd*, 865 So.2d 483 (Fla. 1st DCA 2004)

The ALJ correctly concluded in paragraph 901 of the RO that utilization of these more detailed classifications in FLUCFCS Level III to determine type-for-type compliance would improperly emphasize "exact replication" of wetlands communities over the more appropriate concept of "natural function" restoration. The ALJ also correctly concluded that the "type-for-type" language of Rule 62C-16.0051(4), F.A.C., preceded the later-enacted provisions of §§ 373.414(6)(b) and 378.203(10), Fla. Stat., emphasizing the concept of restoring the natural "function" of wetlands disturbed by phosphate mining. (RO, ¶¶ 893-896) This argument giving priority to exact replication of vegetation types over natural function in the restoration of wetlands communities disturbed by phosphate mining activities was previously asserted by Charlotte County

and rejected by DEP in the Altman Final Order. See Charlotte County, 25 F.A.L.R. at 4726, *aff'd*, 896 So.2d 756 (Fla. 2d DCA 2005).

Based on the above rulings, Charlotte County's Exceptions V and VI are denied.

Exceptions VII and VIII

Charlotte County's related Exceptions VII and VIII deal with the issue of the propriety of the Revised Ft. Green WRP Modification given preliminary approval by DEP staff in February of 2004. (DEP Ex. 17) This Revised WRP Modification was requested by IMC to relocate certain approved reclaimed mitigation wetlands at its existing Ft. Green Mine site as the result of changes in the CSAs at Ft. Green to reflect the substantial reduction in 2004 of the proposed phosphate mining at OFG.

Exception VII - Charlotte County contends in this Exception that the ALJ was "confused" and erred by finding in paragraphs 364 and 365 of the RO that the two proposed CSAs (O-1 and O-2) on the Ft. Green Mine site will be reduced in size and relocated further away from Horse Creek. However, these challenged findings of the ALJ are amply supported by the expert testimony at the final hearing of Kevin Claridge, Orlando Rivera, and Stephen Partney (DEP specialists in CRP, ERP, and WRP matters); and by the rebuttal testimony of IMC's witness, Deidre Allen. The credibility of expert witnesses and the weight given to their testimony are evidentiary matters within the province of the ALJ; and such evidentiary matters cannot be altered by a reviewing agency, absent a complete lack of competent substantial evidence of record from which the findings could be reasonably inferred. See Collier Medical Center v. State, Dept. of HRS, 462 So.2d 83, 85 (Fla. 1st DCA 1985); Florida Chapter of Sierra Club v. Orlando Utilities Commission, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

Charlotte County attempts to discount the probative value of this expert testimony of the DEP permitting specialists and the related testimony of Ms. Allen concerning the proposed changes in the CSAs and related reclaimed mitigation wetlands at Ft. Green by suggesting that their analyses were based on "confusion" over the documents they were comparing. However, the sufficiency of the facts required to form an expert opinion normally resides with the expert and any purported deficiencies in such facts requires a weighing of the evidence, a matter also generally within the province of the ALJ, as the trier of the facts. Gershanik v. Dept. of Professional Regulation, 458 So.2d 302, 305 (Fla. 3rd DCA 1984), *rev. den.*, 462 So.2d 1106 (Fla. 1985). In any event, I find no apparent confusion or reversible error by the four witnesses (Claridge, Partney, Rivera, and Allen) in their analyses of the changes to the proposed CSAs and related relocation of reclaimed wetlands at the Ft. Green Mine resulting from the 2004 revisions to IMC's proposed phosphate mining activities at the nearby OFG site.

Consequently, the ALJ's findings in paragraph 365 of the RO that the previously approved CSAs at the Ft. Green Mine will be reduced in size and relocated further away from Horse Creek as a result of IMC's 2004 changes to the scope of the proposed phosphate mining at the OFG mine are based on competent substantial evidence of record, and I have no authority to reject them. Furthermore, the ALJ's related findings in paragraph 364 that the proposed changes in the CSAs and associated relocation of reclaimed wetlands at the Ft. Green Mine will result in a "strengthening of the already-approved mitigation and diminishing of the [adverse] impacts of the already-approved CSAs," and "will reduce the hydrological and biological [adverse] impacts from those

already permitted" are deemed to be reasonable inferences drawn by the ALJ from the testimony of Claridge, Rivera, Partney, and Allen.

Exception VIII.

Charlotte County's related Exception VIII deals with the potential "secondary impacts" of the proposed OFG mining/reclamation activities arising from the Ft. Green Mine Revised WRP Modification. The County objects to Conclusions of Law 816 and 862 of the RO and contends that the changes in the proposed additional CSAs and related relocation of reclaimed wetlands at the Ft. Green Mine requested in the Revised WRP Modification are adverse "secondary impacts" of the proposed activities at OFG.

Based on this adverse secondary impact hypothesis, Charlotte County contends that the ALJ erred by not making explicit findings and conclusions addressing the issue of whether IMC's proposed modification of the Ft. Green Revised WRP complies with Rule 40D-4.301(1)(f), F.A.C., and BOR 3.2.7. These cited provisions, adopted by reference in DEP's rules, require an ERP applicant to provide reasonable assurance that a proposed project "will not cause adverse secondary impacts to water resources."

Conclusion of Law 816 challenged in this Exception consists entirely of quotations and/or paraphrase by the ALJ of portions of BOR Section 3.2.7, which amplifies and implements Rule 40D-4.301(1)(f). I conclude that the BOR quotes and/or paraphrases in Conclusion of Law 816 are accurate and they are adopted in this Final Order.

The ALJ's challenged Conclusion of Law 862 asserts that:

> Unmitigated, the proposed activities will not cause adverse secondary impacts. The secondary impacts from the ERP all require their own permitting, and a more precise analysis of these impacts, as direct impacts, will take place in those permitting proceedings for these proposed activities. Also, the agricultural activities, post-reclamation are not secondary impacts facilitated by this ERP because they pre-

exist the proposed activities for which IMC seeks an ERP.

The term "secondary impacts" is not defined in Rule 40D-4.301(1)(f), BOR 3.2.7, or in any related provisions dealing with environmental resource permitting requirements for phosphate mining activities. However, secondary impacts have been defined by Florida case law to mean those "**impacts caused not by the construction of the proposed project itself**, but by other relevant activities very closely linked or causally related to the construction of the project." Deep Lagoon Boat Club v. Sheridan, 784 So.2d 1140, 1143 n.3 (Fla. 2d DCA 2001); Conservancy, Inc. v. A. Vernon Allen Builder, 580 So.2d 772, 776-778 (Fla. 1st DCA 1991) (emphasis added).

I view the proposed additional CSAs and related reclamation activities at the existing Ft. Green Mine to be "directly" related to the proposed OFG mining activities, rather than "closely linked or causally related." Without authorization from DEP to utilize CSAs on the Ft. Green Mine site, IMC would have no approved method or location for disposing of the approximate 26 million tons of clay materials estimated to be excavated at OFG under the Revised ERP. (RO, ¶ 62) Therefore, any impacts to water resources attributable to the CSAs and related activities at the Ft. Green Mine proposed in the Revised WRP Modification would be direct or primary impacts of the mining activities at the OFG site, rather than secondary. Compare Charlotte County v. IMC Phosphates Company, 25 F.A.L.R. at 4747, 4768, *aff'd*, 896 So.2d 756 (Fla. 2d DCA 2005) (all impacts of proposed phosphate mining on the nearby Altman Tract, including proposed clay settling ponds and other processing activities at off-site facilities, were "primary" impacts of IMC's proposed activities on the Altman Tract).

Charlotte County's contention that the ALJ erred by failing to properly address the secondary impacts of the proposed OFG activities is further weakened by the unchallenged Finding of Fact 64 of the RO stating in part that the Revised WRP Modification:

> . . .will not authorize the design or construction of the embankments that retain the water within these CSAs while they are essentially clay ponds. DEP will separately permit the construction and operation of CSAs O-1 and O-2 [at the Ft. Green Mine].

The ALJ's determination that any issues arising out of the construction and operation of CSAs O-1 and O-2 at the Ft. Green Mine will require separate permits from DEP at a later date is consistent with this agency's prior ruling in the "Manson-Jenkins" Final Order. Manasota-88, 25 F.A.L.R. at 887-888, *aff'd*, 865 So.2d 483 (Fla. 1st DCA 2004) (concluding that Rules 62-620 and 62-672, F.A.C., required IMC to obtain a separate Wastewater Facilities and Activities Permit from DEP for the construction and operation of two designated clay settling areas in connection with its proposed phosphate mining activities on the Manson-Jenkins Tract).

In view of the above rulings, paragraphs 816 and 862 of the RO are adopted. Moreover, whether construed to be primary or secondary impacts of the OFG mining activities, I have adopted the ALJ's findings in paragraph 365 of the RO that the reconfiguration and relocation of CSAs O-1 and O-2 and the related relocation of reclaimed wetlands at the Ft. Green Mine will reduce the adverse hydrological and biological impacts from those already permitted. Thus, there are no findings by the ALJ in these proceedings supporting a determination of "adverse impacts to the water resources" attributable to issuance of the Ft. Green Mine Revised WRP Modification.

In light of the above rulings, Charlotte County's Exceptions VII and VIII are denied.

Exception IX. The ALJ Erroneously Concluded that Charlotte Lacks Standing to Challenge the WRP or to Raise IMC's Failure to Pay the Appropriate Permit Fees.

This Exception objects to the purported ruling of the ALJ in paragraphs 778-779 of the RO that Charlotte County lacks standing to challenge the Ft. Green Mine Revised WRP Modification requested by IMC in these proceedings. However, the ALJ did not make such a ruling in the RO. The ALJ only ruled in his Conclusion of Law 778 that the Petitioner, Behrens, lacks standing to challenge this WRP Modification; noting that the parties "with standing under Section 403.412, Florida Statutes, may challenge the WRP modification." The ALJ ruled in Conclusion of Law 773 that Charlotte County has standing in these proceedings under Section 403.412(5), Fla. Stat. Thus, when Conclusions of Law 773 and 778 are read together, the ALJ clearly ruled that Charlotte County has standing under § 403.412(5) to challenge the proposed Ft Green Mine Revised WRP Modification.[7]

This Exception also contends that the ALJ erred by ruling that Charlotte County lacks standing to challenge IMC's alleged failure to pay the appropriate additional processing fees in connection with its Revised CDA submitted to DEP in January of 2004. The ALJ did rule in paragraph 779 of the RO that no party, including Charlotte County, has standing to challenge whether or not IMC should have paid an additional processing fee in connection with its submittal of the Revised CDA.

There is no contention by any party that IMC failed to pay the proper application fees when it filed its initial CDA with DEP in April of 2000. Moreover, there are no

[7] The title to Charlotte County's Exception IX incorrectly refers to the Ft. Green "WRP," rather than the proper reference, Ft. Green "Revised WRP Modification." The ALJ correctly ruled in Conclusion of Law 921 that Charlotte County cannot challenge the original Ft. Green WRP issued in 1995, and this legal conclusion was not objected in Charlotte County's Exceptions.

factual findings by the ALJ in the RO that the DEP staff personnel reviewing the proposed OFG project advised IMC that an additional processing fee would be required in connection with the filing of the Revised CDA in January of 2004. I thus conclude that there is no basis in this record for denying the requested Revised ERP, CRP, and WRP Modification due solely to alleged noncompliance with the additional processing fee provisions of Rule 62-4.050(6), F.A.C.

I also agree with the challenged conclusions of the ALJ in paragraph 779 of the RO that the ministerial decision of DEP staff to not collect an additional processing fee upon IMC's submittal of the Revised CDA does not implicate any of the parties' "substantial interests" and is not an environmentally related matter cognizable under § 403.412(5), Fla. Stat. However, even assuming Charlotte County had standing to challenge this decision of DEP staff and such decision was erroneous, I further agree with the ALJ that this purely ministerial matter would not, of itself, warrant denial of the Revised ERP, CRP, or WRP Modification.

In light of the above rulings, Charlotte County Exception IX is denied.

Exception X. The ALJ Failed to Address the Ecosystem Management Statutes

Charlotte County's tenth Exception is based on the claim that the RO erroneously fails to address the "ecosystem management agreements" provisions of §§ 403.075 and 403.0752, Fla. Stat.[8] Nevertheless, in paragraphs 65-67 of the RO, the ALJ correctly found that, in connection with the original Ona Mine CDA filed by IMC in 2000, DEP and IMC entered into a Team Permitting Agreement (Agreement) "pursuant to the 1996

[8] An ecosystem management agreement is "a concept that includes coordinating the planning activities of state and other governmental units, land management, environmental permitting and regulatory programs, and voluntary programs together with the needs of the business community, private landowners, and the public, as partners in a streamlined and effective program for the protection of the environment." See § 403.075, Fla. Stat.

legislation creating the concept of Ecosystem Management." Charlotte County even acknowledges on page 91 of its Exceptions that the Agreement entered into by DEP and IMC is actually an ecosystem management agreement entered into pursuant to §§ 403.075 and 403.0752, Fla. Stat.

In paragraph 67 of the RO, the ALJ also correctly found that the Agreement entered into by DEP and IMC "on its face, is not binding on IMC." (DEP Ex. 11, p. 1.) Moreover, this Agreement also states on its face that the "[e]ntry of this agreement does not constitute agency action, as provided by § 403.0752(8)(c), Florida Statutes." (DEP Ex. 11, p. 1.) These nonbinding and non-agency action provisions of the subject Agreement are expressly authorized by the plain language of § 403.0752(8)(c), Fla. Stat., stating in part that the "parties to an ecosystem management agreement may elect to enter into a nonbinding agreement that does not constitute agency action."

Notwithstanding the unambiguous language to the contrary in the Agreement and in § 403.0752(8)(c), Charlotte County contends that the Agreement should be construed to be binding on IMC and viewed as DEP agency action subject to challenge in these administrative proceedings. I conclude, however, that neither the ALJ nor the Secretary of DEP has the authority to rewrite the unambiguous terms of the Agreement or to construe § 403.0752(8)(c) to "steer it to a meaning its plain language does not supply" in order to achieve the result desired by Charlotte County. See St. Joe Paper Company v. Dept. of Revenue, 460 So.2d 399, 402 (Fla. 1st DCA 1985). I thus adopt the ALJ's interpretation of the Agreement in paragraph 67 of the RO as being nonbinding on IMC. I also conclude that this nonbinding Agreement is not DEP agency action and is not subject to being challenged in these administrative proceedings.

Based on the above rulings, Charlotte County's Exception X is denied.

Exception XI - Adoption by Reference.

Charlotte County's final Exception consists of a joinder in, and adoption of, "any and all exceptions filed by the other Petitioners and/or Intervenor." I conclude that this generic "adoption by reference" Exception does not comply with § 120.57(1)(k), Fla. Stat., requiring Exceptions to: clearly identify the disputed portion of the recommended order by page number or paragraph; identify the legal basis for the exception; and to include appropriate and specific citations to the record. I thus decline to rule on Exception XI as authorized by § 120.57(1)(k). In any event, all of the Exceptions of the other Petitioners and/or Intervenor deemed to be critical to the ultimate determination of reasonable assurance in these proceedings have been denied in this Final Order.

RULINGS ON SARASOTA COUNTY'S EXCEPTIONS TO THE RO

Exception I. Standing

Sarasota County's first Exception objects to the ALJ's Conclusions of Law 776, 777, and 778 addressing the issue of standing of the various parties in these proceedings. However, the ALJ did not conclude in the RO that Sarasota County lacks standing to contest the issuance to IMC of the OFG Revised ERP, CRP, and WRP Modification. In his related Conclusions of Law 772 and 773, adopted in this Final Order, the ALJ ruled that both Charlotte and Sarasota Counties have standing in these proceedings under § 403.415(5), Fla. Stat., by virtue of the filing of their respective verified petitions alleging injury to the environmental resources listed in this statute.

I concur with the ALJ's conclusion that Sarasota County has standing to challenge IMC's proposed activities at OFG by filing a sufficient verified petition

pursuant to § 403.412(5) of the Environmental Protection Act of 1971, as amended in 2002. The DEP Altman Final Order held that Charlotte County had standing, by filing a verified petition meeting the requirements of § 403.412(5), as amended in 2002, to challenge IMC's proposed phosphate mining activities in nearby Manatee County. See IMC Phosphates Company, 25 F.A.L.R. at 4713-4714. DEP's interpretation of § 403.412(5) in the Altman case was affirmed on appeal at 896 So.2d 756 (Fla. 2d DCA 2005), and is controlling on the issue of a county's standing to challenge a proposed DEP agency action pursuant to this environmental statute.

I thus deem it to be unnecessary to address the issue of whether Sarasota County would have alternative "substantial interests" standing under § 120.569(1), Fla. Stat. Also, as discussed in my above ruling on the Authority's standing Exception, as a practical matter the issue of Sarasota County's standing under § 120.569(1) is now moot because the County's substantive claims had been litigated on their merits in the DOAH hearings and are addressed on their merits in this DEP Final Order. Okaloosa County v. Dept. of Environmental Regulation, ER F.A.L.R. at 1992: 032, p. 6. (concluding that, from a practical standpoint, the issue of Okaloosa County's standing was moot on administrative review because the County's substantive claims were litigated on their merits at the DOAH final hearing).

Accordingly, Sarasota County's Exception I is denied.

Exception II. The ALJ Erred in Interpreting Legal Requirements for Wetlands Restoration

Sarasota County's Exception II raises issues similar to those presented by Charlotte County in its Exception VI. My above rulings rejecting Charlotte County's contentions in Exception VI are incorporated by reference herein, and Sarasota's similar

contentions are likewise rejected. I again express my agreement with the ALJ's conclusions in paragraphs 901-905 of the RO rejecting the Petitioners' "slavish devotion" to the concept of exact replication of vegetation "type" to the virtual exclusion of the more ecologically meaningful concept of restoration of the former natural "function" of disturbed wetlands at the OFG mine site.

Moreover, neither Sarasota County, nor any of the other Petitioners, took exception to Conclusion of Law 897 of the RO. This unchallenged conclusion of the ALJ, which I agree with and adopt, asserts that:

> In any event, it is not difficult to harmonize the [CRP] rules, with the requirement of wetlands restoration by type, nature, and function, with the statutes, with their emphasis on the natural function of wetlands or habitat. The CRP rules carry forward the most important statutory criterion-function, which drives the BOR analysis. (emphasis supplied)

The propriety of emphasizing restoration of the natural function of disturbed wetlands on mined phosphate lands, as opposed to rigid duplication of vegetation type, is supported by the expert testimony of Dr. Durbin. This emphasis on restoration of the natural function of disturbed wetlands at OFG is also supported by the agency testimony in these proceedings of DEP officials, Christine Keenan, Janet Llewellyn, and Orlando Rivera. I do not find these interpretations by DEP officials of statutes and rules within their regulatory jurisdiction and expertise to be "clearly erroneous." Goldring, 477 So.2d at 534. Rather, I find such agency interpretations by the DEP staff to be "permissible" ones, and they are affirmed herein. Suddath Van Lines, 668 So.2d at 212.

I would also note that my predecessor in office as DEP Secretary also rejected a similar argument raised by Charlotte County in its opposition to IMC's proposed phosphate mining/reclamation activities on the nearby Altman Tract. See Charlotte

County v. IMC Phosphates Company, 25 F.A.L.R. at 4726, stating in part that:

> In summary, I conclude that the ALJ's Recommended Order does not require that IMC "replicate" the exact wetlands conditions now existing at the Tract site in order to have a sufficient reclamation plan. Rather, the ALJ properly finds and concludes that IMC's reclamation plan for the Tract wetlands should maintain or improve the natural functions of the diverse types of wetlands systems, as they exist at the site immediately prior to mining operations.

Based on the above rulings, Sarasota County's Exception II is denied.

Exception III. The ALJ Erred by Precluding Evidence of Cumulative Impacts.

Sarasota County's Exception III contends that the ALJ erred by granting IMC's motion *in limine,* thus precluding it from presenting evidence relating to the "cumulative impacts" of future mining projects in conjunction with the OFG project at issue here. This evidentiary-based "cumulative impacts" issue was also raised by Charlotte County in its Exception III and was addressed in detail in the ruling thereon, which ruling is incorporated by reference herein. I again acknowledge that the issue of admissibility of evidence at a DOAH hearing is a matter over which I do not appear to have substantive jurisdiction under § 120.57(l), Fla. Stat.

I also restate my agreement with the ALJ's interpretation of the controlling provisions of § 373.414(8)(b), Fla. Stat., as applied to the material facts found by the ALJ in these proceedings. I further conclude that Sarasota County's reliance on the cited appellate decision in Florida Power Corp. v. Dept. of Environmental Regulation, 638 So.2d 545 (Fla. 1st DCA 1994), and the DOAH final order in Charlotte County v. SWFWMD, 1997 WL 1052343 (Fla. DOAH 1997), is misplaced. Neither of the cited cases involved an interpretation of § 373.414(8)(b), since this statutory subsection was not enacted until the year 2000. See Ch. 2000-133, § 4, at 193, Laws of Fla. Also,

neither of the cited cases resulted in a ruling that the *de minimis* rationale established by administrative and judicial case law is not applicable in determining the sufficiency of mitigation offered by an ERP applicant to offset adverse impacts to wetlands.

In the cited Florida Power Corp. decision, the court upheld an agency final order in which the DER Secretary rejected a hearing officer's conclusion that the destruction of six acres of forested wetlands was an acceptable *de minimis* adverse impact of the proposed project, even without any offsetting mitigation. In these proceedings, however, it is undisputed that the OFG project will create more wetlands (276 acres) than will be disturbed (less than 212 acres).[9] (Tables 12A1-1 and 13A1-1)

I have also ruled above that the ALJ's conclusion that the evidence fails to establish that the OFG project will cause more than "negligible" adverse impacts to the streamflow of the Peace River at the point where potable water is withdrawn to meet the drinking water needs of Sarasota County is supported by competent substantial evidence. Moreover, no party has challenged the ALJ's finding in paragraph 687 of the RO accepting Dr. Garlanger's expert testimony that the projected negligible adverse impact to Peace River streamflow attributable to the OFG project represents the same reduction in streamflow caused by a decrease in average rainfall of less than 0.01 inches of rain. I do not view negligible streamflow impacts analogous to those resulting from a projected decrease in average rainfall of less than 0.01 inches to be equivalent to the unmitigated destruction of six acres of wetlands, as was the issue in the Florida Power Corp. case.

[9] The ALJ's finding in the RO that 264 acres of wetlands will be disturbed by the proposed mining activities at OFG has been modified and reduced by IMC's subsequent agreement to implement the ALJ's recommendation that the Stream 1e series and its associated wetlands be preserved, rather than mined.

Finally, this argument that any unmitigated adverse impacts of the OFG project, no matter how negligible or inconsequential, would require a cumulative impacts analysis under § 373.414(8)(b) was also raised by the Authority and rejected in the prior rulings denying the Authority's Exceptions. For the reasons set forth above and in the rulings denying Charlotte County's Exception III and the Authority's Exception VI, Sarasota County's Exception III is also denied.

Exception IV. DEP Should Deny the Permit Applications because of IMC's Unwarranted Reliance on Post-Issuance Documents.

Sarasota County's fourth Exception objects to portions of the ALJ's Findings of Fact 148 and 258 and the related ERP Specific Conditions 12.a and 16.B.2. The County contends that the language therein "erroneously acquiesces to the use of post-issuance documents to provide reasonable assurances to comply with restoration standards." This contention is rejected for the following reasons:

1. Florida case law does not prohibit DEP from relying on permit conditions requiring an applicant to take some post-permit issuance actions as a part of the agency's "reasonable assurance" determination. See Save Anna Maria, Inc., 700 So.2d at 117. See also Metro. Dade County v. Coscan, Florida, 609 So.2d 644, 646 (Fla. 3d DCA 1992) (concluding that permit conditions requiring future monitoring of the impacts of the respective projects on seagrass vitality and water quality could be considered as a "part of reasonable assurance"); and Manasota-88, 25 F.A.L.R. at 897, *aff'd per curiam*, 865 So.2d 483 (Fla. 1st DCA 2004) (issuing phosphate mining permit to IMC and adopting the administrative law judge's recommendation that IMC submit the final version of the financial responsibility mechanism 30 days prior to commencing mining).

2. I agree with the ALJ's observation in paragraph 924 of the RO that the proposed activities at OFG are "complex and extensive." The extraction of phosphate ore from over 3,400 acres of land and the subsequent extensive reclamation activities are projected to continue for over 10 years. This multifaceted project, calling for reclamation of uplands and restoration of wetlands over a period of years, necessitates some reassessments and adjustments to the project by IMC in future years based on site-specific conditions at that time. I conclude that the challenged factual findings and permit conditions are both necessary and reasonable.

3. Moreover much of Sarasota County's concerns over the submittal of post-permit issuance documents by IMC have been resolved due to the remand of these proceedings back to the ALJ for additional findings of fact on specific matters set forth in DEP's LRO. Among the specific matters identified on page 26 of the LRO for additional findings by the ALJ on remand was:

> 9. Consideration of the submittal of new and/or revised maps or other documents necessary to implement changes to the OFG project made at the initial DOAH final hearing or on remand.

Many additional and/or revised documents were presented by IMC and admitted into evidence at the hearing on remand as identified by the ALJ in the ROR. (ROR, ¶¶ 1, 3, 7, 8, 11, 12, 13, 18, 19, 23, 24, 27, 41, 42, 45, 51-57)

For the above reasons, Sarasota County's Exception IV is denied.

Exception V. DEP Should Deny the Applications Based on IMC's Failure to Provide the Proper Amount of Mitigation Costs Required for Financial Assurance

Sarasota County's fifth Exception objects to paragraph 926 of the RO, wherein the ALJ acknowledges that this complex phosphate mining and reclamation project may warrant a DEP remand of these proceedings back to him for "supplemental factfinding."

Sarasota County's primary concern in this Exception is the alleged failure of IMC to provide reasonable assurance of compliance with the BOR financial responsibility provisions relating to cost estimates of moving and contouring sand tailings for the wetlands mitigation/reclamation requirements imposed in the ERP and CRP.

Nevertheless, as discussed above, I entered a LRO in August of 2005 remanding these proceedings to DOAH for limited additional factual findings, as alluded to by the ALJ in paragraph 926 of the RO. Among the specific matters remanded for additional findings were the costs of transporting any necessary sand tailings from IMC's Fort Green or Four Corners mines to OFG for wetlands mitigation purposes, and the costs of contouring such sand tailings at the OFG mine site. The LRO also concluded that the cost estimates for acquiring additional sand from third parties to reclaim the disturbed uplands or wetlands at OFG should not be included.

Additional factual findings on these sand tailings issues were made by the ALJ in Findings of Fact 22 through 29 of his ROR, which findings are adopted herein. Among those findings of the ALJ are: there will be ten times as much sand tailings generated from the normal mining activities at OFG as will be required to restore disturbed streams and wetlands at the site; and those sand tailings will be reasonably available for use as backfill at OFG. (ROR, ¶¶ 22, 26) Consequently, I conclude that DEP's LRO and the subsequent remand proceedings conducted by the ALJ have rendered moot these sand tailings financial responsibility concerns of Sarasota County. I also reject Sarasota County's suggestion that the remand in these consolidated proceedings was improper for the reasons set forth in the LRO and the ALJ's ROR, which are incorporated by reference herein. Sarasota County's Exception V is thus denied.

Exception VI. Additional Exceptions Adopted by Reference

Sarasota County's final Exception, consisting of only one sentence, incorporates by reference the "exceptions filed by the other Petitioners and/or Intervenor." I conclude that this generic Exception does not comply with the requirements of § 120.57(1)(k), Fla. Stat., and I decline to rule thereon as authorized by this statute. In any event, all of the Exceptions of the other Petitioners and/or Intervenor that are deemed to be critical to the ultimate determination of reasonable assurance in these proceedings have been denied in this Final Order.

LEE COUNTY'S "JOINDER AND ADOPTION OF CHARLOTTE'S EXCEPTIONS."

Lee County's "Exceptions" consist of a one-sentence "Joinder and Adoption of Charlotte's Exceptions." I conclude that such a generic joinder and adoption by reference document does not comply with § 120.57(1)(k), Fla. Stat., requiring exceptions to: clearly identify the disputed portion of the recommended order by page number or paragraph; identify the legal basis for the exception; and to include appropriate and specific citations to the record. I thus decline to rule on Exception XI as authorized by § 120.57(1)(k). In any event, all of Charlotte County's Exceptions that are deemed to be critical to the ultimate determination of reasonable assurance in these proceedings have been denied in this Final Order.

RULINGS ON DEP'S AND IMC'S EXCEPTIONS TO THE RO

DEP filed various Exceptions to the RO, some of which are divided into several subsections. DEP's objections to the RO are organized into four sections: Exceptions, Technical Exceptions, Other Exceptions and Required Actions, and Implementing Conditions for ERP Permit and CRP Approval. DEP also included an Appendix A,

which contains proposed new and modified permit conditions purporting to implement some of the ALJ's proposed additional conditions.

IMC also filed various Exceptions to the RO. In addition, IMC provided proposed revised permit conditions, which will be considered along with DEP's Exceptions to the extent they are substantially the same or overlap. All of DEP's and IMC's Exceptions and proposed revised permit conditions contain some commentary on the RO. Accordingly, they all will be treated as Exceptions and will be addressed in this Final Order as they appear in DEP's Exceptions. In addition, each of the recommendations in subparagraphs 884.a.-r. and 919.a.-f. of the RO will be addressed following the rulings on DEP's and IMC's Exceptions.

In the LRO, I asked the ALJ to consider on remand all of the new and modified permit conditions proposed in the Exceptions of DEP and IMC to determine whether they adequately captured his recommendations. The ALJ essentially complied with this request. In his ROR, the ALJ typically did not comment negatively or positively on a particular condition, which I interpret to be his acknowledgment that the proposed permit condition appropriately captured his intent. In my subsequent discussion of the ALJ's recommendations, I will indicate those issues on which I requested additional findings in the LRO. I will also indicate those issues I deem to be moot in light of the ALJ's supplemental factual findings in the ROR.

DEP's Exception I.A. Interpretation of § 373 Mitigation and § 378 Reclamation, and IMC's Exceptions to Conclusions of Law Regarding § 373.414(b).

These Exceptions take issue with paragraphs 833-853 of the RO, to the extent the ALJ reaches erroneous legal conclusions as to when a phosphate land conceptual reclamation plan for disturbed wetlands ("CRP") under Chapter 378, Fla. Stat., is

sufficient to meet the requirements of Environmental resource permit ("ERP") mitigation under Chapter 373, Part IV, Fla. Stat. The link between these two chapters is found in § 373.414(6)(b), Fla. Stat., which provides:

> Wetlands reclamation activities for phosphate and heavy minerals mining undertaken pursuant to chapter 378 shall be considered appropriate mitigation for this part 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.

The ALJ interpreted § 373.414(6)(b) to mean "that CRP wetlands reclamation activities count toward ERP mitigation, but do not preempt, even partly, ERP mitigation." (RO, ¶ 834) I agree with DEP and IMC that "preemption" is not the proper way to characterize the relationship between the CRP and ERP requirements, because preemption implies that one statutory process replaces the other. Both statutory processes are still applicable, and one does not preempt or replace the other.

Section 373.414(6)(b) is a "bridge" between the two statutory processes and sets the standard for determining whether CRP wetlands reclamation is sufficient to satisfy the related ERP mitigation requirements. Thus, CRP wetlands reclamation and ERP mitigation overlap under the limited conditions set forth in § 373.414(6)(b), and this statute establishes the circumstances under which a phosphate mining project that disturbs wetlands satisfies both criteria.

In order for CRP wetlands reclamation to satisfy ERP mitigation requirements, it must: (1) maintain or improve water quality, and (2) maintain or improve the function of the biological systems. This statutory interpretation is consistent with BOR Sections 3.3.1.6 and 3.3.1.7 adopted by reference in DEP Rule 62-330.200(3), F.A.C. This interpretation is also consistent with a prior DEP interpretation of § 373.414(6)(b) in

Manasota-88 v. IMC Phosphates Co., 25 F.A.L.R. at 880, affirmed by the appellate court at 865 So.2d 483 (Fla. 1st DCA 2004).

This agency interpretation of § 373.414(6)(b) was also adequately explicated in these proceedings by the final hearing testimony of Janet Llewellyn, Deputy Director of DEP's Division of Water Resource Management. It is undisputed that § 373.414(6)(b) is a statute administered and enforced by DEP. As noted in the above Standards of Review section, an agency has the primary responsibility of interpreting statutes within its regulatory jurisdiction and expertise. Also, considerable deference should be given to such agency statutory interpretations, and they should not be overturned unless "clearly erroneous." Goldring, 477 So.2d at 534.

Although Charlotte County filed a response to these Exceptions, it does not appear to contest the substance or validity of the interpretations by DEP and IMC of the above-quoted provisions of § 373.414(6)(b), Fla. Stat. Charlotte County only contests the ability of DEP and IMC to challenge the ALJ's findings in this regard. Likewise, the Authority also seems to agree with DEP's and IMC's contentions that "preemption" is an improper characterization of the effect of § 373.414(6)(b) as applied to a proposed phosphate mining application that will disturb wetlands.

In view of the above, I conclude that CRP wetlands reclamation under Chapter 378, Fla. Stat., does not "preempt" ERP mitigation under Chapter 373, Part IV, Fla. Stat. I thus reject the ALJ's legal interpretation of § 373.414(6)(b), Fla. Stat., to the extent he suggests that DEP's interpretation of this statute does not appropriately integrate CRP

wetlands reclamation requirements with ERP mitigation requirements in phosphate mining applications.[10]

DEP Exception I.B. Sufficiency of Mitigation and "Abuse of Discretion."

This Exception of DEP takes issue with the ALJ's admonitions in paragraphs 884 and 919 of the RO that "**DEP abuses its discretion**" if it does not modify the Revised ERP and CRP for OFG by adopting the modified and supplemental conditions set forth in these two paragraphs. I would note that the ALJ correctly acknowledged in paragraph 791 of the RO that the ultimate decision as to the adequacy of IMC's proposed mitigation "is an issue of law for the agency [DEP]." Thus, these "abuse of discretion" admonitions by the ALJ are difficult to reconcile with his prior recognition of this agency's primary role as the ultimate decision-maker as to the sufficiency of IMC's mitigation plans for the OFG project.

Only an appellate court has the authority to rule that the actions of an agency head in a final order entered in a formal administrative proceeding constitute an "abuse of discretion." See, e.g., §§ 120.595(5) and 120.68(7)(e), Fla. Stat. I thus reject these admonitions that DEP "abuses its discretion" to the extent they imply that the ALJ, rather than the Secretary of DEP, has the final say as to the sufficiency of IMC's mitigation plan or whether IMC has provided the necessary "reasonable assurances" in these proceedings.[11] See Save Anna Maria, 700 So.2d at 116, and 1800 Atlantic Developers, 552 So.2d at 946 (DEP has the statutory responsibility to determine the

[10] I find that my statutory interpretation of § 373.414(6)(b), F.S., is more reasonable than the ALJ's interpretation which was rejected.

[11] I find that my legal conclusions on this "abuse of discretion" issue is more reasonable than the ALJ's interpretation which was rejected.

legal sufficiency of mitigation measures, and the hearing officer [now administrative law judge] is not vested with the power to review this agency's discretion in making this legal determination);[12] and Miccosukee Tribe of Indians v. South Florida Water Management District, 20 F.A.L.R. 4482, 4491 (Fla. DEP 1998), *aff'd*, 721 So.2d 389 (Fla. 3d DCA 1998) (concluding that the matter of whether the facts found in a recommended order are sufficient to constitute reasonable assurance under Rule 62-4.070(1), F.A.C., for a permit to be issued in a contested proceeding is a regulatory decision that, in the final analysis, must be made by DEP).

I am aware of the decision in Hopwood v. Dept. of Environmental Regulation, 402 So.2d 1296 (Fla. 1st DCA 1981), where the court ruled that DER abused its discretion in not issuing the subject application, as modified by certain additional conditions recommended by the hearing officer. Nevertheless, in Hopwood it was the appellate court that made the abuse of discretion ruling, not the hearing officer. Furthermore, unlike the ALJ's recommended modifications here, the additional conditions recommended by the hearing officer in Hopwood (enlarged culverts and other technical modifications) did not involve the issue of sufficiency of proposed mitigation plans, a matter within DER's exclusive final authority.

In any event, I view these abuse of discretion admonitions by the ALJ to be "harmless error." In paragraphs 884 and 919 of the RO, the ALJ recommended 18 modifications to the Revised ERP and six modifications to the Revised CRP. This Final Order adopts substantially all of these recommended modifications, as subsequently

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[12] As discussed in more detail in my prior rulings denying Charlotte County's Exception I, which are incorporated by reference herein, 1800 Atlantic is still the seminal case articulating the nature of my ultimate responsibility over the issue of mitigation sufficiency and the role of the ALJ as the finder of the underlying facts describing the nature of the proposed mitigation.

revised in the ALJ's ROR. In fact, the only one of these aggregate 24 recommended ERP and CRP modifications of the ALJ that is totally rejected in this Final Order is his suggestions that DEP "prohibit IMC from conveying OFG to the Carlton-Smith family or any other party until DEP has released IMC from all liability for mitigation." As discussed in more detail hereafter, this recommended restriction on conveying the OFG real property implicate the sufficiency of IMC's proposed mitigation, an issue over which I have final authority.

As limited above, DEP's Exception I.B is thus granted.

DEP's Exception I.C. and IMC's "Exceptions as to Conclusions of Law Pertaining to Water Quality."

These Exceptions object to paragraphs 848 through 850 of the RO. DEP and IMC contend that these legal conclusions of the ALJ interpreting the phrase "maintain or improve water quality" in § 373.414(6)(b), Fla. Stat., essentially establish an OFW anti-degradation" standard for all the waters at the OFG site. I have already rejected such an anti-degradation interpretation of this language in § 373.414(6)(b) for the reasons set forth in detail in my prior rulings denying the Authority's Exception VIII, which rulings are incorporated by reference herein.

As previously noted, the OFW anti-degradation standards of Rule 62-4.242(2), F.A.C., only apply to water bodies designated as OFWs under Rule 62-302.700(9), F.A.C. There are no OFWs at the OFG site. As also previously discussed, DEP has consistently interpreted this "maintain or improve water quality" language in § 373.414(6)(b) to mean that water quality cannot be degraded below the water quality standards for the class established for the water body under Rule 62-302, F.A.C.

These Exceptions of DEP and IMC are thus granted and paragraphs 848 through 850 of the RO are rejected to the extent they could be construed to constitute a interpretation that § 373.414(6)(b) requires an OFW anti-degradation standard to be applied to all non-OFW waters impacted by IMC's proposed activities at OFG.[13]

DEP's Exceptions I.D. and I.E. and IMC's "Exception to Findings of Fact 766" and "Exceptions to Conclusions of Law Regarding Financial Responsibility"

These Exceptions deal with the related issues of whether IMC omitted the costs of contouring the sand tailings in its financial responsibility mechanism, and whether IMC must provide financial responsibility under the ERP for obtaining and transporting sand tailings to fill the mine cuts at OFG. In paragraph A.5. of the LRO, I asked the ALJ to conduct a comprehensive reevaluation of IMC's financial responsibility in light of my interpretations of the financial responsibility criteria applicable to IMC's proposed activities at OFG. Thus, these Exceptions are discussed below in the context of the ALJ's recommendations for ERP conditions relating to financial responsibility in his ROR, and those subsequent rulings are incorporated by reference herein.

Exception I.F. Draft Reclamation Guidelines

In this Exception, DEP objects to Findings of Fact 577 to 593 and Conclusions of Law 884.g, 919.b, 919.c, and 919.d of the RO. DEP contends that, in these portions of the RO, the ALJ relied upon the Bureau of Mine Reclamation's Guidelines for the Reclamation, Management, and Disposition of Lands with the Southern Phosphate District of Florida as if they were rules. This document was introduced by DEP and presented to the ALJ as evidence that the OFG Revised ERP and CRP conditions were consistent with draft internal guidance. The ALJ acknowledged that the Guidelines

[13] I find that my statutory interpretation of § 373.414(6)(b), F.S., is more reasonable than the ALJ's purported interpretation as set forth in these Exceptions.

were in draft form (RO, ¶ 577), but relied on this document in his analysis of the sufficiency of the Revised ERP and CRP conditions applicable to wetlands restoration and uplands reclamation.

The ALJ noted the lack of specificity in the Revised ERP and CRP conditions when compared to the guidelines, especially with regard to the depth of sand tailings and topsoil or muck requirements, and strictly applied the Guidelines to several of the proposed changes in paragraphs 884 and 919. (RO, ¶¶ 585-592) Even though DEP introduced the Guidelines into evidence in these proceedings, this Exception objects to the ALJ's reliance on these Guidelines in his consideration of the adequacy of some of the Revised ERP and CRP conditions. DEP apparently intended that the Guidelines only be used to bolster its general approach to soil layering, use of topsoil and green manure, and not for whatever explicit construction criteria they contained.

Nevertheless, I conclude that the ALJ did not unreasonably rely on the Guidelines. I agree with the Authority that there is nothing in the record indicating that the ALJ assumed he was required to implement these Guidelines. DEP introduced the Guidelines as an exhibit and its witness testified as if the Guidelines contained important criteria by which the adequacy of the proposed reclamation at OFG could be measured. I thus reject this Exception and its proposed changes to Revised CRP special conditions 8.a. and 8.b. I also find that the criteria proposed by the ALJ relying on the Guidelines are part of the reasonable assurances that IMC must provide to warrant approval of the CRP.

Exception I.G. Visual Inspection Condition

This Exception objects to proposed condition 884.m of the RO, in which the ALJ recommends that DEP eliminate the provision in Revised ERP Specific Condition 17.d allowing DEP to release mitigation wetlands based solely on a visual inspection. I did not ask the ALJ to make additional findings on remand as to this matter.

Revised ERP Specific Condition 16 provides in pertinent part:

> The 105 acres of forested wetland and 216.7 acres of herbaceous wetlands shall be released when the reclaimed wetland have been constructed in accordance with the permit requirements, the following conditions have been met, and no intervention in the form of irrigation, dewatering, or replanting of desirable vegetation has occurred for a period of two consecutive years unless approved by the Bureau of Mine Reclamation.

The Revised ERP then recites criteria the reclaimed wetlands must meet in order for the OFG project to be successful. The criteria include, but are not limited to: meeting Class III water quality standards; proper hydroperiods and seasonal flow patterns; analysis of hydrologic data; and evaluations of whether (1) ephemeral wetlands have been inundated for no more than 8 months of a normal water year, (2) plants meet the required densities, numbers, and species richness, and (3) whether macroinvertebrate communities of reclaimed streams meet the values for species richness and diversity.

Revised ERP Specific Condition 17.d. provides:

> The Department may release the mitigation wetlands based on a visual evaluation, notwithstanding that all the requirements of Specific Condition 16 have not been met.

It is difficult to understand how many of the success criteria in Specific Condition 16 could be evaluated solely by a visual inspection. DEP's argument that elimination of the visual evaluation language will prevent its staff from exercising its professional judgment

seems to ignore the fact that the existing provisions of Specific Condition 17.d do not establish any standards for determining when early release is appropriate.

Much of the testimony at the initial formal hearing concerning previous attempts at wetland mitigation addressed the failures of IMC to create successful mitigation, and many of these unsuccessful wetland mitigation sites appear to have been released by DEP long before they were successful. I find that allowing the early release of mitigation sites based solely on visual inspection is an inappropriate condition. I recognize that, in some circumstances, early release of mitigation sites may be appropriate, and this ruling is not meant to prevent DEP from articulating the criteria in future permits through which mitigation sites can be released before they are fully successful. Therefore, this Exception is denied.

Exception I.H. Gopher Tortoise Relocation

This Exception of DEP objects to the ALJ's proposed modification of the Revised ERP in paragraph 884.r. of the RO. This modification would include a requirement that IMC relocate gopher tortoises prior to mining and present a gopher tortoise plan to BMR and the Florida Fish and Wildlife Conservation Commission. DEP properly points out that this provision is more appropriate in the Revised CRP, which addresses upland impacts caused by the mining activities. DEP requests that this recommended modification either be rejected or included in the Revised CRP. I find DEP's latter request to be more appropriate, and conclude that the gopher turtle relocation requirements proposed by the ALJ in paragraph 884.r. should be adopted in substance,

but incorporated into the Revised CRP as an additional specific condition. I also find this to be a technical, rather than substantive matter.[14]

Exception I.I. Conveyance of Property Restriction

This Exception objects to the ALJ's recommended additional conditions in paragraph 884.n and the second sentence of paragraph 919.e of the RO. These suggested additional conditions address the protection of the OFG mitigation and reclamation between the time the actual construction is complete and the time the mitigation and reclamation efforts are successful.

The ALJ seems to be concerned that the proposed OFG mitigation and reclamation would be irreparably damaged if the OFG property is transferred from IMC to the Carlton-Smith family before these mitigation and reclamation activities are successful. The ALJ expresses doubts that DEP could successfully enforce IMC's mitigation and reclamation responsibilities if IMC is no longer the fee owner of the OFG Tract. The ALJ is also concerned that DEP and/or its contractors may not be allowed to enter the OFG property to complete the mitigation and reclamation work if IMC defaults on its obligations and DEP uses financial assurance funds to do the work itself.

In Paragraph 884.n, the AJ recommends an additional ERP condition that would:

> Prohibit IMC from conveying OFG to the Carlton-Smith family or any other party until DEP has released IMC from all liability for mitigation. (If the vague assurances in the CDA about a conveyance after reclamation allow a conveyance without completion of all mitigation, DEP and its contractors may not be able to enter the land to perform the required work, even if DEP has sufficient financial security to complete the mitigation.)

[14] I view the ALJ's confusion between the requirements of the Revised ERP and CRP in this regard this to be harmless error.

Paragraph 919.e recommends the following CRP modification:

> Amend the CRP approval to require IMC to protect the uplands, herbaceous wetlands, and wooded wetlands from grazing, mowing, or other adverse land uses until the uplands are established and for the specified periods for the wetlands (or until the specified conditions for the wooded wetlands). This may require prohibiting the conveyance of the land and restricting agricultural activities in the meantime.

IMC and the Carlton-Smith family have entered into an agreement through which the property will be transferred "when mitigation is complete." The ALJ finds that this phrase is vague. The ALJ apparently questions whether "completion" refers to completion of the construction or the final completion of the success criteria. DEP argues that the ALJ's recommendations are either unnecessary or amount to a possible unconstitutional restraint on IMC's rights to transfer property. However, administrative agencies lack jurisdiction to consider and resolve constitutional claims. See, e.g., Florida Hospital v. Agency for Heath Care Adm., 823 So.2d 844, 847 (Fla. 1st DCA 2002); Hays v. Dept. of Business Reg., 418 So.2d 331, 33 (Fla. 3d DCA 1982).

I agree with Charlotte County's observation that DEP's permitting rules allow the imposition of such conditions as are necessary to ensure that an applicant provides reasonable assurance that the proposed project will not violate applicable permitting standards. Under some conditions, DEP could require a permittee to retain such title interest in the subject real property in order to facilitate the satisfactory completion of permit conditions; otherwise DEP may not have the requisite assurances that permit conditions will be met. Nevertheless, I find that these recommended additional conditions in paragraph 884.n and the second sentence of paragraph 919.e of the RO pertain to the adequacy of IMC's proposed mitigation at OFG, and are thus matters over

which I have final authority under the 1800 Atlantic rationale. For several reasons, I also find that IMC has provided reasonable assurance on this mitigation issue.

First, the Revised ERP and CRP require IMC to meet the success criteria for the proposed OFG mitigation and reclamation. Given my decision rejecting the authority of DEP to release mitigation sites based solely on visual inspection, it is more likely that mitigation sites will be successful before the property is transferred because DEP will only release the mitigation if success is demonstrated. If the OFG wetland mitigation is adversely affected due to grazing or other activities so that it does not meet the success criteria, then the mitigation will not be released.

Second, § 211.32(j), Fla. Stat., broadens the responsibility for successful reclamation if the property is transferred to the Carlton-Smith family. That section, which embodies the Legislature's intent on this issue, provides:

> The obligation to reclaim under paragraph (a) shall run with the land and shall be enforceable against any person claiming a fee interest in the land subject to that obligation.

Clearly, the Legislature anticipated that property could be alienated before phosphate lands reclamation met all of the success criteria. The Legislature could have required a restriction on alienation as a fundamental condition of permitting, but it chose not to. If the property is transferred before reclamation is successful, DEP could enforce the reclamation requirements against both IMC under the CRP and the Carlton-Smith family under the statute.

Third, as DEP points out, the failure of IMC to meet the mitigation or reclamation success criteria would subject them to an enforcement action, which could include permit revocation. Also, IMC's inability to create successful mitigation or reclamation

could adversely affect its ability to obtain permits to mine other areas. See Rule 62-4.070, F.A.C.

Fourth, as Charlotte County notes, Rule 62C-16.051(9)(c), F.A.C., requires that reclamation areas be protected from "grazing, mowing, or other adverse land uses" until established. Paragraph (d) of that same rule requires that herbaceous wetlands are to be protected from these activities for three years, and forested wetlands for five years or until the trees are 10 feet tall. Finally, I disagree with the ALJ's legal interpretation that the IMC/Carlton Smith agreement is ambiguous. I interpret "completion" to mean successful completion and expect no transfer of title of OFG mitigation and reclamation areas to take place until they are released by DEP.

The apparent intent of the ALJ in these recommended additional conditions is to facilitate the right of entry to the OFG site by IMC or by DEP and its contractors in order to complete or repair required mitigation and reclamation, and to prevent degradation before completion. DEP contends that these real property conveyance restrictions suggested by the ALJ are tantamount to changing the historical permitting standard from one of reasonable assurances to a much higher standard of absolute guarantees. I agree with this contention.

For the reasons stated above, I grant this Exception of DEP and reject the ALJ's recommended additional conditions in paragraphs 884.n and 919.e. of the RO.[15]

Exception I.J. Ft. Green Mine Stay of Permit Issuance

DEP's final Exception to the ALJ's recommendations in the RO relates to Recommendation No. 3 at page 417. This recommendation would delay the approval of

[15] I find that my legal conclusions on this sufficiency of mitigation issue are more reasonable than the ALJ's recommended conditions which were rejected.

the Ft. Green Mine Revised WRP Modification until "the ERP and CRP approval become final and the time for appeal has passed or, if an appeal is taken, all appellate review has been completed." This recommendation is rejected. I have no authority to delay the issuance of a permit to an applicant contingent on the results of appellate review of the issuance of another separate permit. In addition, the recommended delay in issuance of the Ft. Green Mine Revised WRP could violate the 45-day deadline imposed by § 120.60(1), F.S., for approving or denying a permit application after a recommended order is submitted to the agency.

Accordingly, this Exception is granted, and I decline to adopt the ALJ's Recommendation No. 3 on page 417 of the RO.

IMC's Exceptions to Conclusions of Law Regarding Standing

IMC contends that the ALJ erred in concluding in paragraph 776 of the RO that Charlotte County, Lee County, and Sarasota County have demonstrated "substantial interests" standing under § 120.569(1), Fla. Stat. IMC also argues that the ALJ erred by concluding in paragraphs 772 and 773 of the RO that Charlotte County and Sarasota County have standing in these proceedings by filing verified petitions meeting the requirements of § 403.412(5) of the Environmental Protection Act of 1971, as amended in 2002. In paragraph 771 of the Initial RO, the ALJ further concluded that Lee County established standing to intervene in these proceedings by also filing a verified petition meeting the requirements of § 403.412(5), Fla. Stat.

In the above rulings on Charlotte County's Exception IX and Sarasota County's Exception I, I concurred with the ALJ's conclusions that both Charlotte County and Sarasota County have demonstrated standing in these proceedings under § 403.412(5)

by filing verified complaints meeting the requirements of that statute. I find IMC's reliance on the contrary statutory interpretation of ALJ, J. Lawrence Johnston, in his recommended order in the prior Altman case to be misplaced. The conclusion by ALJ Johnston that the 2002 amendments to § 403.412(5) eliminated the standing of Charlotte County to challenge IMC's phosphate mining/reclamation activities at a nearby Manatee County site by filing a verified petition meeting the technical requirements of that statute was rejected in DEP's Final Order entered in the Altman case. See Charlotte County v. IMC Phosphates Company, 25 F.A.L.R. at 4712-4714, *aff'd*., 896 So.2d 756 (Fla. 2d DCA 2005). I view the Altman Final Order affirmed on appeal to be controlling precedent that Charlotte County, Lee County, and Sarasota County have standing in these proceedings under § 403.412(5).

I also concluded in the above rulings on Charlotte County's Exception IX and Sarasota County's Exception I that, since these two Petitioners have standing under § 403.412(5), it is unnecessary to make a determination on whether they have alternative standing under § 120.569(1), Fla. Stat. I reaffirm these prior rulings and conclude that it is unnecessary to rule on the merits of IMC's Exceptions challenging the alternative "substantial interests" standing of Charlotte County, Lee County, and Sarasota County under § 120.569(1). I also again observe that, for all practical purposes, the issue of the standing of these Petitioners and Intervenor to institute and maintain these administrative cases is moot because their substantive claims were fully litigated in the DOAH proceedings and are addressed on their merits in this Final Order. Okaloosa County v. Dept. of Environmental Regulation, ER F.A.L.R. at 1992: 032, p. 6 (concluding that the issue of Okaloosa County's standing was essentially moot on

administrative review because the County's substantive claims had been litigated on their merits at the DOAH final hearing).

DEP'S AND IMC'S TECHNICAL EXCEPTIONS

DEP filed nine "Technical Exceptions" and IMC filed six. In paragraph A.8 of my LRO, I requested the ALJ to make further factual findings on these Technical Exceptions on remand. In his subsequent ROR, the ALJ made the additional findings on four of these Technical Exceptions, but declined to revisit the other Technical Exceptions "for a variety of reasons, including that certain findings are supported by the record, certain findings – while technically incorrect – are subordinate and not misleading, and certain findings have been superceded by the findings in the Remand RO." The ALJ did not clarify in the ROR which of these findings he believed were supported by the record and which were subordinate and not misleading.

DEP Technical Exception II.(a) and IMC Exception 34(a)

DEP and IMC assert that the ALJ erred in finding that no bay trees need be present in the canopy of a bay swamp and request that the word "presence" be replaced by the word "predominance" in the last sentence of Finding of Fact 77 of the RO. I asked the ALJ to reconsider this exception and he declined this request. Although I find the record to be unclear on this issue, both Charlotte County and the Authority agree that no harm is caused by this change advocated by DEP and IMC. I thus conclude that this is one of the Technical Exceptions the ALJ thought was subordinate, and it is granted by substituting the word "predominance" in lieu of the existing word "presence" in the last sentence of Finding of Fact 77 of the RO.

DEP's Technical Exception II.(b) and IMC Technical Exception 34(b)

These Exceptions object to Findings of Fact 143 and 570-571 of the RO pertaining to the proposed recharge well system for the ditch and berm system at OFG. DEP asserts that the ALJ confused the purpose and configuration of the recharge wells, which was due in part to the language in Specific Condition 10.a. of the Revised ERP. In paragraph A.4 of the LRO, I asked the ALJ to make additional findings on this issue and he complied with this request. The ALJ made extensive additional findings on this recharge wells issue in paragraphs 9-17 of the ROR, which I find to be supported by competent substantial evidence of record. The ALJ also approved DEP's and IMC's proposed language changes for Revised ERP Specific Condition 10.a, describing the design and operation of the OFG recharge well system.

Consequently, I find that these Technical Exceptions of DEP and IMC are moot in light of the ALJ's subsequent findings on remand, and they are denied on that procedural basis. I also approve the new language for Revised ERP Specific Condition 10.a., as set forth in Finding of Fact 18 of the ROR.

DEP Technical Exception II(c) and IMC technical exception 34(c)

In these Exceptions, DEP and IMC contend that the first sentence of paragraph 255 of the RO contains an erroneous reading by the ALJ of Revised ERP Specific Condition 16.B.2 by stating that the reference wetland design modeling was done to predict subsurface conditions, rather than based on predicted subsurface conditions. I agree with this contention. Revised ERP Specific Condition 16.B.2 does provide that the modeling was done "based on predicted subsurface conditions" after excavation and backfilling of the mine cuts. The ALJ declined to make additional findings on this matter

on remand. I conclude that this reading of Revised ERP Specific Condition 16.B.2 by the ALJ in Finding of Fact 255 is unsupported by competent substantial evidence, and it is rejected. However, I do agree that this is a subordinate factual finding having no bearing on the final disposition of these proceedings. As limited, these Technical Exceptions of DEP and IMC are granted.

DEP Technical Exception II(d) and IMC Technical Exception 34(d)

These Exceptions of DEP and IMC identify four findings of fact in the RO that purportedly contain erroneous wetland designations or documents, and the ALJ declined to make additional finding on these matters on remand. However, Charlotte County and the Authority agree that these are technical, rather than substantive factual matters. I thus conclude that the challenged findings constitute harmless non-substantive errors and grant these Technical Exceptions on that basis. Accordingly:

(1) Finding of Fact 174 is modified by changing "W0399" in the last parenthetical to "W039."
(2) Finding of Fact 515 is modified to change "Map I-2" to "Figure 13A-5-1."
(3) Finding of Fact 518 is modified to change "G-005" to "G505."
(4) Finding of Fact 541 is modified to change "G-039" to "G-033," the reference wetland is designated "E-030," and the fringe is designated "E-029."

DEP Technical Exception III.(e) and IMC Technical Exception 34(e)

These Exceptions object to Finding of Fact 744 of the RO. DEP and IMC assert that the ALJ should have stated therein that the storm water pumps would be operated in anticipation of storm events, rather than the recharge wells. The ALJ declined to revisit this Exception on remand. DEP and IMC cite to Dr. Garlanger's testimony in support of their contention, but his testimony does not clearly reflect whether the water is moved through recharge wells or storm water pumps. Therefore, these Technical Exceptions must be denied.

DEP Technical Exception III.(f)

In this Exception, DEP correctly points out that, in the portion of the RO entitled "Witnesses and Proposed Recommended Orders," the ALJ excluded one of its witnesses, Orlando Rivera, and misspelled the name of another DEP witness, Kevin Claridge, in the Preliminary Statement, page 34, Section XI, of the RO. The ALJ agreed to reconsider this Exception on remand and corrected these Preliminary Statement matters in his ROR, which corrections are adopted in this Final Order. I thus find this Exception to be moot and it is denied on that procedural basis.

DEP Technical Exception III(g)

This DEP Exception correctly notes that the ALJ mistakenly stated in Finding of Fact 437 of the RO that IMC has a 100-year floodplain, rather than Horse Creek. However, the ALJ agreed to reconsider this Exception on remand and corrected this erroneous finding in paragraph 60 of his ROR, which correction is adopted in this Final Order. Consequently, this Exception is also deemed to be moot and denied on that procedural basis.

DEP Technical Exception III(h)

DEP correctly notes in this Exception that the initial proposed recommended orders were filed by the parties on September 20, 2004, rather than August 31, 2004, as stated in the Preliminary Statement portion of the RO. However, the ALJ corrected this subordinate factual error in paragraph 59 of the ROR, and the correct filing date of September 20, 2004, is adopted in this Final Order. Thus, this Exception is also deemed to be moot and denied on that basis.

DEP Technical Exception III(i)

This Exception correctly notes that the Revised WRP modification request was filed by IMC on April 13, 2001, rather than on April 24, 2000, as stated in the Preliminary Statement portion of the RO. However the ALJ corrected this erroneous date in paragraph 60 of the ROR, which is adopted in this Final Order. This is another Technical Exception that has been rendered moot by the ALJ's findings in the ROR.

DEP Technical Exception III(j) and IMC Technical Exception 34(f)

These Exceptions of DEP and IMC object to the ALJ's recommendation in Conclusion of Law 884.h of the RO that Revised ERP Specific Condition 14.c should be amended to require a minimum depth of four feet of sand tailings and four inches of topsoil for construction of wet prairies. The ALJ reconsidered this provision in the context of DEP's proposed permit condition for Specific Condition 14.f, which is discussed below.

DEP Exception III. Other Exceptions and Required Actions.

Exception III.A

This Exception objects to paragraphs 748 and 749 of the RO, wherein the ALJ wrestled with the issue of whether IMC's ditch and berm system has the capacity to accommodate the design storm. The necessary capacity of the ditch and berm system depends on whether OFG is constructed in an open or closed basin as those terms are defined in BOR 1.7.1 and 1.7.29, respectively, and applied in BOR 4.2. If a drainage basin is open, then the ditch and berm system must be designed to handle a 25-year storm. If the basin is closed, the system must be designed to handle a 100-year storm.

The ALJ made several factual findings in the RO and opined that these findings would provide me with a sufficient factual basis for making the legal determination as to whether OFG is in an open or closed basin. However, in my LRO, I concluded that the findings in the RO were not sufficient on the open or closed basin issue and requested the ALJ to make additional findings on this issue, which he did. In paragraph 44 of the ROR, the ALJ found that the drainage basins in the OFG Tract discharge "in storms considerably less intense than the 100-year storm." Based on this additional finding in the ROR, which is adopted herein, I conclude that the drainage basins at the OFG site are "open basins" within the purview of BOR 1.7.1, 1.7.29, and 4.2; and the OFG ditch and berm system must be designed to handle a 25-year storm.

IMC's Exception to Implication as to Jurisdiction over Floodplain

In this Exception, IMC argues that the ALJ improperly implied in paragraph 878 of the RO that DEP's jurisdiction over wetlands is coextensive with a water body's floodplain. However, I have reviewed paragraph 878 and conclude that the ALJ clearly differentiated between wetlands and floodplains therein. This Exception is thus denied.

DEP Exception III B. Submission of Revised Application Information

In section III.B of its exceptions, DEP reviews each of the "submission of revised application information" submitted by IMC in order to comply with the ALJ's recommended ERP and CRP modifications at OFG. In paragraphs 884 and 919 of the RO, respectively, the ALJ recommended 18 changes to the Revised ERP and six changes to the Revised CRP. The ALJ expressed the view that these changes are crucial to IMC's burden of providing reasonable assurances in these proceedings. However, as discussed above, the ultimate determination of whether an applicant has

provided the necessary reasonable assurances to be entitled to issuance of an environmental permit must be made by DEP, not the ALJ. In any event, each of these changes recommended by the ALJ are addressed below.

DEP and IMC suggest new permit language incorporating most of the ALJ's recommended modifications to the Revise ERP and CRP. DEP and IMC assert that their proposed language changes are necessary because the ALJ's recommended modifications are generally cursory in nature and lack the necessary specificity to be incorporated into appropriate permit conditions. In order to preserve the Petitioners' due process rights, I requested the ALJ to make additional findings on remand on this suggested new permit language. The ALJ complied with this request in his ROR.

884.a. Adding Stream 1e to the No-mine Area.

IMC has accepted this recommendation of the ALJ and has agreed to modify the OFG project by preserving the Stream 1e series, which includes a number of tributaries to Horse Creek. In the LRO, I asked the ALJ to clearly delineate the boundary of this now preserved area and to consider any specific conditions required to allow the mining of up to 5% of the non-wetland area of the 25-year floodplain. In Finding of Fact 1 of the ROR, the ALJ approved IMC Exhibit 2f-R (Figure A-1f) as the no-mine area of the Stream 1e series with 1.98 percent of the non-wetland floodplain that could be mined. No additional or revised conditions are required to implement these clarifications.

IMC had originally planned to create a dragline crossing over part of the Stream 1e series. However, due to this inclusion of the Stream 1e series in the OFG no-mine area, I asked the ALJ to resolve on remand any factual disputes concerning whether

IMC could adequately mitigate any adverse impacts caused by the crossing over this now-preserved area.

At the remand hearing, IMC and DEP proposed a new consolidated crossing over Stream 1ee that would eliminate another utility crossing over Stream 2e. After taking considerable testimony on this matter, the ALJ found in numbered paragraphs 2 through 8 of the ROR that the consolidated crossing at Stream 1ee and the elimination of the utility crossing at Stream 2e would have significantly less environmental impact than his original recommendation. In the subsequent rulings on the Petitioners' Exceptions to the ROR, I conclude that the Stream 1ee consolidated crossing matter is within the reasonable purview of the dragline crossing issue identified in paragraph A.3 on page 25 of my LRO. The ALJ's consolidated crossing findings in the ROR are supported by the expert testimony on remand of Dr. Garlanger and they are adopted.

On remand, IMC proposed detailed new permit language for Revised ERP Specific Condition 13 incorporating this consolidated crossing concept into the OFG project. This new consolidated crossing permit language was approved by DEP and was adopted in its entirety by the ALJ in his ROR. I accept the new Revised ERP Specific Condition 13, as set forth in numbered paragraph 8 of the ROR.

884.b. Add Stream 3e' to Stream Restoration Plan.

This recommendation of the ALJ that Stream 3e' be added to the Stream Restoration Plan was accepted by IMC and DEP and has not been contested by the Petitioners. This supplementation of the Stream Restoration Plan, as set forth in Finding of Fact 32 of the ROR, is thus accepted as an additional Revised ERP condition.

884.c. Amend Table 1.

This recommendation of the ALJ relates to Table 1 (IMC Exhibit 1588), containing information on the hydroperiods for different kinds of wetland mitigation sites. Table 1 recites that the hydroperiod for bayhead wetlands is 5 – 12 months, but the ALJ found that the proper hydroperiod for bayhead wetlands was 8 – 11 months. On remand, this Table was amended by IMC to correct this hydroperiod for bayhead wetlands, and the amended exhibit was admitted into evidence at the remand hearing. I view this amendment be in the nature of a technical modification to Table 1, and it is accepted and adopted herein.

884.d. Requirement for a Recharge Well System.

DEP's Technical Exception II(b) and IMC Technical Exception 34(b) object to certain findings of the ALJ on the design and operation of the OFG proposed recharge well system. In paragraph A.4 of the LRO, I asked the ALJ to reconsider his Findings of Fact 143 and 570-571 of the RO and make additional findings on the basic design of this recharge well system. The ALJ agreed to do so and made extensive additional findings in numbered paragraphs 9-18 of the ROR, which I find to be based on competent substantial evidence presented at the remand hearing, including the expert testimony of Dr. Garlanger.

The ALJ also found on remand that DEP's and IMC's proposed revisions to ERP Specific Condition 10.a, respond adequately to the recharge well system issues raised in my LRO. This proposed revised ERP Specific Condition 10.a language set forth in Finding of Fact 18 of the ROR is accepted and adopted herein, and DEP's and IMC's Exceptions are thus deemed to be moot.

884.e. Revised ERP Modification Concerning Spoil Piles.

This recommendation of the ALJ suggests that the spoil piles in the mine cuts at OFG be graded to create a progressive depth of sand tailings to facilitate the flow of groundwater in the surficial aquifer. DEP and IMC agreed to this Revised ERP modification, in part, and suggested new language for ERP Specific Condition 12.c. In the LRO, I asked the ALJ to consider this new language on remand. The ALJ agreed and found that the revised language proposed by IMC was appropriate (DEP's version of this condition left out the initial sentence.) This revised ERP Specific Condition 12.c language, as forth in Finding of Fact 46 of the ROR, is accepted and adopted herein.

884.f. New Map I-1.

The change in the hydroperiod for bayheads and the addition of Stream 3e' to the Stream Restoration Plan necessitated changes to several documents that are part of the Revised ERP. During the initial formal hearing, IMC submitted a new Map I-1 reflecting the change to the hydroperiod and the Stream Restoration Plan. The ALJ recommended in paragraph 884.f of the RO that a new Map I-1 be submitted like that submitted at the end of the hearing.

In its Exception 42(a), IMC proposed a new ERP Specific Condition 26 requiring it to submit, within 45 days of issuance of the Final Order, two signed and sealed copies of any revised maps, figures, or other documentation required by the Final Order. The ALJ found this new condition to be a reasonable way to implement the revisions to the various documents, and I agree. A similar post-final order document submission was approved in the Manson-Jenkins Final Order issuing an ERP to IMC to mine phosphate lands in Manatee County. See Manasota-88 v. IMC Phosphates Company, 25 F.A.L.R.

at 897, 945. Thus, new ERP Specific Condition 26, as set forth in Finding of Fact 53 of the RO, is accepted and adopted herein.

884.g. Muck Requirements for Forested Wetland Mitigation Areas.

This recommendation of the ALJ suggests that ERP Specific Condition 14.b be amended to require a minimum of one foot of muck for each reclaimed bay swamp. DEP took exception to this condition in its Exception I.F., and my detailed rulings thereon are found earlier in this Final Order. DEP proposed new permit language incorporating this recommended change, along with the appropriate FLUCFCS codes, which the ALJ approved in his ROR. This revised ERP Specific Condition 14.b., as set forth in Finding of Fact 47 of the ROR, is accepted and adopted herein.

884.h. Wet Prairie Requirements.

DEP took exception to this recommendation in Technical Exception II.(j), which is addressed above. In my LRO, I asked the ALJ to consider DEP's proposed changes to Revised ERP Specific Conditions 14.c, 14.d, and 14.f, which he did (IMC only suggested changes to condition 14.f.). In Finding of Fact 48 of the ROR, the ALJ sets out these proposed changes to Specific Conditions 14.c and 14.d and finds they are appropriate. However, in Finding of Fact 49 of the ROR, the ALJ rejects DEP's and IMC's use of the term "approximately," rather than "at least," in Specific Condition 14.f to describe the amount of sand tailings and topsoil in wet prairies, hydric pine flatwoods, or hydric palmetto prairies.

I find that the ALJ relied upon competent substantial evidence in making his findings in the ROR on these proposed changes to Specific Conditions 14.c, 14.d, and 14 f., including the appropriateness of the "at least" language in 14.f. Thus, the revised

ERP Specific Conditions 14.c and 14.d, as set forth in Finding of Fact 48 of the ROR, are accepted and adopted herein. However, as recommended by the ALJ, the proposed revisions to ERP Specific Condition 14.f, are further modified by inserting the words “at least” in lieu of the word “approximately” to describe the minimum depth of sand tailings and topsoil at the wet prairie sites.

884.i. Changed Contour Precision.

This recommendation of the ALJ suggests that the precision of the final topographic map for the reclaimed wetlands in Revised ERP Specific Condition 14.i should be recorded at the interval of 0.1 foot, rather than 1.0 foot, because this level of precision can be obtained with modern equipment. DEP and IMC proposed new permit language in their Exceptions requiring 1-foot contours with 0.1 foot sampled spots. I asked the ALJ to consider this proposal on remand, and he found that DEP’s and IMC’s proposed revision of Specific Condition 14.i was acceptable. Thus, the revised ERP Specific Condition 14.i, as set forth in Finding of Fact 50 of the ROR, is accepted and adopted herein.

884.j. Multiple Transects.

This recommended ERP modification suggests that IMC make multiple transects over the mine area. DEP proposed new permit language in its Exceptions that include the use of grid cells, which increase the flexibility of IMC to model the ground water. I asked the ALJ to consider the proposal on remand, and he found that the new language proposed by DEP was acceptable. Thus, revised ERP Specific Condition 16.B.2, as set forth in paragraph 51 of the ROR, is accepted and adopted herein.

884.k. Replace Stream 8e with 7e as a Reference Wetland.

The ALJ recommended that Stream 8e be replaced as a reference wetland by Stream 7e on Table RF-1. DEP and IMC agree to this technical change, which has not been opposed by the Petitioners. This technical change is thus adopted, and Stream 7e replaces Stream 8e as the reference wetland on Table RF-1.

884.l. Add Table RF-1 to the ERP.

The ALJ also recommended that Table RF-1 be added to the Revised ERP to identify the 35 reference wetlands in this OFG permit document. DEP and IMC agreed and proposed revised Monitoring Requirements to incorporate this recommendation of the ALJ. I asked the ALJ to consider this new language on remand, and he found this revised language to be acceptable. The Petitioners have raised no objections. I thus accept and adopt herein these revised Monitoring Requirements, Paragraph B, as set forth in Finding of Fact 52 of the ROR.

884.m. Eliminate the visual evaluation option for release of mitigation sites.

This recommended modification by the ALJ of Revised ERP Specific Condition 17.d is accepted and adopted herein for the reasons set forth in my above ruling denying DEP's Exception I.D, which are incorporated by reference herein.

884.n. Prohibit IMC from conveying land until the mitigation is released.

I decline to adopt this real property conveyance restriction recommended by the ALJ for the reasons set forth in detail in the above ruling granting DEP Exception I.I, which ruling is incorporated by reference herein.

884.o-p. Recalculate financial responsibility for hydrologist's fee; Recalculate financial responsibility to include the cost of obtaining sand tailings; and Recalculate financial responsibility to include Stream 3e.'

In the LRO, I explained how the OFG Revised ERP financial responsibility should be analyzed and interpreted in conjunction with the financial responsibility requirements for the Revised CRP. I asked the ALJ to re-evaluate six aspects of the financial responsibility in light of my explanation. He agreed and made a comprehensive reevaluation of the facts previously found and received new evidence that was relevant. The ALJ found in numbered paragraphs 21 and 29 of the ROR, respectively, that IMC's new total ERP financial responsibility for the entire OFG project was $3,685,634.00, and the revised estimated costs of OFG wetland restoration was $2,379,697. The ALJ also found these revised ERP costs to be reasonable. I conclude that these findings of the ALJ are based on competent substantial evidence of record at the remand hearing and they are accepted.

In particular, the ALJ found the following in the ROR, which track my requests in subparagraphs A.5(a) through (f) of the LRO, dealing with any potential necessary adjustments to Table B (Wetlands Mitigation Financial Summary). I find that these additional findings by the ALJ are supported by competent substantial evidence presented at the remand hearing and they are adopted and accepted herein:

> LRO Issue 5.a - IMC proposed a mining and reclamation scheme that the ALJ found in paragraphs 22-27 of the ROR will ensure that OFG sand tailings will be reasonably available for use as backfill for the OFG re-claimed wetlands. DEP proposed a revised ERP Specific Condition 25 that provides a mechanism to ensure that OFG sand is used for backfilling, which the ALJ approved. I accept the revised ERP Specific Condition, as approved by the ALJ in paragraph 27 of the ROR. In paragraph 28 of the ROR, the ALJ also found that no adjustments would be required to Table B (IMC's Wetlands Mitigation Financial Summary) for estimated costs associ-ated with the sand tailings underlying the wetlands and surface waters to

be reclaimed at OFG. Thus, no additional ERP financial responsibility is required for the transportation of OFG sand used for the reclamation of mined wetlands at the site.

LRO Issue 5.b - In Finding of Fact 29 of the ROR, the ALJ found that the average earthmoving costs proposed by IMC were reasonable and they were incorporated in Table B.

LRO Issue 5.c - In paragraphs 30 and 31 of the ROR, the ALJ found that IMC's cost estimates for hydrological services, mapping, and engineering design were adequate.

LRO Issues 5.d,e - In paragraphs 32 and 33 of the ROR, the ALJ found that IMC's estimated ERP financial responsibility costs at OFG, after adding reclamation costs for Stream 3e, restoration of the consolidated crossing over Stream 1ee, and subtraction of the now preserved Stream 1e series, are adequate.

LRO Issue 5.f - In paragraph 34 of the ROR, the ALJ found the estimated costs to grade the spoil piles at OFG, as recommended in paragraph 884.e of the RO, would generate no additional ERP financial responsibility for IMC. In paragraphs 36 and 41, the ALJ calculated the cost of placing at least one foot of mulch in each reclaimed bay swamp at $41,344.00, and the cost of transporting topsoil to the reclaimed wet prairies at $117,344.00. He also found in paragraph 42 of the ROR that no additional costs would be incurred by obtaining 0.1 foot contours or conducting multiple transects.

884.r. Gopher tortoise relocation plan.

I discussed this recommendation above in granting DEP's Exception I.H. The recommendation is accepted and is incorporated into the Revised CRP.

919.a. Incorporate Maps I-2 and I-3.

The ALJ recommended that Maps I-2 and I-3 be incorporated into the Revised CRP. In 43(a) of its exceptions, IMC proposed a new CRP Specific Condition 15 that requires IMC to submit, within 45 days of issuance of this Final Order, two signed and sealed copies of any revised maps, figures, or other documentation required by the Final Order. The ALJ found this new condition to be a reasonable way to hand the various documents, and I agree. See Manasota-88, 25 F.A.L.R. at 897, *aff'd per*

curiam, 865 So.2d 483 (Fla. 1st DCA 2004) (adopting the administrative law judge's recommendation that IMC submit the final version of the financial responsibility mechanism 30 days prior to commencing phosphate mining). Thus, new CRP Specific Condition 15, set out in paragraph 57 of the ROR, is accepted and adopted herein.

919.b-d. The depth of sand tailings for upland reclamation.

The ALJ made several recommendations for sand tailings, topsoil, and green manure for different plant communities in the reclamation. DEP and IMC proposed revised CRP Specific Conditions 8a and 8b, which were found to be acceptable by the ALJ. Thus, the revised CRP Specific Conditions 8a and 8b set forth in paragraph 54 of the ROR are accepted and adopted herein.

919.e,- f. Prohibiting conveyance of the property and restricting agricultural activities; and modifying deadlines in the CRP to comply with DEP's rules.

The ALJ recommended in the RO that the OFG Revised CRP require that IMC protect the upland reclamation from adverse conditions until the reclamation was established. DEP filed an exception to the portion of this recommendation that restricted the transfer of the property for the reasons articulated above. The ALJ also recommended, and DEP agreed, that the deadlines in the Revised CRP should be modified to comport with DEP's rules. DEP and IMC proposed a new CRP Specific Condition 14 to address these issues, which the ALJ did not disapprove. I thus accept and adopt herein new CRP Specific Condition 14, as set forth in paragraph 56 of the ROR, but reject that part of the ALJ's recommendation in the initial RO that would restrict the transfer of the property.

RULINGS ON EXCEPTIONS TO THE RECOMMENDED ORDER ON REMAND (ROR)

I. EXCEPTIONS TO THE ROR OF DEP AND IMC

DEP's and IMC's Exceptions to the ROR are similar in substance and are consolidated for purposes of their consideration and disposition. DEP and IMC agree with all of the factual findings of the ALJ set forth in numbered paragraphs 1 through 60 of the ROR. The only objection to the ROR raised in these Exceptions relates to the Recommendation section, which reads as follows:

> The proposed recommended orders of DEP and IMC contain recommendations that DEP issue the ERP, and approve the CRP, both as amended above. The Administrative Law Judge declines to recommend the issuance of the ERP and approval of the CRP, both as amended above.

DEP and IMC both assert that these provisions of the ROR do not constitute revised recommendations by the ALJ that DEP ultimately deny issuance of the Revised ERP and disapprove the Revised CRP for the proposed phosphate mining/reclamation activities at the OFG site. Instead, DEP and IMC contend that this statement merely reflects the ALJ's correct interpretation of the limited scope of the remand to DOAH as specified in my LRO entered on August 5, 2005.

These Exceptions correctly point out that my limited remand to DOAH was expressly restricted to additional factual findings by the ALJ on specific matters set forth in detail on pages 25-26 of the LRO. I did not request the ALJ to make any additional recommendations based on additional factual findings in the ROR. I thus construe this last sentence of the Recommendation portion of the ROR to be an implicit acknowledgment by the ALJ that additional recommendations on the ultimate disposition of the Revised ERP and CRP applications were beyond the scope of the

limited remand for additional factual findings as set forth in the LRO. I conclude that the ALJ was merely declining to respond to improper requests by DEP and IMC in their proposed recommended orders on remand for additional recommendations as to the ultimate disposition of these proceedings.

In paragraph 923 of his prior RO, the ALJ concluded that:

> DEP should issue the ERP, subject to the conditions set forth in paragraph 884 above. DEP should issue the CRP approval, subject to the conditions set forth in paragraphs 919 above. DEP should issue the WRP modification.

These conclusions by the ALJ that DEP should issue and/or approve IMC's subject applications for the OFG site, subject to his suggested additional conditions, were essentially repeated in the formal Recommendation portion of the RO. I conclude that these recommendations, as set forth in the RO, are the recommendations of the ALJ still in effect for the ultimate disposition by DEP of these formal proceedings.

Accordingly, DEP's and IMC's Exceptions to the ROR are granted, and the last sentence of the Recommendation portion of the ROR is construed to be an appropriate ruling by the ALJ declining the improper requests of DEP and IMC for additional recommendations on remand.

II. EXCEPTIONS TO THE ROR OF THE AUTHORITY AND SARASOTA COUNTY

The Exceptions to the ROR of the Authority and Sarasota County (sometimes referred to collectively as "Petitioners") are similar in substance and are consolidated in this Final Order for purposes of their consideration and disposition. Neither of these Petitioners contends that the ALJ's factual findings in the ROR are not supported by competent substantial evidence of record. Rather, their Exceptions to the ROR consist of a basic attack on the essential legality of the remand portion of these proceedings.

These Petitioners claim that the ALJ erred in improperly soliciting the remand in his initial RO, DEP erred in entering the remand order as invited by the ALJ, and the ALJ erred again in accepting the remand. Both Petitioners argue that the applicable law of Florida does not authorize a remand to DOAH under the material facts presented here.

This attack by the Petitioners on the legality of the entire remand portion of these proceedings is rejected for the following reasons:

1. It is true that there is no express statutory authority for an agency to remand a proceeding back to DOAH. However, such authority for agency remand of an administrative case back to DOAH where additional findings of fact are necessary to the issuance of a cogent agency final order is established by a long line of Florida appellate decisions going back to the mid-1980's. See, e.g., Dept. of Environmental Protection v. Dept. of Management Services, Div. of Adm. Hearings, 667 So.2d 369 (Fla. 1st DCA 1995); Collier Development Corp. v. State, Dept. of Environmental Regulation, 592 So.2d 1107 (Fla. 2d DCA 1991); Dept. of Professional Regulation v. Wise, 575 So.2d 713 (Fla. 1st DCA 1991); Manasota 88, Inc. v. Tremor, 545 So.2d 439 (Fla. 2d DCA 1989); Miller v. State, Dept. of Environmental Regulation, 504 So.2d 1325 (Fla. 1st DCA 1987); Cohn v. Dept. of Professional Regulation, 477 So.2d 1039, 1047 (Fla. 3d DCA 1985). In fact, the Florida appellate courts have held that there are some circumstances under which agency remand to DOAH is not only appropriate, but is actually "dictated." Miller, 504 So.2d at 1327; Cohn, 477 So.2d at 1047.

2. In their respective Exceptions, these Petitioners attempt to distinguish the holdings in each of the above-cited cases based on purported factual and procedural differences between them and the instant cases. However, I do not find their attempt to

distinguish these cited cases authorizing agency remand to DOAH for additional fact-finding under certain circumstances to be persuasive. No two administrative or judicial cases have identical facts or procedural elements, and such factual and procedural identity is not required in order to establish controlling precedent. I find it telling that neither Petitioner has cited to a single Florida case where the decision of a hearing officer (now "administrative law judge") to accept remand of an administrative proceeding from an agency for additional fact-finding has been held to be improper by a Florida appellate court and reversed on appeal.

3. I conclude that the subject consolidated cases constitute one of those exceptional circumstances referred to in Miller and Cohn above where a remand to DOAH is not only authorized, but is dictated. The ALJ's initial RO left unresolved such significant factual matters as the:

> (a) OFG closed basin-open basin issue due to rulings in the LRO rejecting the ALJ's interpretation of DEP's rule provisions regulating this matter.
>
> (b) OFG recharge well mechanism due to errors in material factual findings in the RO acknowledged by all the parties and the ALJ on remand.
>
> (c) Appropriate boundaries of the Stream 1e series, its associated wetlands and floodplain necessitated by IMC's subsequent agreement to accept the ALJ's recommendation in the RO that this 46-acre wetlands area be left undisturbed, rather than mined as originally proposed.
>
> (d) Precise location and timing of a dragline crossing over this now preserved Stream 1e area at the OFG site.
>
> (e) Additional findings necessary to implement IMC's subsequent agreement to accept the ALJ's recommendation in the RO that Stream 3e' be restored.
>
> (f) The ERP financial responsibility of IMC for sand tailings generated at OFG in light of rulings in the LRO rejecting a portion of the ALJ's interpretations of DEP rules regulating this matter.

4. In addition, the ALJ expressly acknowledged in paragraphs 924-926 of his RO that his recommended permit modifications in paragraphs 884 and 919 would likely warrant a remand to DOAH for "supplemental factfinding." None of the cases relied upon by these Petitioners involve a similar recommended order where a hearing officer or administrative law judge acknowledged that the agency's acceptance of his recommended permit changes would likely necessitate a remand to DOAH for additional fact-finding.

5. I reject the Petitioners' suggestion that the ALJ's acceptance of the limited remand for additional factual findings as requested in my LRO violates any essential requirements of law under the Florida Administrative Procedure Act ("APA"), as articulated in J.W.C. Company, 396 So.2d at 778. All of the above-cited Florida decisions approving agency remand to DOAH for additional findings of fact in formal administrative proceedings were handed down after the J.W.C. Company opinion was issued in 1981. The record reflects that the Petitioners were given ample opportunity to prepare their respective cases on remand. The LRO was entered on August 5, 2005, and the remand hearing did not commence until October 10, 2005, over two months after the LRO was entered. The record further reflects that all the parties engaged in discovery prior to the remand hearing, the ALJ held two prehearing case management conferences, and issued two related orders dealing with prehearing deadlines and scope of the remand.

6. I also adopt the ALJ's conclusions in the ROR rejecting the Petitioners' efforts to limit the scope of the DEP remand order. The ALJ correctly observes that such scope of remand issues implicate procedural and evidentiary matters, such as rulings

on motions *in limine* and admissibility of evidence at the remand hearing. These procedural and evidentiary rulings appear to be matters that have been determined by Florida case law to be within the substantive jurisdiction of the ALJ, as the fact-finder in these administrative proceedings. See, e.g., Barfield v. Dept. of Health, 805 So.2d 1008, 1011-12 (Fla. 1st DCA 2002).

7. Finally, I conclude that the ALJ's decision to receive evidence at the remand hearing and make additional factual findings in the ROR on the propriety of a consolidated crossing at Stream 1ee first proposed by IMC on remand is within the reasonable scope of the dragline crossing issue set forth in paragraph A.3 on page 25 of the LRO. The undisputed evidence presented at the hearing on remand clearly supports the ALJ's findings in paragraphs 2-8 of the ROR that this Stream 1ee consolidated crossing significantly reduces the adverse impacts to the OFG water resources when compared to the two Stream1ee/Stream 2e crossings proposed in the Revised ERP. I find no fault with the ALJ in making additional factual findings on remand on a consolidated dragline-crossing route that unequivocally reduces the adverse impacts to the OFG streams and wetlands of the proposed mining activities.

Based on the above rulings, the Exceptions to the ROR of the Authority and Sarasota County are denied.

III. EXCEPTIONS TO THE ROR OF CHARLOTTE COUNTY

Charlotte County's Exceptions to the ROR raise some issues that have also been raised in the Exceptions to the ROR filed by DEP, IMC, the Authority and Sarasota County. My prior rulings herein on those Exceptions of DEP, IMC, the Authority and Sarasota County are thus incorporated in their entirety by reference herein.

Charlotte County's Exception I

Charlotte's first Exception to the ROR contends that the ALJ's recommendations in the initial RO have been modified and superceded by his subsequent ROR. This contention is rejected for the reasons set forth in my prior rulings on DEP's and IMC's Exceptions to the ROR. In those rulings, I construed the last sentence of the Recommendation portion of the ROR to be an appropriate ruling by the ALJ declining DEP's and IMC's improper requests for additional recommendations on remand. I also ruled that the ALJ's recommendations set forth in the initial RO for the ultimate disposition by DEP of these consolidated recommendations remain unchanged. Those rulings are reaffirmed.

Accordingly, Charlotte County's Exception I to the ROR is denied.

Charlotte County's Exception II, III, and V

The three related Exceptions to the ROR, challenging the basic legality of the limited remand to DOAH for additional factual findings in these proceedings, contain some arguments similar to those made by the Authority and Sarasota County and rejected in my prior rulings above. Charlotte County's arguments are rejected for the same reasons set forth in my rulings denying the Authority's and Sarasota County's Exceptions to the ROR.

As noted above, none of the Petitioners, including Charlotte County, has cited to a single case where a decision by a hearing officer or administrative law judge to accept an agency remand order for additional factual findings was held to be improper and reversed on appeal. Moreover, none of the cited cases involve a situation where recommended multiple permit modifications were made by a hearing officer or

administrative law judge, who also acknowledged that the agency's acceptance of these suggested permit modifications would likely require "supplemental fact-finding."

I also find Charlotte County's Exceptions to the ROR attacking the basic legality of the remand proceedings in this case to be inconsistent with the prior assertion in numbered paragraph 121 of its Exceptions to the RO that: **"to the extent, if any, that any of the above-referenced deficient recommended permit conditions [in paragraphs 884 and 919 of the RO] can be rectified with additional findings of fact, . . . the case should be remanded back to the ALJ for additional findings of fact concerning such permit conditions."** (emphasis supplied)

Charlotte County's contention that the limited remand to DOAH impairs the fairness of these proceedings is also not persuasive in substance. As discussed above, the remand for additional findings of fact was necessitated by multiple recommended permit modifications from the ALJ, recognized as likely necessary by the ALJ, and acknowledged by Charlotte County as being appropriate in numbered paragraph 121 of its Exceptions to the RO. In addition, the record on remand reflects that Charlotte County and the other Petitioners were afforded ample opportunity to implement discovery and to present additional testimony, documentary evidence, and legal argument in support of their respective positions at the five-day remand hearing, in their proposed recommended orders on remand, and in their exceptions to the ROR.[16]

Finally, neither Charlotte County, nor any of the other Petitioners, deny that the ALJ's additional findings on remand will result in significant increases in the extent of ecologically important streams and wetlands at OFG left undisturbed and being restored

[16] At the remand hearing, Charlotte County presented the testimony of five expert witnesses and had approximately 50 exhibits admitted into evidence.

over that proposed by IMC in the Revised ERP and CRP prior to remand. Accordingly, Charlotte County's Exceptions II, III, and V to the ROR are denied.

Charlotte County's Exception IV

In this Exception to the ROR, Charlotte County argues that the limited remand to DOAH in this case constituted a failure on my part to fulfill my statutory obligation to rule on certain technical Exceptions to the initial RO filed by DEP and IMC. I find this contention to be without merit for several reasons.

First, this Final Order, exceeding 100 pages in length, not only rules on the various Exceptions to the ROR, but also includes detailed rulings on the numerous Exceptions to the RO filed by all the parties, including DEP, IMC, and Charlotte County. Second, assuming that this inclusion of the "technical errors" issue in the remand was erroneous, it would only be harmless error. In his ROR, the ALJ declined to consider most of these technical errors and only made four clerical corrections, all of which were unopposed by Charlotte County. Third, Charlotte County offers no explanation of its purported authority to act on behalf of DEP and IMC and to assert the claim that I failed to properly address Exceptions filed by these Respondents.

For the above reasons, Charlotte County's Exception IV to the ROR is denied.

Charlotte County's Exception VI and VII

In these related Exceptions, Charlotte County contends that the ALJ erred in allowing DEP and IMC to present new permit conditions on remand. This contention, challenging the decisions and rulings of the ALJ in implementing the limited remand order, was addressed in my prior rulings denying the Authority's and Sarasota County's Exceptions to the scope of remand, which have been incorporated by reference herein.

I again decline to substitute my judgment for that of the ALJ on these procedural and evidentiary rulings on remand.

I have also previously concluded that the matter of the "consolidated crossing" at Stream 1ee addressed in the hearing on remand is reasonably related to the dragline crossing issue remanded for additional findings in paragraph A.3 on page 25 of the LRO. I reaffirm my agreement with the ALJ's decision to receive evidence and make additional factual findings on this consolidated crossing site, which was found by the ALJ to unequivocally reduce adverse impacts of the mining activities at OFG on the now preserved Stream 1e series and its appurtenant wetlands. I find these additional findings on the consolidated crossing site, as set forth in numbered paragraphs 2 through 8 of the ROR, to be supported by the expert testimony of Richard Cantrell and Dr. Garlanger at the remand hearing, and they are adopted herein.

I find Charlotte County's reliance on the Altman case to be misplaced. The DEP final order in the Altman case declined to consider the additional conditions first proposed in IMC's Exceptions for the stated reason that these additional conditions had not been recommended by the ALJ, as required by the case law of Florida. IMC Phosphates, 25 F.A.L.R. at 4732. The additional permit conditions necessitating the limited remand to DOAH in these proceedings were recommended by the ALJ in paragraphs 884 and 919 of his RO. If additional permit conditions had also been recommended by the ALJ in the Altman case, I would have been required to consider and dispose of such recommended additional conditions by approval, rejection, or remand for additional findings.

Charlotte County 's Exceptions VI and VII to the ROR are thus denied.

Charlotte County's Exception VIII to the ROR – The Well Recharge System

In this Exception, Charlotte County claims that the ALJ "erroneously disregarded important undisputed evidence concerning the recharge well system." Charlotte County is essentially requesting that I substitute my judgment for that of the ALJ on purely evidentiary matters and supplement the ALJ's factual findings in the ROR with the additional findings suggested in the County's Exceptions. However, the Florida case law cited in the above Standards of Review holds that an agency reviewing a DOAH recommended order has no authority to add to the findings of fact of an administrative law judge, and the agency must review the sufficiency of such factual findings as they exist. Furthermore, an administrative law judge is not required to believe the testimony of any witness, even if such testimony is undisputed. Dept. of Highway Safety v. Dean, 662 So.2d 371, 372 (Fla. 5th DCA 1995).

I conclude that the ALJ adequately addressed the recharge well system issue on remand in his unchallenged findings of fact in numbered paragraphs 9 through 18 of the ROR. I specifically note my agreement with the ALJ's finding in paragraph 17 of the ROR that the revised ERP Condition 10.a, quoted in its entirety in paragraph 18, "responds adequately to the issues raised in the RO concerning the role of a recharge well system at OFG."

For the above reasons, Charlotte County's Exception VIII to the ROR is denied.

Charlotte County's Exceptions IX and X – Wetlands Mitigation Financial Responsibility

These two related Exceptions dealing with the issue of IMC's financial responsibility requirements for restoration of wetlands at the OFG site do not actually object to any specific findings of fact of the ALJ in the ROR. Thus, these Exceptions do

not comply with the requirements of § 120.57(1)(k), Fla. Stat., requiring an exception to identify the disputed portion of the recommended order by page number or paragraph. Instead, Charlotte County uses these Exceptions as vehicles for a belated attack on the validity of the legal rulings in the DEP Limited Remand Order ("LRO") entered in these proceedings on August 5, 2005. In fact, Charlotte County's request in paragraph 100 of Exception IX that the "Secretary should take this opportunity to revisit her decision in the Limited Remand Order" clearly indicates these two "Exceptions to the ROR" constitute an unauthorized request for reconsideration of the LRO.

The statutory and rule procedures for filing exceptions to recommended orders under subsection 120.57(1)(k), Fla. Stat., and Rule 28-106.217, F.A.C., are not designed to accommodate challenges to the validity of interlocutory orders of administrative agencies. The proper procedure for challenging an interlocutory agency order, like the subject LRO, is the filing of a Petition for Review of Non-Final Agency Action with the appropriate district court of appeal under Fla. R. App. P. 9.100. This Petition must be filed within 30 days of the rendition of the non-final agency order sought to be reviewed. However, Charlotte County failed to challenge this agency's 2005 LRO by filing a timely Petition for Review of Non-Final Agency Action with the appropriate district court of appeal.

In these Exceptions, Charlotte County is also again asking me to overrule the ALJ on matters such as the probative value of testimony and credibility of witnesses and to supplement the ALJ's findings of fact in the ROR. For instance, Charlotte County repeatedly cites to the purported undisputed testimony at the remand hearing of its expert witness, Thomas Hurd. The County would apparently have me supplement the

ALJ's factual findings in the ROR by incorporating this expert testimony of Mr. Hurd into this Final Order.

Nevertheless, there is no direct reference in the ROR to the expert testimony of Mr. Hurd, and the substance of his opinions are not embodied in the ROR. To the contrary, Mr. Hurd's testimony concerning the purported costs of contouring earth and sand spoil piles was apparently not accepted by the ALJ, who made the unchallenged finding in paragraph 34 of the ROR that the grading of spoil piles "does not generate additional costs because the dragline operator and earthmoving contractor will perform this work as part of their respective responsibilities." Thus, the ALJ obviously did not accord much weight to the expert testimony on remand of Mr. Hurd.

I once more decline to overrule the judgment of the ALJ on purely evidentiary matters and again acknowledge my lack of authority to supplement the ALJ's existing factual findings by making new findings of fact in this Final Order as suggested by Charlotte County. I also again note that the ALJ is not required to believe the testimony of any witness, even if the testimony is undisputed. Dean, 662 So.2d at 372.

In any event, I reaffirm my prior ruling in the LRO that I have no current authority to extend the ERP wetlands mitigation financial responsibility requirements of the BOR to sand tailings waste disposal activities at OFG as defined in Chapter 62C-16, F.A.C. Charlotte County's attempt to have ERP wetlands mitigation financial assurance requirements extended to upland portions of the OFG site ignores the fact that there are existing provisions governing financial responsibility requirements for the reclamation of disturbed upland phosphate lands. See § 378.208, F.S., and Rule 62C-16.0075, F.A.C.

In the prior Altman case, Charlotte County also failed in its attempt to have ERP wetlands mitigation financial assurance requirements extended to upland portions of another proposed phosphate mine site in the Horse Creek vicinity. In the DEP Altman Final Order, which was affirmed on appeal, the then DEP Secretary, David Struhs, expressly concurred with the administrative law judge's conclusion that the "**mining and reclamation of uplands does not come within the purview of the [ERP] financial responsibility provisions of Rule 40D-4.301(1)(j), F.A.C., and the related BOR provisions**. Charlotte County v. IMC Phosphates Company, 25 F.A.L.R. at 4718. (emphasis supplied) Secretary Struhs also concluded at 25 F.A.L.R. 4727 that:

> The interpretation of the provisions of Chapters 373 and 378, Fla. Stat., and Rule 62C-16 is a matter over which this agency has primary jurisdiction . . . In view of the above rulings, the second sentence of paragraph 103 [of the recommended order] is rejected to the extent it concludes that phosphate mine reclamation standards for disturbed uplands and wetlands are synonymous.

In view of the above rulings, Charlotte County's Exceptions IX and X are denied.

Charlotte County's Exception XI – Adoption by Reference

This final "adoption by reference" Exception does not comply with the requirements of § 120.57(1)(k), Fla. Stat., requiring an exception to identify the disputed portion of the recommended order by page number or paragraph and to identify the legal basis for the exception. I thus decline to rule on this Exception as authorized by § 120.57(1)(k). In any event, the other Petitioners' Exceptions to the ROR have been denied in this Final Order.

CONCLUSION

Section 378.202, F.S., entitled "Legislative intent," reads, in pertinent part, that:

> (1) Florida is endowed with varied natural resources that provide recreational, Environmental, and economic benefit to the people of this state. The extraction of phosphate is important to the continued economic well-being of the state and to the needs of society. While it is not possible to extract minerals without disturbing the surface areas and producing waste materials, mining is a temporary land use. Therefore, it is the intent of the Legislature that mined land be reclaimed to a beneficial use in a timely manner and in a manner which recognizes the diversity among mines, mining operations, and types of lands which are mined.

This quoted language states that phosphate mining is an activity expressly sanctioned by the Legislature due to its important economic benefit to this state. This statutory language also expresses the legislative intent that, even though phosphate mining will inevitably cause some disturbance to the environment, such mining activities are still permissible under Florida law, provided the applicant proposes and implements adequate reclamation plans. IMC's proposed phosphate mining/reclamation activities at OFG will disturb less than 212 acres of on-site wetlands in Hardee County.[17] However, IMC has agreed to leave undisturbed more existing wetlands (in excess of 375 acres) than will be disturbed. IMC has also agreed to create more new wetlands (approximately 276 acres) than will be disturbed.

After an extensive initial formal hearing lasting approximately seven weeks, the ALJ entered a 417-page RO in these proceedings. On remand, the ALJ held an additional five-day evidentiary hearing and entered a subsequent ROR exceeding 50 pages in length, in which he made all the additional findings of fact requested in my

[17] The approximate 267 acres of OFG wetlands found by the ALJ to be disturbed in his RO has been reduced in size by IMC's subsequent agreement to preserve, rather than mine, the Stream 1e series, its associated wetlands and mine. Likewise, the ALJ's finding that approximately 320 acres of OFG wetlands will be left undisturbed must be correspondingly increased due to Steam 1e and its associated wetlands having been placed in the "no-mine" area.

LRO. In his ROR, the ALJ stated that he "**invited the remand to permit the development of new or strengthened specific conditions to the ERP or CRP approval, not to allow IMC another opportunity to produce evidence in support of already-existing ERP or CRP specific conditions**." (emphasis supplied)

The ALJ thus reviewed IMC's proposed OFG project in detail and considered and rejected most of a multitude of objections raised by the various permit challengers in these proceedings. Based on the ALJ's numerous factual findings in his RO and ROR, most of which findings I agree with and adopt in this Final Order, I conclude that IMC has provided reasonable assurances that its proposed phosphate mining/reclamation activities at the OFG site and Ft. Green Mine will comply with applicable ER, CRP, and WRP criteria and standards.

I would note that this is the third in a series of administrative cases involving applications filed by IMC to mine phosphate at separate sites in the vicinity of Horse Creek where three different administrative law judges have found no potential significant adverse impacts to water quality or water quantity in the Peace River and Charlotte Harbor. See RO, ¶¶ 661, 685-693; Charlotte County v. IMC Phosphates Company, 25 F.A.L.R. at 4762, 4767-4768; Manasota-88 v. IMC Phosphates Company, 25 F.A.L.R. at 918, 934, 939. Moreover, this is the second case involving applications filed by IMC to mine phosphate at separate sites in the vicinity of Horse Creek where two different administrative law judges have found no potential interference with the Authority's right

to withdraw potable water from the Peace River. See RO, ¶¶ 9, 777; Manasota-88 v. IMC Phosphates Company, 25 F.A.L.R. at 918, 933.

In reaching the determination that IMC has provided the necessary reasonable assurances to be entitled to issuance of the subject OFG permits and approvals, I deem the following matters to be of special significance:

1. The ALJ found in paragraph 60 of the ROR that "Horse Creek and its 100-year floodplain are, respectively, the first and second most important natural resources at OFG." It is undisputed that the Revised ERP not only places these two most important natural resources at the site into the "no-mine" area of OFG, but also grants to the State of Florida a Conservation Easement over this waterbody and its floodplain.

2. In paragraphs 878 and 883 of the RO, the ALJ also concluded that the most significant deficiency in IMC's mitigation plans was the proposed mining of the relatively pristine Stream 1e series and its associated wetlands, and floodplain. The ALJ thus concluded that it was "imperative" that this Stream 1-e series area be preserved. IMC has agreed to implement this recommendation of the ALJ by placing the Stream 1e Series, its associated wetlands, and 25-year floodplain in the "no-mine" area of the OFG project. The boundaries and configuration of this newly-preserved Stream 1e series area were accurately identified at the hearing on remand and are depicted in IMC's Exhibit 2f-R, Figure A-1f.

3. On remand, the ALJ found that there will be ten times as much sand tailings generated from the OFG mining activities as will be required for restoration of disturbed wetlands and surface waters at the OFG site. (ROR, ¶ 22) The ALJ further found that these OFG sand tailings will be reasonably available for use as backfill at OFG. (ROR, ¶ 25)

4. In paragraph 923 of the RO, the ALJ proposed that DEP issue the Revised ERP, approve the Revised CRP, and issue the Ft. Green Mine Revised WRP Modification, subject to the permit modifications recommended in paragraphs 884 and 919 of the RO. As a result of the remand proceedings, almost all of these recommended permit modifications are adopted in this Final Order as proposed by the ALJ or with modifications found to be acceptable by the ALJ in his ROR.

5. In paragraph 924 of the RO, the ALJ ultimately concluded that:

> For a complex and extensive activity, such as that proposed

> for OGC, numerous substantial modifications should not be grounds for denial of the permit or approval, especially if, as here, the application reflects a substantial effort on the part of the applicant to conform to the permitting and approval criteria and the application is close to satisfying the permitting and approval criteria.

I agree with this conclusion of the ALJ. A permit applicant is not required to provide "absolute guarantees" that a complex project will comply with all applicable permitting requirements. The Florida case law holds that demonstration of a "substantial likelihood that the project will be successfully implemented" is sufficient. Coscan Florida, 609 So.2d at 648.

I view IMC's agreements finalized on remand to leave undisturbed the relatively pristine Stream 1e series and its associated wetlands and 25-year floodplain (approximately 46 acres), and to (b) reclaim Stream 3e, to be key supplemental factors in providing reasonable assurance that the OFG Project will be successfully implemented. I also find that the record clearly establishes that my LRO requesting additional findings by the ALJ on remand has facilitated an improved mining/reclamation project at OFG.

It is irrefutable that the modifications to the OFG Project finalized on remand and described in detail in the ALJ's ROR substantially increase the extent of significant streams and wetlands being left undisturbed and being reclaimed at the site as compared to the Project as it existed prior to the remand. However, the Authority and Sarasota County still oppose the limited remand procedure.[18] Nevertheless, under

[18] As noted above, in its Exceptions to the ALJ's RO, Charlotte County initially advised the DEP Secretary that "to the extent, if any, that any of the above-referenced deficient recommended permit conditions can be rectified with additional findings of fact, . . . the case should be remanded back to the ALJ for additional findings of fact."

§ 378.202, Fla. Stat., this agency is directed to ensure that "mined lands be reclaimed to a beneficial use in a timely manner," even if this statutory mandate requires an occasional remand to DOAH.

It is therefore ORDERED:

A. The ALJ's Recommended Order (Exhibit A), as modified in the Limited Remand Order, Recommended Order on Remand, and in the above rulings in this Final Order, is adopted and incorporated by reference herein.

B. The DEP Limited Remand Order (Exhibit B) is incorporated by reference herein.

C. As construed in this Final Order, the ALJ's Recommended Order on Remand (Exhibit C) is adopted and incorporated by reference herein.[19]

D. The Department is directed to issue to IMC Phosphates Company the OFG Revised ERP bearing DEP File No. 0169281-001, subject to the conditions in the related Draft Permit attached to the Notice of Intent to Issue dated February 27, 2004, as modified in these proceedings by the Recommended Order, the Limited Remand Order, the Recommended Order on Remand, and this Final Order.

E. The Department is directed to approve the OFG Revised CRP designated by DEP as "IMC-ONA-CP," subject to the conditions set forth in the Division of Water Resource Management document entitled "Approval of the CRP for the IMC Ona Ft. Green Extension IMC-ONA-CP" dated February 27, 2004, as modified in these

[19] As discussed in the above rulings on DEP's and IMC's Exceptions to the ROR, I construe the last sentence of the Recommended Order on Remand to be a recognition by the ALJ that the requests of DEP and IMC for an additional recommendation on remand exceed the scope of my Limited Remand Order. Therefore, the recommendations of the ALJ in the initial RO that the Revised ERP and CRP and the Ft. Green WRP Modification be issued with his recommended modifications in paragraphs 884 and 919 remain unchanged.

proceedings by the Recommended Order, the Limited Remand Order, the Recommended Order on Remand, and this Final Order.

F. The Department is directed to issue to IMC Phosphates Company the Revised WRP Modification bearing DEP File No. 0142476-004, subject to the conditions set forth in the "Ft. Green Mine 25 Year Permit Modification" document issued by the Division of Water Resource Management on February 27, 2004.

Any party adversely affected by these proceedings 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 Rule 9.110, 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 _____ day of July, 2006, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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

MICHAEL W. SOLE

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

CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by electronic mail :

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Ann Cole, Clerk, and
Robert E. Meale, Administrative Law Judge,
Division of Administrative Hearings
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Tallahassee, FL 32399-1550

this _____ day of _____, 2006.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

_____

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