STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHARLOTTE COUNTY, **Petitioner,** **and** **GEORGE W. MULLINS, JR.; GEORGENE MULLINS HENDERSON; and MICHAEL GRAHAM MULLINS,** **Intervenors,** **vs.** **IMC PHOSPHATES COMPANY and DEPARTMENT OF ENVIRONMENTAL PROTECTION,** **Respondents.**	)	**OGC CASE NO.: 02-0835** **DOAH CASE NO.: 02-4134**

FINAL ORDER

The Division of Administrative Hearings ("DOAH") submitted a Recommended Order to the Department of Environmental Protection ("DEP") in this proceeding. Copies were served upon the Petitioner, Charlotte County ("County"), and the Intervenors, George W. Mullins, Jr., Georgene Mullins Henderson, and Michael Graham Mullins (collectively "Intervenors"), and upon the Co-Respondent, IMC Phosphates Company ("IMC"). A copy of the Recommended Order is attached hereto as Exhibit A.

Exceptions to the Recommended Order were filed on behalf of the County, DEP, and IMC. Responses to the Exceptions of DEP and IMC were filed on behalf of the County, and IMC and DEP filed separate Responses to the County's Exceptions. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

IMC is a general partnership authorized to do business in the State of Florida and is the permit applicant in this administrative proceeding. In October of 2000, IMC filed an application with DEP for a Consolidated Environmental Resource/Wetland Resource Permit ("the "Permit") to conduct phosphate mining and related activities, including land reclamation on the Altman Tract (the "Tract"). The Tract encompasses approximately 2,367 acres of land in the northeastern corner of Manatee County. The eastern boundary of the Tract is the Manatee-Hardee County line, and the Tract is bounded on the north and west by State Road ("SR") 37. SR 62 is adjacent to the southern boundary of the Tract at its southeast corner. Otherwise, the land to the south of the Tract is owned by Manatee County. All of the lands to the north, east, and west of the Tract have been mined for phosphate and are being reclaimed.

After review of the original application, DEP requested, received, and reviewed substantial additional information. In April of 2002, IMC also filed an application with DEP seeking approval of a modification to the approved Conceptual Reclamation Plan ("CRP") for its "Four Corners/Lonesome Mine" located in Polk, Hillsborough, and Manatee Counties. The purpose of this requested CRP modification application was to incorporate IMC's proposed reclamation plan for the Tract. On May 30, 2002, DEP gave notice of its intent to issue to IMC the Draft Permit to conduct phosphate mining and related activities on the Tract. At the same time, DEP also approved the requested CRP modifications incorporating the proposed reclamation plan for the Tract into IMC's existing Four Corners/Lonesome Mine CRP (the "Modified CRP").

The Draft Permit would authorize IMC to mine or disturb approximately 684 acres of wetlands and water bodies for phosphate mining and associated activities. Approximately 1,535 acres of uplands would also be mined or disturbed by phosphate mining activities. After reclamation, the Tract would contain approximately 788 acres of wetlands provided as mitigation for impacted DEP jurisdictional wetlands, 78.4 acres of wetlands preserved throughout mining, and approximately 1,410 acres of uplands. An additional 90 acres of wetlands would be reclaimed as required by the Corps of Engineers for additional mitigation.

In October of 2002, Charlotte County and the Peace River/Manasota Regional Water Supply Authority ("Authority") timely filed their petitions for formal administrative hearings challenging the issuance by DEP of the Draft Permit and the related Modified CRP. DEP then referred these petitions to DOAH and they were consolidated by order of Administrative Law Judge, J. Lawrence Johnston (the "ALJ"). However, the Authority subsequently dismissed its petition with prejudice in March of 2003. The Intervernors, who asserted a fractional interest in mineral rights beneath a portion of the Tract, were granted leave to intervene in the proceeding by the ALJ on March 24, 2003.

A DOAH final hearing was held in Bradenton on April 14-18, 22-25, 28-30; and on May 1, 5, and 6, 2003. Approximately 20 witnesses testified at this lengthy final hearing and over 400 exhibits were admitted into evidence. After the filings of the final hearing transcript and the parties' post-hearing submittals, the ALJ entered the Recommended Order now on agency review.

The Recommended Order contains multiple findings and conclusions by the ALJ that IMC failed to demonstrate at the final hearing that its proposed mining and land

reclamation activities on the Tract will comply with various environmental and land reclamation criteria and standards set forth in Chapters 373 and 378, Fla. Stat., Chapters 62C and 40D, Florida Administrative Code ("F.A.C."), and the Basis of Review for Permit Applications ("BOR") promulgated by the Southwest Florida Water Management District ("District").[1] The ALJ ultimately recommended that "DEP enter a final order denying IMC's applications to mine and reclaim the Altman Tract."

STANDARDS OF ADMINISTRATIVE REVIEW

The following rulings on the Exceptions to Recommended Order are made in light of the standards governing the administrative review of DOAH recommended orders by agencies having the authority and duty to enter final orders in formal administrative proceedings. Section 120.57(1)(l), Fla. Stat., 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."

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). Great deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." See, e.g., 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

[1] Substantial portions of Chapter 40D, F.A.C., and the District's BOR are adopted by reference in DEP's rules governing environmental resource permitting. See Rule 62-330.200(3), F.A.C.

reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. See, e.g., Suddath Van Lines, Inc. v. Dept. of Environmental Protection, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

Section 120.57(1)(l) also 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." However, if a finding of fact in a recommended order is improperly labeled by an administrative law judge, the label should be disregarded and the item treated as though it were properly labeled as a conclusion of law. See Battaglia Properties v. Fla. Land and Adjudicatory Commission, 629 So.2d 161, 168 (Fla. 5th DCA 1994).

A reviewing agency may not reweigh the evidence presented at a DOAH formal hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary matters are within the province of the administrative law judges, as the triers of the facts in formal proceedings. See, e.g., 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); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987).

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 in this case discloses any competent

substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such finding in preparing this Final Order. Bradley, 510 So.2d at 1123. In addition, a reviewing agency has no authority to make independent or supplemental findings of fact in construing the recommended order on review. See, e.g., North Port, Fla. v. Con. Minerals, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

RULINGS ON CHARLOTTE COUNTY'S EXCEPTIONS

Exception Nos. 1, 2 and 7

These three Exceptions of the County object to various findings and conclusions of the ALJ in paragraphs 31, 196, and 262 of the Recommended Order. In these paragraphs, the ALJ reviews the potential secondary impacts of IMC's proposed project and its potential impacts on stream flows in the Peace River and on flooding and drainage patterns on other lands. These findings and related conclusions of the ALJ appear to be correct legal interpretations supported by competent substantial evidence of record. This competent substantial evidence includes the testimony at the final hearing of IMC's expert witnesses, Dr. John Garlanger and Dr. Douglas Durbin.

In the subsequent rulings on IMC's Exceptions, I observe that the ALJ often chose to accept the opinion testimony of the County's expert witnesses over that of IMC's expert witnesses on many of the disputed issues in this case. As to the matters set forth in the three paragraphs challenged in these Exceptions, however, the ALJ evidently found the expert testimony of IMC's witnesses, Dr. Garlanger and Dr. Durbin, to be more credible than the testimony of the County's expert witnesses. I have no more authority to reweigh the evidence or to resolve conflicting expert testimony different from the ALJ with respect to findings that are adverse to the County than I do

to those findings favorable to the County. Consequently, the County's Exception Nos. 1, 2, and 7 are denied.

Exception No. 3

The County's third Exception objects to paragraph 198 of the Recommended Order. In this paragraph, the ALJ concludes that "[n]o minimum flows or levels have been established by rule pursuant to Section 373.042, Florida Statutes, for any water body potentially impacted by the proposed mining or reclamation at the Altman Tract, including Horse Creek or the Peace River."

It is undisputed that no rules have been adopted by the District establishing minimum flows or levels for the Peace River or for any water bodies located on the Altman Tract, including Horse Creek. The County contends that minimum flows or levels do not have to be established by rule and may be established on a case-by-case basis. However, this same contention was raised by the County and expressly rejected in the recent DEP final order entered in the case of Charlotte County v. IMC Phosphates Company, 25 FALR 868, 874-876 (Fla. DEP 2002), referred to by the ALJ in this case as the "Manson Jenkins" Final Order. However, the County suggests that the ALJ erred by relying on the Manson Jenkins Final Order because it has "no legal effect" due to the fact that the order was automatically stayed when the County filed its notice of appeal in the appellate proceeding now pending before the First District Court of Appeals of Florida.

Fla. R. App. P. 9.310(b)(2) does provide for an automatic stay of a final order when a public body files a timely notice of appeal. However, there are no provisions in this appellate rule stating that such automatic stay renders the final order under appeal

of "no legal effect." Furthermore, the County's Exception does not cite to any additional legal authority arguably supporting its proposition that the automatic stay of the DEP Manson Jenkins Final Order renders this order of no legal effect for purposes of precedent in this case.

The failure of the County to cite any legal authority in support its "no legal effect" contention is understandable. The governing case law on this issue appears to be contrary to the County's position. See, e.g., Reese v. Damato, 44 Fla. 692, 33 So. 462, 464 (Fla. 1902) (an appeal does not have the effect of suspending the effect of the judgment); Capital Assurance Co. v. Margolis, 726 So.2d. 376, 377 (Fla. 3d DCA 1999) (pendency of an appeal does not diminish the res judicata effect of the dismissal). See also, Huron Holding Co. v. Lincoln Mine Operating Co., 312 U.S. 183, 189 (1941) (while appeal with proper supersedeas stays execution of the judgment, it does not detract from its decisiveness and finality); Nixon v. Richey, 513 F.2d 430, 438 n.75 (D.C. Cir. 1975) (prior judgment will support claim of collateral estoppel even where it has been stayed pending appeal).

The County also contends that the ALJ improperly relied on the Manson Jenkins Final Order because this DEP final order purportedly conflicts with a DOAH final order entered in the case of Charlotte County v. Southwest Florida Water Management District, DOAH Case No. 94-5742RP, 1997 WL 1052343 (Fla. DOAH 1997), aff'd in part and rev'd in part, 774 So.2d 903 (Fla. 2d DCA 2001). In the Southwest Florida Water Management District DOAH final order, the ALJ concluded that the then provisions of § 373.042 did not require that minimum flows or levels be established by rule.

This same "conflict" contention was also raised by the County and expressly

rejected by the ALJ and DEP in the Manson Jenkins case. The Manson Jenkins Final Order correctly concluded that the County's reliance on the Southwest Florida Water Management District final order was misplaced because this DOAH final order interpreted an earlier version of § 373.042, Fla. Stat., which was subsequently amended in 1997 to require that minimum flows and levels be established by rule. See Manson Jenkins, 25 FALR at 875.

I conclude that the statutory interpretation in the Recommended Order on review and in the Manson Jenkins Final Order that § 373.042(4)(d), Fla. Stat. (2002)[2] requires minimum flows and levels for surface waters to be established by rule is a permissible statutory interpretation that is not clearly erroneous. In any event, the County's contention is moot because no permit is being issued in this Final Order.

In view of the above, the County's Exception No. 3 is denied.

Exception No. 4

The County's fourth Exception objects to the Finding of Fact 200 wherein the ALJ rejects the County's contention that any Draft Permit issued in this case should include a provision similar to the water use permit ("WUP") previously issued to the County by the Peace River Regional Water Supply Authority. The WUP provision sought to be included in the subject Permit would require surface water withdrawals to cease or be reduced if the Peace River's flow falls below any minimum levels subsequently established by the District for the Peace River. However, a WUP permit is issued by the District pursuant to Part II of Chapter 373, Fla. Stat., and is not within the purview of the

[2] Section 373.042(4)(d), Fla. Stat. (2002), prescribes that: "No minimum flow or level adopted by rule or formally noticed for adoption on or before May 2, 1997, shall be subject to the peer review provided for in this subsection." Current subsection (d) was not a part of 373.042(4) at the time the DOAH final order was entered in the Southwest Florida Water Management District case.

environmental resource permitting provisions of Part IV of Chapter 373.

Moreover, the County's WUP contention is directly related to its preceding contention that minimum flows and levels should be established on a case-by-case basis. This WUP contention is thus rejected for the same reasons set forth in my preceding ruling. The County's Exception No. 4 is thus denied.

Exception No. 5

The County's fifth Exception objects to Finding of Fact 201, wherein the ALJ refers to testimony at the DOAH final hearing that DEP and the District have an informal agreement that no separate "Works of the District" permit is required if DEP issues an environmental resource permit for a project located within the jurisdiction of the District. I find the ALJ's Finding of Fact 201 to be supported by competent substantial evidence of record, including the testimony of Janet Llewellyn, DEP's Director of the Division of Water Resource Management. (Tr. Vol. 14, pages 1782-1789.)

I would note that the record does not reflect that the County called any representative of the District to testify to the contrary. I would further note that the County's contention that a separate Works of the District permit is required when DEP issues an environmental resource permit for an activity within the jurisdiction of the District was considered and expressly rejected in the Manson Jenkins case. See Manson Jenkins, 25 FALR at 872. The County's Exception No. 5 is denied.

Exception No. 6

This Exception objects to paragraph 251 of the Recommended Order wherein the ALJ cites to the Manson Jenkins Final Order for the conclusion that DEP relies on Level II of the Florida Land Use Cover Classification System ("FLUCS Code") as a

starting point in determining whether wetlands are being replaced "acre-for acre, type for type" pursuant to Rule 62C-16.0051(4), F.A.C. See Manson Jenkins, 25 FALR at 880-881. The County again suggests that the ALJ's reliance on the Manson Jenkins Final Order is improper because the order is on appeal and is subject to an automatic stay. This suggestion is again rejected for the reasons set forth in detail in my prior ruling denying the County's Exception No. 3. Accordingly, the County's Exception No. 6 is also denied.

Exception No. 8

The County's final Exception objects to the ALJ's statutory interpretation in Conclusion of Law 267 of the provisions of § 403.412(5), Fla. Stat. (2002). The ALJ concluded in this paragraph that the 2002 amendments to § 403.412(5) eliminated the standing of the County to challenge the proposed approval by DEP of the subject Permit and Modified CRP by filing a verified petition under this statutory subsection.[3] Based on a review of the record, however, it does not appear that the ALJ's decision to reach a conclusion as to the County's standing under § 403.412(5) is necessary in this case, since the County's standing was not a disputed issue in the DOAH proceeding.

As discussed in my subsequent ruling denying IMC's Exception X, IMC stipulated in its Proposed Recommended Order filed with the ALJ that the County and the Intervenors have standing to challenge the issuance of the subject Permit and Modified CRP. Furthermore, the matter of the standing of the County or the Intervenors in this

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[3] The Exceptions and Responses to Exceptions filed by IMC and DEP do not appear to dispute the fact that the County filed a verified petition for administrative hearing in this case otherwise meeting the requirements of § 403.412(5), F.S. (2002), assuming that the County's standing was not abolished by the 2002 amendments. Furthermore, in its Response to the County's Exceptions, DEP agrees that the 2002 amendments to § 403.412(5) did not abolish the County's standing to contest the issuance of the subject Permit and Modified CRP by filing an appropriate verified petition for administrative hearing.

proceeding was not listed in the parties' Prehearing Stipulation as a disputed issue of fact or law remaining to be litigated at the final hearing. In addition, in its Response to this Exception, DEP expressly agrees that the County does have standing in this proceeding under § 403.412(5), Fla. Stat. (2002).

In any event, I will proceed with ruling on the merits of this Exception due to the potentially troubling precedent of the ALJ's conclusion that the 2002 amendments to § 403.412(5) eliminated the standing of any "political subdivision of the state" to intervene in an administrative proceeding dealing with environmental permitting issues. Prior to the 2002 amendments, § 403.412(5) authorized the "Department of Legal Affairs, a political subdivision or municipality of the state, or a citizen of the state" to intervene in any administrative proceeding dealing with the protection of the air, water, or other natural resources of the state by "filing a verified petition asserting that the activity . . . sought to be permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state."

In the leading case of Manasota-88, Inc. v. Dept. of Environmental Regulation, 441 So.2d 1109 (Fla. 1st DCA 1983), the court construed these prior provisions of § 403.412(5). In its Manasota-88 opinion, the court ruled that a citizen was authorized to initiate a formal administrative proceeding by filing a verified petition under § 403.412(5) when DER proposed to proceed with the issuance of a permit, even though there was no proceeding pending before DOAH at that time. Id. at 1111. The Manasota-88 court further concluded that, for purposes of the "intervene" language of § 403.412(5), a permit proceeding commenced when DER "issued it notice of proposed action, not when the matter is later referred to DOAH for formal action." Id. at 1111.

The 2002 amended language of § 403.412(5) at issue in this case provides that:

> As used in this section and as it relates to citizens, the term "intervene" means to join an ongoing s. 120.569 or 120.57 proceeding; this section does not authorize a citizen to institute, initiate, petition for, or request a proceeding under s. 120.569 or s. 120.57 (emphasis supplied).

The County contends that the plain language of these 2002 amended provisions only abolishes the prior standing of a "citizen" to initiate a permit proceeding by filing a verified petition under § 403.412(5) asserting that the challenged agency activity "will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state." I agree with the County's interpretation of this plain statutory language quoted above.

If the Legislature had intended to also abolish the prior standing of a "political subdivision of the state" to intervene in a permit proceeding by filing a verified petition containing the allegations required by § 403.412(5), it would have been a simple matter to do so by adding the words "political subdivisions of the state" to the amended language quoted above, along with the existing words "citizens" and "citizen." However, the Legislature did not choose to do so, and neither the ALJ nor DEP have the authority to amend the current language of § 403.412(5) by adding the words "political subdivision of the state." A logical extension of the ALJ's statutory interpretation would arguably support a conclusion that these 2002 amendments express the intent of the Legislature to also abolish the standing of the Dept. of Legal Affairs to intervene in an environmental permit proceeding by filing a verified petition under § 403.412(5).

Section 403.412(5), Fla. Stat, (2002), known as the "Environmental Protection Act of 1971," is a part of the Environmental Control provisions of Chapter 403, F.S., which the Department has been charged by the Legislature to implement and enforce.

See § 403.061, Fla. Stat. I thus conclude that the interpretation of the provisions of § 403.412(5) is a matter over which the Department has "substantive jurisdiction" under § 120.57(1)(l), F.S. I also find that the Department's interpretation of § 403.412(5) in this Final Order to be more reasonable than the ALJ's interpretation set forth in the Recommended Order.

Based on the above rulings, the County's Exception No. 8 is granted and Conclusion of Law 267 is rejected.

RULINGS ON DEP'S EXCEPTIONS TO RECOMMENDED ORDER

Exception No. 1

DEP's first Exception objects to paragraphs 103, 104, 106, 107, and 108-112 set forth in the section of the Recommended Order titled "Benefits of Reclamation." DEP's primary argument in this Exception is that the ALJ erroneously applied the "reasonable assurance" standard in analyzing the sufficiency of IMC's Modified CPR. DEP suggests that the reasonable assurance standard applicable to the review of IMC's Permit application does not apply to the consideration of the sufficiency of IMC's related conceptual reclamation plan for the Tract.

The term "reasonable assurance" is codified in § 373.414(1), Fla. Stat., and is also found in Rule 62-4.070(1), F.A.C. The cited statute and rule are regulatory provisions administered and enforced by DEP. "Reasonable assurance" has been judicially defined to require an applicant seeking a regulatory permit from the State for activities impacting state surface waters or jurisdictional wetlands to establish a "substantial likelihood that the project will be successfully implemented." Metro Dade County v. Coscan Florida, Inc., 609 So.2d 644, 648 (Fla. 3d DCA 1992).

I agree with DEP to the limited extent that the ultimate determination of whether "reasonable assurance" has been provided that a proposed project will comply with applicable environmental criteria and standards is a mixed determination of fact and law which, in the final analysis, must be made by this agency, not the ALJ. See, e.g., Florida Chapter of the Sierra Club v. Suwannee American Cement Co., 23 FALR 1455, 1467 (Fla. DEP 2000), appeal dismissed, 802 So.2d 520 (Fla. 1st DCA 2000); Miccosukee Tribe of Indians v. South Florida Water Management District, ER FALR 98:119, p.5 (Fla. DEP 1998), *affirmed*, 721 So.2d 389 (Fla. 3d DCA 1998); Save our Suwannee v. Piechocki, 18 FALR 1467, 1471 (Fla. DEP 1996); Barringer v. E. Speer and Associates, 14 FALR 3660, 3667 n.8 (Fla. DER 1992).

Nevertheless, I conclude that it was appropriate for the ALJ to apply the reasonable assurance standard in this case to both the Permit application and the Modified CRP application. As noted in DEP's Exception, the term "reasonable assurance" is not codified in Chapter 378, Fla. Stat., or in Chapter 62C-16, F.A.C. However, in this case, IMC's proposed reclamation plan cannot be severed from its related environmental resource permit application governed by Part IV of Chapter 373, Fla. Stat., and the implementing rules of DEP and the District.

IMC's proposed reclamation plan is the primary mitigation being offered by IMC in this case to offset the undisputed adverse impacts of its proposed mining activities on surface waters and wetlands on the Tract. Without mitigation that complies with the statutory requirements of § 373.414, Fla. Stat., IMC would not be entitled to issuance of its phosphate mining Permit. See §§ 373.414(1)(b) and 373.414(6)(b), Fla. Stat. Consequently, the fact that the Modified CRP is being offered by IMC as the primary

mitigation to offset the adverse effects of its proposed mining activities on the surface waters and wetlands on the Tract brings the Modified CRP within the purview of the "reasonable assurance" scrutiny associated with environmental resource permitting.

In addition, final orders of the Department of Environmental Regulation (a predecessor agency of DEP) have specifically acknowledged that the "reasonable assurance" scrutiny applies to reclamation plans associated with phosphate mining applications. See U.S. Agri-Chemicals Corp. v. Dept of Environmental Regulation, 1993 WL 378041 (Fla. DER 1993) (preliminary permit denial issued because the reclamation plan did not provide reasonable assurance of the restoration of a functional wetland); Concerned Citizens League of America v. IMC Fertilizer, Inc., 1989 WL 197936 (Fla. DER 1989) (concluding that IMC provided reasonable assurances that its reclamation plan would successfully restore 131 acres of wetlands). Thus, DEP's contention that the "reasonable assurance" standard does not apply to the Modified CRP is rejected.

DEP also contends in this Exception that the ALJ erred by attempting to expand the jurisdiction of this agency under Chapters 373 and 378, Fla. Stat., to phosphate mine "uplands." DEP asserts that there is no requirement to reclaim [phosphate mine] uplands to "maintain or improve the functions provided by the existing conditions" as suggested by the ALJ in the second sentence of paragraph 103. This same contention is raised by IMC and is considered at length in the subsequent ruling on IMC's Exception IV. To the limited extent granted in my ruling on IMC's Exception IV, I also grant this portion of DEP's Exception No. 1 as it relates to the second sentence of paragraph 103 of the Recommended Order.

In all other aspects, DEP's Exception No. 1 is denied.

Exception No. 2

DEP's Second Exception objects to paragraphs 105-112, 114, 230-231, and 250-259 of the Recommended Order. In these challenged portions of the Recommended Order, the ALJ considers the elements of IMC's proposed reclamation plan for the Tract. The ALJ finds and concludes that IMC's Modified CRP fails to comply with various requirements of Chapter 378, Fla. Stat. and Chapter 62C-16, F.A.C., governing phosphate mine land reclamation activities regulated by DEP.

A primary argument set forth in this Exception is that the ALJ consistently applied an erroneous "replication" standard for phosphate reclamation, improperly requiring IMC to "exactly duplicate the current landscape on the Altman Tract." DEP insists that no such duplication or replication standard is embodied in the phosphate land reclamation provisions of Part II of Chapter 378, Fla. Stat., or the implementing rules set forth in Chapter 62C-16, F.A.C.

A similar argument is made by IMC in its Exceptions to the Recommended Order. For the reasons set forth in detail in my subsequent rulings denying IMC's Exceptions III and V, this portion of DEP's Exception No. 2 is also denied.

DEP further contends that the ALJ erred by concluding in paragraph 259 of the Recommended Order that IMC''s Modified CRP must comply with Rule 62C-16.0021(15), F.A.C. This rule provision defines the critical term "restoration" for purposes of the entire Chapter 62C-16. Rule 62C-16.0021(15) states in part that, subject to technological limitations and economic considerations, reclaimed phosphate lands should be restored in a manner "which will return the type, nature, and function of

the ecosystem to the condition in existence immediately prior to mining operations (emphasis supplied)."

DEP's Exception suggests that these rule provisions are "not self-implementing" and that the "immediately prior to mining operations" language of Rule 62C-16.0021(15) does not constitute a mandatory phosphate mine reclamation and restoration standard. A similar "not self-implementing" argument is made with respect to the related provisions of § 378.207(1), Fla. Stat. I find this "not self-implementing" statute and rule argument of DEP to be without merit.

DEP's Exception does not cite to any legal authorities arguably supporting its contention that the provisions of § 378.207(1) and Rule 62C-16.0021(15) are not self-implementing and thus do not have to be complied with by IMC in this case. The case law of Florida holds that a state agency must comply with the requirements of its own rules, until they are duly amended or abolished. See, e.g., DeCarion v. Martinez, 537 So.2d. 1083 (Fla. 1st DCA). This case law has been cited with approval and followed in prior final orders of this agency. Sheridan v. Deep Lagoon Boat Club, 22 FALR 3257 (Fla. DEP 2000); Ventura v. Lee County, 18 FALR 3076 (Fla. DEP 1996). I thus conclude that, subject to technological limitations and economic considerations, IMC is required to return the type, nature and function of a disturbed wetlands ecosystem on the Tract to the condition in existence "immediately prior to mining operations" as expressly required by DEP Rule 62C-16.0021(15).

The ALJ determined in paragraph 259 of the Recommended Order that "IMC did not prove at the final hearing that its reclamation [plan] will meet these restoration requirements." I conclude that paragraph 259 is a mixed statement of fact and law

supported by competent substantial evidence and is a correct interpretation of the applicable statutory and rule provisions.

Consequently, DEP's Exception No. 2 is denied.

Exception No. 3

DEP's third Exception objects to paragraphs 124 and 269 of the Recommended Order. Similar objections are raised by IMC in its Exceptions ruled upon below. In paragraph 124, the ALJ essentially concludes that the legal ramifications of the Intervenors' fractional mineral interests underlying a portion of the Tract warrants denial of IMC's Permit and Modified CRP applications. This legal conclusion of the ALJ is rejected for the reasons set forth in detail in my subsequent ruling granting IMC's Exception I, which are incorporated herein. Accordingly, DEP's Exception is granted as the portions of paragraph 124 concluding that IMC has failed to demonstrate compliance with various permitting and land reclamation requirements because of the legal ramifications of the Intervenors' fractional mineral interests.[4]

In paragraph 269, the ALJ concludes that the Intervenors have established the requisite "immediate injury-in-fact" to support standing under the "substantial interests" test codified in § 120.569(1), Fla. Stat. DEP contends that there is no competent substantial evidence of record that the Intervenors will suffer an immediate injury-in-fact to its "environmental" interests, which are the only interests this environmental resource permit proceeding is designed to protect. I agree with DEP's basic contention that an administrative proceeding involving a challenge to the issuance or denial of an

[4] I find that the substituted conclusions of law and rule interpretations in this portion of the Final Order are more reasonable than the ALJ's conclusions of law and rule interpretations, which were rejected.

environmental resource permit is designed to protect the "environmental," rather than the "property" interests of the party contesting the agency action.

Nevertheless, I decline to rule on the merits of DEP's objection to paragraph 269 for the following reasons:

1. The Intervenors were allowed to participate in this permit proceeding pursuant to an Order Granting Leave to Intervene entered by the ALJ on March 24, 2003. This intervention Order of the ALJ expressly states that it is entered "[s]ubject to the ruling on any timely motion to dismiss filed under Florida Administrative Code Rule 28-106.204(2)."[5] However, there are no indications in the Recommended Order, the Exceptions, or in any other documents of record to the timely filing by either DEP or IMC of a motion to dismiss the Intervenors' Petition to Intervene.

2. As discussed in my prior ruling granting the County's Exception 8, the issue of the Intervenor's standing to intervene in this permit proceeding was not listed in the parties' Prehearing Stipulation as a disputed issue remaining to be litigated at the final hearing. Thus, paragraph 269 appears to be a gratuitous legal conclusion by the ALJ on the Intervenors' standing, rather than a deferred ruling on a disputed issue timely raised in a motion to dismiss the Petition to Intervene.

3. The Intervernors have been afforded a lengthy formal hearing in this case at which their claims were fully adjudicated on their merits. Furthermore, this Final Order rejects on its merits the ALJ's legal conclusion in paragraph 124 that IMC has failed to demonstrate compliance with various permitting and land reclamation requirements because of the legal ramifications of the Intervenors' fractional mineral interests.

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[5] Pursuant to Rule 28-106.204(2), F.A.C., DEP and IMC had 20 days after service of the Petition to Intervene to file timely motions to dismiss.

Based on the above rulings, the ALJ's legal conclusions in paragraph 269 on the issue of Intervenors' standing are deemed to be dicta in this case that do not constitute agency precedent in future cases. Accordingly, the portion of DEP's Exception No. 3 objecting to paragraph 269 is denied on procedural grounds.

Exception No. 4

DEP's fourth Exception objects to paragraphs 134 and 135 of the Recommended Order dealing with the legal ramifications of the Intervenors' fractional mineral interests on the issue of IMC's "legal control" of the Tract site. A similar objection is raised by IMC in its Exception I addressed later in this Final Order. For the reasons set forth in detail in my subsequent ruling granting IMC's Exception I, DEP's Exception No. 4 is also granted.

Exception No. 5

DEP's fifth Exception objects to paragraphs 215-217 dealing with the issue of IMC's compliance with the "financial responsibility" requirements of the BOR associated with its proposals for the reclamation and restoration of wetlands on the Tract. In paragraph 215, the ALJ essentially discounts IMC's estimated per acre cost of wetlands mitigation and relies, instead, on the much higher estimates testified to by the County's chief expert witness, Kevin Erwin.

As discussed in my subsequent rulings on IMC's Exceptions, the Recommended Order reflects that the ALJ chose to accept Mr. Erwin's opinions on many of the disputed issues in this case when faced with conflicting expert testimony presented by IMC. I decline to substitute my judgment for that of the ALJ on this evidentiary conflict over estimated per acre costs of wetlands mitigation on the Tract.

In paragraph 216, which is essentially a conclusion of law, the ALJ interprets the portion of IMC's draft escrow agreement proposing to fund wetlands mitigation costs by making cash payments on an annual basis in light of the provisions of BOR 3.3.7.6. The ALJ cites to the portion of the provisions of BOR 3.3.7.6 requiring establishment of financial responsibility for "each phase of the project." The ALJ correctly notes, however, that IMC's response to DEP's request for additional information attached to and made a part of IMC's Permit application in this case represents that the "Altman Tract is not a multiphase project." (IMC Ex. 6, page SP-00619.) The ALJ also concludes that IMC's proposed mining sequences for various portions of the Tract are not totally independent and thus do not meet the "phased projects" definition provisions of BOR 2.1. I find no fault with these legal interpretations by the ALJ, including his ultimate conclusion that IMC's proposal to fund the Tract wetlands mitigation costs on an annual basis does not comply with the "phased projects" requirements of the BOR.

In this Exception, DEP cites to the testimony of IMC's Vice-President of Operations, Robert Kinsey, as purported support for its suggestion that "DEP has reasonably interpreted this requirement to fund the escrow agreement on an annual basis."[6] DEP then cites several cases purportedly supporting its contention that this testimony of IMC's Vice-President of Operations is entitled to "great deference." However, none of the cited cases hold that testimony of a permit applicant executive officer as to this agency's interpretations of permitting requirements is entitled to "great deference." In the absence of any testimony by DEP officials on this issue, I decline to

[6] Mr. Kinsey testified that: "DEP recognizes an escrow agreement and it can be done in phases and DEP agreed. As far as this project, a phase means on a year to year basis, so on an annual basis." (Tr. Vol. II, page 175.)

rule that the testimony of Mr. Kinsey is entitled to any deference concerning agency rule interpretation or policy.

I view paragraph 217 to be a mixed statement of fact and law. In the first sentence, the ALJ asserts that IMC did not offer any "financial responsibility" for proposed reclamation of uplands. It is undisputed that IMC's proposal to make annual cash deposits into an escrow account only applies to estimated wetlands mitigation costs designed to meet the financial responsibility requirements of Chapter 40D-4 and the BOR. The ALJ then concludes in the second sentence of paragraph 217 that mining and reclamation of uplands does not come within the purview of the financial responsibility provisions of Rule 40D-4.301(1)(j), F.A.C., and the related BOR provisions. I agree with this rule interpretation and so does DEP in its Exception.

I do not construe the ALJ's observation in the third sentence of paragraph 217 that "successful reclamation of uplands is required in this case to give reasonable assurances as to successful reclamation of the wetlands" to constitute a conclusion by the ALJ that the financial responsibility provisions of Rule 40D-4.301(1)(j) and BOR 3.3.7 are applicable to the reclamation of uplands on the Tract. I also do not construe this observation of the ALJ to constitute a conclusion that IMC's proposed reclamation plan for uplands on the Tract fails to comply with the separate financial responsibility requirements of § 378.208, Fla. Stat.

Section 378.208(1) states in part that "[c]ompliance with the rate of reclamation established in s. 378.209 is deemed to be appropriate financial assurance." Thus, with respect to the reclamation of the Tract uplands, no financial responsibility cash payments would be required from IMC under Chapter 378, Fla. Stat., until a

determination has been made that it is “not in compliance with the rate of reclamation established in s. 378.209.” See § 378.208(2).

Returning to the first sentence of paragraph 217, I thus construe this sentence to be a correct statement by the ALJ that IMC’s proposed annual cash payments into the escrow account discussed in the preceding paragraph 216 do not include any estimated mitigation costs for uplands on the Tract. As construed, paragraph 217 of the Recommended Order is adopted and DEP’s Exception No. 5 is denied.

Exception No. 6

DEP’s sixth Exception objects to paragraph 221 of the Recommended Order dealing with IMC’s agreement to grant a conservation easement to the State of Florida over the preserved flow-way of Horse Creek and the Replacement Central Marsh. I conclude that paragraph 221 is another mixed statement of fact and law on the part of the ALJ.

In the first sentence, the ALJ finds that the proposed conservation easement is being used by IMC as a part of its demonstration in this case that fish and wildlife values in the Horse Creek flow-way and Replacement Central Marsh “will be protected in perpetuity.” DEP contends that there is no competent substantial evidence or applicable statute or rule supporting a conclusion that the proposed conservation easement is a necessary part of IMC’s mitigation. This contention overlooks a basic point, i.e., that IMC’s former “voluntary” act of agreeing to grant the conservation easement to the State has now become a mandatory requirement by being codified into DEP’s Draft Permit as Specific Condition No. 20. (IMC Ex. 12, pages 21-22.) Thus,

IMC would be legally bound to comply with Special Condition 20, even though there is no express statute or rule requiring IMC to grant the conservation easement.

The second sentence of paragraph 221 is essentially a legal conclusion that the Intervenors' fractional mineral interests constitutes a legal impediment to IMC's legal capacity to grant a sufficient easement to the State. This portion of paragraph 221 is rejected for the reasons set forth in detail in my subsequent ruling granting IMC's Exception I.

The third and fourth sentences of paragraph 221 are also legal conclusions. The ALJ concludes that the undisputed fact that the proposed conservation easement has not been officially accepted by the Board of Trustees of the Internal Improvement Trust Fund ("Trustees") mandates a determination that the "benefits of the offered conservation easement are not assured." I find this conclusion of the ALJ to be unwarranted.

As discussed above, IMC's proposed conservation easement has been incorporated into the Draft Permit as Specific Condition 20. This Special Condition requires in part that the "Perpetual Conservation Easement" must be recorded in the Manatee County public records. Specific Condition 20 also requires that:

> An Easement Documentation Report and Easement Management Plan shall be mutually prepared and finalized by IMC Phosphates and the Bureau of Mine Reclamation upon release of Mitigation Marsh 561. The Perpetual Conservation Plan shall be incorporated and made a part of this permit document; notwithstanding their survival in record beyond the duration of this permit.

I conclude that these detailed provisions of Specific Condition 20, when considered in light of the fact that DEP is also the staff of the Trustees for purposes of

land acquisition,[7] provides the necessary reasonable assurance pertaining to the issue of the "perpetuity' of the conservation easement. If the Permit were to be issued and IMC did not comply with the conservation easement provisions of Specific Condition 20, then IMC would be in violation of the Permit. In such event, DEP would be warranted in taking enforcement action, including revocation of the Permit as authorized by General Condition 2 of the Draft Permit (IMC Ex. 12, page 3.)

In view of the above rulings, DEP's Exception No. 6 is denied as to the first sentence of paragraph 221 and granted as to the remaining portions of the paragraph. For the above reasons, I find that my interpretations of this agency's Draft Permit Conditions and my conclusions concerning the conservation easement are more reasonable than the portions of paragraph 221 that are rejected. However, I deem the rejected portions of paragraph 221 to be harmless error because this Final Order adopts other findings and conclusions of the ALJ warranting denial of the Permit and disapproval of the Modified CRP application.

Exception No. 7

DEP's seventh and final Exception objects to the ALJ's Conclusion of Law 275, which reads as follows:

> The County also contends that IMC's ERP application must be denied because no notice of DEP's receipt of the application was published, as required by Rules 62-1.6105(6), [sic] 62-312.060(14), and 62-343.090 (2)(k). Neither IMC nor DEP address this argument, which appears to have merit.[8]

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[7] See § 253.002(1), Fla. Stat.

[8] The ALJ's reference to "Rule 62-1.6105(6)" must be a clerical error because there is no such rule in existence.

The ALJ's "appears to have merit" statement "appears" to be an indirect conclusion by the ALJ that IMC's Permit application should be denied for the sole reason that no notice of DEP's receipt of the application was published.

The rules cited by the ALJ are in Chapter 62, F.A.C., which contains administrative rules adopted, enforced, and implemented by this agency. Thus DEP has the primary responsibility for interpreting its own rule provisions in Chapter 62, including those cited by the ALJ. I find that the rule interpretations in this portion of the Final Order are more reasonable than the ALJ's rule interpretations in Conclusion of Law 275. I also reject the ALJ's indirect conclusion that the undisputed fact that no notice of DEP's receipt of the application was published constitutes a legal basis for the denial of IMC's Permit application in this case.

As noted in DEP's Exception, none of the rule provisions cited to by the ALJ require publication of notice of receipt by DEP of all environmental resource permit applications. Rule 62-312.060(14) cited by the ALJ only requires publication "if" required by Rule 62-103.150 and § 403.815, F.S. However, Rule 62-103.150 was repealed in 1998 and § 403.815 states that DEP "may" publish or by rule require the applicant to publish a notice of receipt of an application.

Rule 62-343.090(2)(k) cited by the ALJ only requires publication by the permit applicant of notice of receipt by DEP of an application requesting approval for "activities which, because of their size, potential effect on the environment or the public, controversial nature, or location, are reasonably expected by the Department to result in a heightened public concern or likelihood of a request for administrative hearing." There are no specific findings or conclusions in the Recommended Order that DEP made, or

should have made, a determination in this case that IMC's Permit application filed in October of 2000 would reasonably be expected to result in heightened public concern or a likelihood of requests for administrative hearings.

An agency reviewing a recommended order has no authority to make independent factual findings to supplement those made by the administrative law judge. Furthermore, in a formal administrative proceeding, legal conclusions in an agency final order must be reached by applying the governing law to valid factual findings in the recommended order on review.

In addition, there are no findings or conclusions in the Recommended Order that the County or the Intervenors were adversely affected in any way because there was no publication of receipt of IMC's Permit application in October of 2000. It is undisputed that IMC published notice of the filing of its Modified CRP application in the Bradenton Herald in April of 2002 (Rec. Order, para. 14). It is also undisputed that, in June of 2002, IMC published both DEP's Notice of Intent to issue the Permit and DEP's Notice of Intent to approve the Modified CRP in the Bradenton Herald (Rec. Order, para. 15)

It is evident from the record in this case that such published notices by IMC afforded both the County and the Intervenors timely points-of-entry to file petitions challenging the proposed agency actions. It is also evident from the record that the County and the Intervenors were afforded a multi-week formal hearing resulting in a Recommended Order of the ALJ recommending that "IMC's applications to mine and reclaim the Altman Tract be denied."

I thus grant DEP's Exception No. 7 and reject Conclusion of Law 275 to the extent it concludes that publication of notice of receipt of IMC's Permit application is

required by the cited DEP rules and/or that the lack of such publication in this case constitutes a legal basis for denial of the Permit. Nevertheless, I deem Conclusion of Law 275 to be harmless error because this Final Order adopts other findings and conclusions of the ALJ warranting denial of the Permit.

RULINGS ON IMC'S EXCEPTIONS TO RECOMMENDED ORDER

Exception I – Intervenors' Fractional Mineral Interests.

IMC's initial Exception objects to paragraphs 6, 124, 135, 212, and 221 of the Recommended Order. The ALJ correctly finds in these paragraphs that the Intervenors possess fractional mineral interests underlying a portion of the Tract, and that they did not give their consent to IMC's proposed phosphate mining and land reclamation activities. The ALJ then essentially concludes that this lack of consent on the part of the Intervenors to IMC's proposed activities on the Tract constitutes a sufficient legal basis for denying the subject Permit and Modified CRP applications.

IMC contends that the challenged portions of the Recommended Order consist primarily of legal conclusions of the ALJ, rather than factual findings. IMC further contends that the ALJ's conclusions that the Intervenors' fractional mineral interests and lack of consent render IMC's proposed activities on the Altman Tract unpermittable are clearly erroneous.

At the outset, I conclude that the challenged portions of paragraphs 124, 135, 212, and 221, labeled by the ALJ as "Findings of Fact," are not purely factual findings.[9]

[9] The statements in paragraph 6 of the Recommended Order that the Intervenors are the owners of fractional mineral interests underlying a portion of the Tract and that they did not consent to IMC's proposed mining and land reclamation activities are undisputed factual findings. However, the ALJ made no findings that the Intervenors have obtained the necessary permits from DEP or other agencies to conduct mining activities on the Tract or that there are any pending applications seeking such permits.

Rather, these portions of the Recommended Order consist primarily of the ALJ's interpretations of the legal ramifications of the Intervenors' fractional mineral interests on IMC's proposed activities on the Tract.

Pure findings of fact do not contain determinations that proposed activities of a permit applicant will not comply with applicable rule criteria and standards. Such rule interpretations are essentially conclusions of law. If an administrative law judge improperly labels a finding of fact in a recommended order, the label should be disregarded and the item treated as though it were properly labeled as a conclusion of law. Battaglia Properties, 629 So.2d at 168. Thus, those portions of paragraphs 124, 135, 212, and 221 containing legal interpretations by the ALJ of applicable rule criteria and standards should be considered under the same standard as any other conclusions of law. Robbins v. Dept. of Community Affairs, 20 FALR 3268, 3271 (Fla. DCA 1997).

I also conclude that the matter of whether an applicant seeking a regulatory permit from this agency has sufficient ownership interest or legal control over the project site for the purposes of the filing and agency review of the application is a matter within the "substantive jurisdiction" of DEP. See, e.g. Rules 40D-1.6105(1) and 40D-4.301(1)(j), F.A.C. See also Save the Manatee Club v. Citrus Recreational Marina, 19 FALR 2732, 2735 (Fla. DEP 1997); Powell v Alabama Electric Coop., 15 FALR 325, 326 (Fla. DER 1992).

The ALJ suggests that the purported legal right of the Intervenors to access the Tract site at any time for purposes of mineral exploration and mining (other than phosphate) renders IMC's legal control of the Tract property insufficient to comply with various rule requirements relating to its proposed phosphate mining and land

reclamation activities. However, there is no competent substantial evidence of record that the Intervenors have filed applications with DEP or other regulatory agencies or have taken any specific actions to attempt to explore for or excavate minerals underlying the Tract. Furthermore, there is no competent substantial evidence in this case of any proven non-phosphate mineral reserves underlying the Tract having significant economic value.

A party seeking a regulatory permit from DEP or a water management district is not required to disprove all “possibilities,” “theoretical impacts,” or “worst case scenarios” raised by a permit challenger in order to be entitled to the permit. Sheridan v. Deep Lagoon Boat Club, 22 FALR 2358, 2365 (Fla. DEP 2000); Save Our Suwannee v. Piechocki, 18 FALR 1467 (Fla. DEP 1996); Florida Audubon Society v. South Florida Water Management District, 14 FALR 5518 (Fla. SFWMD 1992). The permit applicant is only required to deal with “reasonably foreseeable” adverse environmental impacts. Save Our Suwannee, 18 FALR at 1472; Florida Audubon Society, 14 F.A.L.R. at 5524; and Rudloe v. Dickerson Bayshore, Inc., 10 FALR 3426, 3440-41 (Fla. DER 1988). I conclude that the mere “possibility” that the Intervenors might someday attempt to exercise their exploration and/or mining rights underlying a portion of the Tract is not, *per se*, a “reasonably foreseeable” adverse impact warranting denial of IMC’s Permit.

I would note that this agency has previously determined that continuing authorization from two of three persons holding title as tenants-in-common constituted sufficient legal interest to pursue a dredge and fill application, even though the applicant’s option to purchase the project site expired before the application was filed. Citrus Recreational Marina, 19 FALR at 2735. I would further note that General

Conditions 3 and 4 of the Draft Permit in this case expressly state that the "permit conveys no title to land or water, does not constitute State recognition or acknowledgment of title, . . . and does not relieve the permitee from liability for harm or injury to . . . property caused by construction or operation of this permitted source."

This is not a case where DEP would be knowingly approving activities resulting in an encroachment or trespass on lands not owned by the permit applicant. It is undisputed that IMC is the sole owner of the Tract surface lands and that IMC has the exclusive right to mine phosphate and other sedimentary materials to a depth of 150 feet below the ground surface, provided the necessary regulatory permits are obtained. (Recommended Order, paragraphs 6, 212; IMC Ex. 5). I conclude that this sole ownership of the Tract surface lands and the underlying phosphate mineral interest held by IMC constitute sufficient "ownership" interests for purposes of the filing and agency review of the subject Permit and Modified CRP applications.

As to any purported disputed issues related to the extent, limitations, and scope of the Intervenor's fractional mineral interests, this administrative proceeding is not the proper forum for resolving such matters. Such disputed real property issues should be considered and resolved by a court of competent jurisdiction. See, e.g., Buckley v. Dept. of Health and Rehab. Services, 516 So.2d 1008, 1009 (Fla. 5th DCA 1987); Miller v. Dept. of Environmental Regulation, 504 So.2d 1325, 1327 (Fla. 1st DCA 1987); Safe Harbor Enterprises v. Dept of Environmental Protection, 21 FALR 2318, 2321 (Fla. DEP 1999); Hageman v. Dept. of Environmental Protection and Robert Carter, 17 FALR 3684, 3690 (Fla. DEP 1995). See also § 26.012(2)(g), Fla. Stat.

In view of the above, IMC's Exception I is granted as to those portions of paragraphs 124, 135, 212, and 221 of the Recommended Order containing conclusions of the ALJ that IMC has failed to demonstrate compliance with various environmental resource permitting and land reclamation requirements because of the legal ramifications of the Intervenors' fractional mineral interests underlying a portion of the Tract.[10] These erroneous legal conclusions are deemed to be harmless error, since this Final Order adopts other findings and conclusions of the ALJ warranting denial of the Permit and Modified CRP applications.

Exception II – "Reasonable Assurances."

IMC's Exception II consists of numerous objections to various paragraphs of the ALJ set forth in paragraphs 47-49, 53, 58, 61, 77, 84-86, 89-94, 124, 143, 155-157, 160-163, 166, 194, 208, and 215 of the Recommended Order. IMC contends that the ALJ misapplied the "reasonable assurance" standard in making these challenged findings. IMC essentially argues that the ALJ's misapplication of the "reasonable assurance" standard was due to the ALJ's failure to require the County to present evidence of "equivalent quality" to that presented in IMC's case-in-chief. See Dept. of Transportation v. J.W.C. Co., 396 So.2d. 778 (Fla. 1st DCA 1981).

I view IMC's real objection in this Exception to be the weight given by the ALJ to the evidence and the manner in which he resolved often-conflicting expert testimony presented at the final hearing. As noted in the Standards of Agency Review above, a reviewing agency has no authority to reweigh the evidence presented at a DOAH formal

[10] I find that the substituted conclusions of law and rule interpretations in this portion of the Final Order are more reasonable than the ALJ's conclusions of law and rule interpretations which were rejected.

hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary matters are within the province of the ALJ, as the trier of the facts.

The alleged erroneous findings of the ALJ challenged in this Exception also are based on IMC's own interpretations and inferences drawn from the testimony of record that are most favorable to their contentions. Nevertheless, I have no authority to modify the ALJ's findings of fact by interpreting the evidence or drawing inferences there from in a manner proposed by IMC that is different from the reasonable interpretations made and inferences drawn by the ALJ. Heifitz v. Dept. of Business Regulation, 475 So.2d 1277, 1281-82 (Fla. 1st DCA 1985).

A plain reading of the Recommended Order indicates that, on many of the disputed issues in this case, the ALJ chose to accept the opinion testimony of the County's expert witnesses over the often-conflicting testimony of IMC's expert witnesses. For instance, the ALJ repeatedly cites with approval in his Recommended Order to the testimony of the County's chief expert witness, Kevin Erwin. (Findings of Fact 44, 46, 118-119, 121, 125, 215.) Mr. Erwin was accepted to testify at the DOAH final hearing as an expert in the areas of ecology, wetlands ecology, wildlife ecology, and the restoration and reclamation of wetlands and uplands.

On the other hand, the ALJ expressly rejected the expert testimony of IMC's botanist, Dr. Clewell, on one of the key issues in this case - the ecological and environmental quality of the Central Marsh portion of the Tract. (Finding of Fact 44.) The ALJ also discounted the expert testimony of IMC's zoologist, Dr. Durbin, concerning the critical issue of whether IMC's reclamation plans would maintain or improve the existing functions of the biological systems at the Tract. (Finding of Fact 123.)

In these miscellaneous Exceptions, IMC essentially discounts the credibility of the testimony of the County's expert witnesses and repeatedly cites to the more favorable testimony of its own expert witnesses. However, the ALJ's decision to accept one expert's testimony over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of competent substantial evidence of record from which the finding 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).

IMC also attempts to discount the probative value of the testimony of some of the County's expert witnesses by arguing that the factual bases for their opinions were inadequate. IMC suggests that its expert witnesses had "superior knowledge of site conditions" on various disputed issues. However, the sufficiency of the facts required to form an expert opinion normally resides with the expert and any purported deficiencies in such facts require 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).

The existence of opposing testimony from IMC's expert witnesses, Dr. Garlanger, Dr. Durbin, and Dr. Clewell, does not invalidate the ALJ's findings and related conclusions based on the opposing testimony of the County's expert witnesses. If there is competent substantial evidence to support the findings of fact of an administrative law judge (formerly "hearing officer"), it is irrelevant that there may also be competent

substantial evidence to support contrary findings. Arand Construction Co. v. Dyer, 592 So.2d 276, 280 (Fla. 1st DCA 1991); Conshor, Inc. v. Roberts, 498 So.2d 622, 623 (Fla. 1st DCA 1986).

The term competent substantial evidence "does not relate to the quality, character, convincing power, probative value or weight of the evidence but refers to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence. *Competency* of evidence refers to its admissibility under legal rules of evidence. *Substantial* requires that there be some (more than a mere iota or scintilla), real, material, pertinent and relevant evidence." Scholastic Book Fairs, Inc. v. Unemployment Appeals Commission, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996). Disregarding paragraph 124 which is essentially a legal conclusion, there is more than a "mere iota or scintilla" of relevant and material evidence in the record of the DOAH formal hearing supporting the ALJ's findings challenged in IMC's Exception II.

I have previously granted IMC's Exception to paragraph 124 of the Recommended Order, dealing with the Intervenors' mineral interests, by ruling that it is an erroneous legal conclusion. With respect to the remaining paragraphs of the Recommended Order objected to in this omnibus Exception, I conclude that they are supported by competent substantial evidence of record. This competent substantial evidence includes the aggregate expert testimony at the DOAH final hearing of Kevin Erwin, Phillip Davis, Dr. Fraser, and Dr. Janicki. Consequently, Exception II is denied as to all of the challenged paragraphs of the Recommended Order, except for paragraph 124.

Exceptions III and V – Florida Land Use Cover Forms Classification System ("FLUCS Code") and Replication Issues.

IMC's related Exceptions III and V object to paragraphs 49-52, 72-77, 105-112, 114, 230-231, and 250-259 of the Recommended Order. IMC makes two basic arguments in these Exceptions. The first argument is that the ALJ erroneously interpreted and applied the FLUCS Code in analyzing IMC's proposed reclamation plan for the Tract. The second related argument is that the ALJ's alleged erroneous interpretation and application of the FLUCS Code resulted in an inappropriate "replication" standard for phosphate mine reclamation.

What the ALJ ultimately found is that deficiencies in IMC's mapping of various areas of the Tract using the FLUCS Code could lead to significant misunderstandings as to the nature of the existing conditions on the Tract. (Paragraph 49.) For instance, the ALJ found that IMC's mapping of the controversial Central Marsh area made the shrub marsh seem much larger than it is by failing to distinguish the freshwater marshes surrounding it. (Paragraph 50.)

The ALJ also expressly rejected IMC's mapping of approximately 85 acres of wetlands on the Tract as "improved pasture." The ALJ found that there is no improved pasture on the Tract and these 85 acres designated by IMC as improved pasture are "mostly high-quality wet prairie." (Paragraph 51.) The ALJ further rejected IMC's mapping of 869 acres (approximately 30 percent of the entire Tract) as "mixed rangeland." The ALJ found that there is no mixed rangeland on the Tract and the 869 acres designated by IMC as mixed rangeland are actually "separate and discrete areas of mostly high-quality native grasslands and palmetto prairie." (Paragraph 52.)

With respect to wetlands on the Tract, the ALJ observed that Level II of the FLUCS Code was used as a starting point to determine compliance with the "acre-for-acre, type-for-type" restoration requirements of Rule 62C-16.0051(4), F.A.C. In paragraph 251, the ALJ cites with approval to the Manson Jenkins Final Order wherein Level II of the FLUCS Code was used to distinguish between "herbaceous wetlands" and "forested wetlands." See Manson Jenkins, 25 FALR at 881. As discussed in my above rulings on the County's Exceptions, I find no fault with the ALJ's reliance on the Manson Jenkins Final Order. I also conclude that the ALJ's analysis of the FLUCS Code in his Recommended Order is supported by the expert testimony at the final hearing of the County's witnesses, Kevin Erwin and Jeremy Craft.

Nevertheless, this FLUCS Code analysis did not complete the ALJ's review of the sufficiency of IMC's proposed reclamation plan for the wetlands on the Tract. In paragraphs 250-259, which are mixed statements of fact and law, the ALJ reviewed IMC's reclamation plan for the Tract in light of the specific statutory and rule provisions set forth in Chapter 378, Fla. Stat., and Chapter 16C-16, F.A.C. In addition to the "acre-for-acre, type-for-type" wetlands restoration requirement of Rule 62C-16.0051(4), the ALJ cites to Rule 62C-16.0021(15) requiring that phosphate mine reclamation must **return the type, nature, and function of the ecosystem to the condition existing immediately prior to mining operations** (emphasis supplied).

The ALJ also cites to § 378.207(1), Fla. Stat., requiring a phosphate mine reclamation plan to **return the natural function of wetlands or a particular habitat or condition** to pre-mining conditions (emphasis supplied). The ALJ further cites to

§ 378.203(10), requiring a phosphate mine reclamation plan to **maintain or improve water quality and function of biological systems present at the site to prior to mining** (emphasis supplied).

The ALJ observed that IMC's reclamation plan would replace 478 acres of herbaceous marsh on the Tract with 875 acres of herbaceous marsh and 38 acres of forested wetlands with 70.5 acres of forested wetlands. (Paragraphs 252-253). The ALJ had previously observed that IMC essentially "plans to recreate a wetlands system dominated by a large, relatively deep freshwater marsh" resulting in "fewer shallow marshes" and "less diversity." (Paragraph 106.) The ALJ ultimately concluded that IMC did not prove that its reclamation plan will meet the cited statutory and rule provisions requiring that the natural functions of the wetlands ecosystems on the Tract be restored and maintained to their pre-mining conditions. (Paragraph 259.) I concur with and adopt this major conclusion of the ALJ

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.

In view of the above rulings, IMC's Exception Nos. III and V are denied.

Exception IV – Uplands Reclamation.

IMC's Exception IV objects to paragraphs 103 and 122 of the Recommended Order. In paragraph 103, which is a mixed statement of fact and law, the ALJ

concludes that “IMC did not give reasonable assurances that the wetlands and uplands it would reclaim would maintain or improve the functions provided by the existing conditions.” IMC contends that that there are no phosphate land reclamation provisions requiring that mined “uplands” be reclaimed so as to maintain or improve their functions existing prior to mining.

A similar argument was made by DEP in its Exception No. 1. IMC and DEP state in their Exceptions that the reclamation of mined uplands is governed by the “Reclamation and Restoration Standards” of Rule 62C-16.0051, F.A.C. IMC and DEP both contend that compliance by IMC with the detailed standards set forth in Rule 62C-16.0051 is sufficient to establish compliance with the uplands reclamation requirements of Chapter 378, Fla. Stat., and Chapter 62C-16, F.A.C.

The phosphate land reclamation rule provisions of Ch. 62C-16, F.A.C., adopted by DEP, do distinguish between wetlands and uplands in certain aspects. For example, Rule 62C-16.0051(4) requires that disturbed wetlands be **restored acre-for-acre, type-for-type** (emphasis supplied). No such “acre-for-acre, type-for-type” requirement is applied to reclamation of disturbed uplands in either Ch. 378 or Ch. 62C-16.

In contrast, Rule 62C-16.0051(9)(c), F.A.C., states that “**upland forested areas shall be established to resemble premining conditions where practical and where consistent with proposed land uses** (emphasis supplied). Also, Rule 62C-16.0051(9)(b) authorizes a reclamation plan to have some upland “bare areas,” provided they do not exceed one-quarter acre in size. These quoted provisions of DEP Rule 62C-16.0051 clearly allow some variations for uplands from the requirement that

proposed reclamation must maintain or improve on an "acre-for-acre, type-for-type" basis the natural functions of disturbed wetlands to their pre-mining conditions.

I would also note that the environmental resource permit provisions of Part IV, Ch. 373, Fla. Stat. only incorporate by reference in its mitigation requirements those "**wetlands reclamation activities for phosphate and heavy mining undertaken pursuant to chapter 378** (emphasis supplied). See § 373.414(6)(b), Fla. Stat. Thus, the scope of the review of the Modified CRP offered as mitigation by IMC to offset the adverse impacts of its proposed mining activities on the Tract, is limited by § 373.414(6)(b) to a determination of whether the proposed **wetlands reclamation activities . . . maintain or improve the water quality and the function of the biological systems present at the site prior to mining** (emphasis supplied).

I conclude that the interpretation of the provisions of Chapters 373 and 378, Fla. Stat., and DEP Rule 62C-16 is a matter over which this agency has primary jurisdiction. I also conclude that the statutory and rule interpretations in this Final Order are more reasonable than those of the ALJ. In view of the above rulings, the second sentence of paragraph 103 is rejected to that extent that it concludes that phosphate mine reclamation standards for disturbed uplands and wetlands are synonymous. The second sentence of paragraph 103 is also rejected to that extent that it concludes that IMC must provide reasonable assurance that its plan for reclamation of disturbed Tract uplands will "maintain or improve the functions provided by the existing conditions" for

purposes of the mitigation provisions of § 373.414(6)(b). As limited, IMC's Exception IV is granted as to paragraph 103 of the Recommended Order.[11]

IMC also objects to paragraph 122 of the Recommended Order containing findings of the ALJ relating to the potential for invasion of exotic and nuisance species on disturbed Tract uplands adjacent to wetlands. I conclude that these findings of the ALJ are amply supported by the opinion testimony at the final hearing of the County's expert witness, Mr. Erwin. Accordingly, IMC's Exception to paragraph 122 is denied.

Exception VI – Water Quantity Impacts.

IMC's Exception VI objects to paragraphs 155-157 and 160-163 dealing with the issue of whether IMC's proposed mining and reclamation activities on the Tract will comply with the "water quantity impacts" requirements of Rule 40D-4.301(1), F.A.C., IMC characterizes these findings of the ALJ as constituting "additional assurances" above and beyond the necessary "reasonable assurance" standard discussed in my ruling on DEP's Exception No. 1.

The ALJ relies primarily on the testimony of IMC's chief expert, Dr. Garalanger, based on modeling designed to assess the significance of projected flow reductions anticipated during mining and reclamation at the Tract. The ALJ analyzes Dr. Garlanger's modeling results, which predicted only slight flow reductions downstream. The ALJ noted that predicted flow impacts at Charlotte Harbor would be "miniscule and immeasurable." (Paragraph 153.) Even at closer downstream locations, the predicted flow impacts would be a slight reduction in water depth deemed to be of no ecological consequence. (Paragraph 153.)

[11] The rejected conclusions of the ALJ in paragraph 103 are deemed to be harmless error because this Final Order adopts other findings and conclusions of the ALJ warranting denial of IMC's Permit and disapproval of its Modified CRP.

Even though the ALJ had stated concerns over Dr. Garlanger's modeling analysis, he ultimately concluded that the opposing testimony of the County's expert witness, Phillip Davis, on this issue "was not enough to overcome IMC's reasonable assurances as to water quantity impacts." (Paragraph 165.) I thus agree with IMC that the ALJ has concluded that IMC has provided the necessary reasonable assurance that its proposed activities on the Tract will not cause adverse water quantity impacts. I also agree with and adopt this reasonable assurance determination of the ALJ.

Despite his reasonable assurance determination, the ALJ suggests in the last sentence of paragraph 163 that IMC be required to provide "additional assurances" as to water quantity impacts by performing additional modeling. However, I am not aware of any authority for DEP to impose additional permit conditions dealing with a disputed issue that has been resolved in favor of the permit applicant in the agency final order.

I view the ALJ's suggestion that "additional assurances" be required on water quantity impacts of IMC's proposed project to be a matter of law over which this agency has substantive jurisdiction. I also find that my conclusions of law are more reasonable than those of the ALJ. For the above reasons, IMC's Exception No. VI is granted to the limited extent that the last sentence of paragraph 163 is rejected. The remainder of the paragraphs of the Recommended Order objected to in this Exception are adopted.

<u>Exception VII – Applicability of Mitigation to "Works of the District</u>."

IMC's Exception VII objects to paragraph 207, which is in the section of the Recommended Order dealing with "Works of the District." Rule 40D-4.301(1)(h), F.A.C., provides that an environmental resource permit applicant must provide reasonable assurance that a proposed activity "will not cause adverse impacts to a work

of the District established pursuant to Chapter 373.042, F.S." In paragraphs 203-204, the ALJ interprets various statutory and rule definition provisions in light of his factual findings and concludes, "the portions of Horse Creek passing through the Altman Tract are part of the Horse Creek tributary of the Peace River" and are "Works of the District." This significant conclusion of the ALJ was not challenged by IMC. It is undisputed in this case that the portions of Horse Creek passing through the Tract will be adversely impacted, since they will be destroyed and replaced by IMC's proposed mining and land reclamation activities. Thus, the ALJ correctly concludes that IMC's proposed activities on the Tract will cause adverse impacts to a Work of the District.

In Paragraphs 207-208, the ALJ discusses the issue of the availability of mitigation to offset the adverse impacts to Works of the District. Paragraph 207, objected to by IMC, is a legal conclusion consisting entirely of the ALJ's interpretations of cited rule and BOR provisions. However, the ALJ does not conclude in paragraph 207 that mitigation is not available to offset adverse impacts to Works of the District. In fact, in his succeeding paragraph 208, the ALJ observes, "if mitigation is available to offset adverse impacts to 'Works of the District,' reasonable assurances were not given that IMC's proposed reclamation will offset those impacts."

I thus do not construe paragraphs 207 or 208 to contain a legal conclusion by the ALJ that mitigation is not available to offset adverse impacts to Works of the District. Furthermore, I do not reach such a legal conclusion myself. I would note that the "Works of the District" at issue in this case is the portion of Horse Creek passing through the Tract. The reclamation and restoration of this portion of Horse Creek is an integral part of the mitigation offered by IMC to offset adverse impacts of its proposed

mining activities on the Tract regulated by DEP pursuant to Part IV of Ch. 373, Fla. Stat. See §§ 373.414(1)(b) and 373.414(6)(b), Fla. Stat.

As construed, paragraphs 207 and 208 of the Recommended Order are adopted and IMC's Exception VII is denied.

Exception No. VIII – Financial Responsibility for Wetlands Mitigation.

IMC's Exception VIII objects to paragraphs 215-217 dealing with the issue of IMC's compliance with the "financial responsibility" requirements of the BOR associated with its proposals for the reclamation and restoration of wetlands on the Tract. IMC raises essentially the same arguments in this Exception that were considered and rejected in my prior ruling denying DEP's Exception No. 5. For the reasons set forth in detail in my ruling on DEP's Exception No. 5, which are incorporated by reference herein, IMC's Exception No. VIII is also denied.

Exception IX – Conservation of Fish and Wildlife.

IMC's Exception IX objects to paragraphs 221 and 222. In these two paragraphs, the ALJ evaluates the significance of IMC's proposal to grant to the State a "Perpetual Conservation Easement" as related to compliance with the criteria in Rule 40D-4.302(1)(a)2, F.A.C., dealing with the "conservation of fish and wildlife."

In the second sentence of paragraph 221, the ALJ essentially concludes that the value of IMC's proposed conservation easement is diminished due to the existence of the Intervenors' fractional mineral interests. I have previously rejected this legal conclusion of the ALJ for the reasons set forth in my prior ruling on DEP's Exception No. 6, which are incorporated by reference herein. Thus, IMC's Exception IX is also granted as to the second sentence of paragraph 221.

The third and fourth sentences of paragraph 221 are also legal conclusions. The ALJ concludes that the undisputed fact that the proposed conservation easement has not been officially accepted by the Board of Trustees of the Internal Improvement Trust Fund ("Trustees") mandates a determination that the "benefits of the offered conservation easement are not assured." I have also previously rejected this legal conclusion of the ALJ for the reasons set forth in my prior ruling on DEP's Exception No. 6, which are also incorporated by reference herein. Thus, IMC's Exception IX is also granted as to the third and fourth sentences of paragraph 221.

In paragraph 222, the ALJ acknowledges IMC's contention that the proposed conservation easement will connect to a larger regional network of habitat corridors developed by DEP known as the "Integrated Habitat Network (IHN)." However, the ALJ then finds that "it is not clear from the evidence how or if the IHN actually will tie into the Altman Tract." IMC objects to this finding of the ALJ, which appears to be supported by the expert testimony of the County's witnesses, Kevin Erwin and Jeremy Craft. I once again decline to substitute my judgment for that ALJ on the evidentiary matter of reconciling conflicting expert testimony of record. IMC's Exception IX is thus denied as to paragraph 222 of the Recommended Order.

<u>Exception X – Standing Issues.</u>

IMC's Exception X objects to the ALJ's Conclusion of Law 268 determining that Charlotte County has standing to initiate this formal administrative proceeding pursuant to §§ 120.52(12)b and 120.569(1), Fla. Stat. The ALJ concluded that the County's "substantial interests' will be affected in the event the Permit and Modified CRP are

approved by DEP and thus the County has standing to contest these proposed agency actions in this case under §§ 120.52(12)b and 120.569(1).

Nevertheless, page 37 of IMC's Proposed Recommended Order submitted to the ALJ for his consideration requested that the Recommended Order contain the following language:

> 1. Petitioners and Intervenors have standing to challenge the issuance of Consolidated ERP/WRP FL 01555875-004 and Modified CRP IMC-FCL-CPD.

Conclusion of Law 268 is thus entirely consistent with the above-quoted portion of IMC's Proposed Recommended Order submitted to the ALJ. How could DEP grant this Exception by ruling that the ALJ erred in reaching a conclusion on standing that was stipulated to and requested by IMC in its Proposed Recommended Order? In any event, my prior ruling granting the County's Exception No. 8 concludes that the County has standing in this proceeding pursuant to the separate statutory provisions of § 403.412(5), Fla. Stat. (2002). Accordingly, Exception X is denied.

Exception XI – No Publication of DEP's Receipt of IMC's Permit Application.

IMC's Exception XI objects to Conclusion of Law 275, which reads as follows:

> The County also contends that IMC's ERP application must be denied because no notice of DEP's receipt of the application was published, as required by Rules 62-1.6105(6), [sic] 62-312.060(14), and 62-343.090 (2)(k). Neither IMC nor DEP address this argument, which appears to have merit.

IMC contends that none of the rules cited by the ALJ required publication of notice of receipt by DEP of its Permit application in this case. This same contention was considered and accepted in my prior ruling granting DEP's Exception No. 7. I again note that there was no finding by the ALJ in this case that the County or the Intervenors suffered any harm or prejudice due to no publication of receipt of notice of

IMC's Permit application. For the reasons set forth in detail in the ruling on DEP's Exception No. 7, which are incorporated herein, IMC's Exception XI is also granted.

Exception No. XII - The ALJ's Exclusion of Evidence of Favorable Economic Impacts.

IMC's Exception XII does not address any of the ALJ's findings or conclusions in the Recommended Order. Instead, IMC objects to a ruling made by the ALJ at the final hearing excluding evidence by IMC that would purportedly demonstrate the economic benefits of the phosphate industry to the State of Florida. I conclude that the challenged evidentiary ruling of the ALJ is not a matter over which this agency has "substantive jurisdiction" under § 120.57(1)(l), Fla. Stat. See, e.g. Barfield v. Dept. of Health, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001) (concluding that the Dentistry Board lacked substantive jurisdiction to reject the ALJ's ruling that certain grading sheets were inadmissible at the formal hearing). Consequently, Exception No. XII is denied.

Exceptions XIII and XIV – Insufficiency of Reclamation Plan and Mitigation.

These two related Exceptions of IMC object to paragraphs 279 and 280 of the Recommended Order. Paragraph 279 contains the ALJ's key conclusion of law that IMC's Modified CRP "does not meet all the standards for approval of phosphate mining reclamation plans." The ALJ then reaches the related conclusion of law that IMC has thus failed to provide reasonable assurances "that mitigation is adequate under Section 373.414(6)(b) to offset the adverse impacts associated with proposed mining at the Altman Tract." In paragraph 280, the ALJ reiterates his conclusion that "IMC's proposed mitigation plan is insufficient."

The ALJ correctly acknowledges in paragraph 280 that the ultimate determination of the sufficiency of a mitigation plan is a matter within the excusive final authority of

DEP. See, e.g., Save Anna Maria, Inc. v. Dept. of Transportation, 700 So.2d 113, 116 (Fla. 2d DCA 1997). Nevertheless, I conclude that these critical legal conclusions of the ALJ in paragraphs 279 and 280 are correct and they are adopted in this Final Order. These "summary" conclusions of law are warranted and supported by the ALJ's related findings and conclusions challenged, but sustained in my prior rulings denying DEP's Exception Nos. 1, 2, and 5 and IMC's Exceptions II, III, V, VII, and VIII, which are incorporated herein. Accordingly, IMC's Exceptions XIII and XIV are also denied.

Exceptions XV – Cumulative Impacts Analysis.

IMC's Exception XV objects to paragraph 282 of the Recommended Order. The ALJ concludes that the cumulative impact analysis prescribed in § 373.414(8)(b), Fla. Stat., is "superfluous" in this case because IMC did not prove that the mitigation proposed through its reclamation plan would offset the adverse impacts of the proposed phosphate mining on the Tract. I concur with this legal conclusion of the ALJ for the reasons set forth in my preceding ruling, which are incorporated herein. Exception XV is denied.

Exception XVI – Harm to Water Resources.

IMC's Exception XVI objects to paragraph 283 of the Recommended Order. In this paragraph, the ALJ concludes that IMC has not provided reasonable assurance that its proposed phosphate mining activities on the Tract will comply with the applicable criteria set forth in Ch. 40D-4, F.A.C., and the District's BOR adopted by reference in DEP Rule 62-330, F.A.C.

As discussed in my ruling on DEP's Exception No. 1, the determination of whether a permit applicant has provided the necessary reasonable assurance to be

entitled to the issuance of a permit by this agency is a matter that must be decided, in the final analysis, by DEP. However, I concur with and adopt this “summary” conclusion of law in paragraph 283 for the reasons set forth in my prior rulings denying DEP’s Exception Nos. 1, 2, and 5 and IMC’s Exceptions II, III, V, VII, VIII, XIII, and XIV, which are incorporated herein. IMC’s Exception XV is thus denied.

XVII – Additional Permit Conditions.

IMC’s final “Exception” is not actually an Exception to any findings of fact or conclusions of law in the ALJ’s Recommended Order. Instead, XVII sets forth various proposed “additional permit conditions” that IMC stipulates it would be willing to accept in order to facilitate issuance of its Permit and Modified CRP in this proceeding. The case law of Florida does support the limited authority of this agency to enter a final order containing additional permit conditions suggested by a DOAH administrative law judge in a recommended order. See, e.g., The Conservancy, Inc. v. Dept. of Environmental Regulation, 580 So.2d 772, 774 (Fla. 1st DCA 1991); Hopwood v. Dept. of Environmental Regulation, 402 So.2d 1296 (Fla. 1st DCA 1981). However, the courts caution that “substantial amendments to a permit application in mid-proceedings may well constitute a due process problem of notice to the agency.” Id. at 1299.

In this case, the ALJ did not suggest in his Recommended Order that, with the inclusion of certain additional permit conditions, IMC’s proposed activities on the Tract would be permittable. Moreover, I conclude that these suggested additional permit conditions constitute proposed substantial amendments to IMC’s Permit and Modified CRP applications that may create “due process” problems if adopted in this Final Order. I view of particular import IMC’s proposed additional permit condition discussed in

numbered paragraph 6 of XVII. This proposed agreement of IMC to not mine the Central Marsh portion of the Tract implicates one of the major and most controversial issues in this case, i.e., the proposed mining of a significant portion of the Tract described by the ALJ as a “very high-quality diverse, wetland system.”

In this final order preparation stage of the subject administrative proceeding, I function in a quasi-judicial role, rather than as a fact-finder and/or investigator. See Ridgewood Properties, Inc. v. Dept. of Community Affairs, 562 So.2d. 322 (Fla. 1990). My current duties as an agency head reviewing a DOAH recommended order is limited by § 120.57(1)(l), Fla. Stat., to essentially determining whether the ALJ’s factual findings are based on substantial competent evidence and whether his legal conclusions and rule interpretations over which this agency has “substantive jurisdiction” are legally correct. Thus, in ruling on the parties’ Exceptions, I have no authority to make supplemental findings dealing with the sufficiency of additional permit conditions first proposed in this case after the Recommended Order was submitted to this agency.

In its Response to IMC’s Exception XVII, the County does not agree that DEP has the authority to incorporate these suggested additional permit conditions in this Final Order. The County also does not concede that such additional permit conditions, if incorporated in this Final Order, would resolve its objections to the issuance of the Permit and Modified CRP. Therefore, it would not be appropriate for me to attempt to determine in this Final Order whether these belated additional permit conditions proposed by IMC would be sufficient to cure all the deficiencies in the Permit and Modified CRP applications identified in the ALJ’s Recommended Order.

In light of the above rulings, IMC’s “Exception” XVII is denied.

CONCLUSION

During the course of a lengthy final hearing, the ALJ heard extensive expert testimony on the various water quality, water quantity, and land reclamation issues raised by the County and the Intervenors in this proceeding. Upon completion of the final hearing, the ALJ entered a Recommended Order exceeding 115 pages in length. In this thorough Recommended Order, the ALJ makes recommended findings and conclusions on each issue properly presented for his consideration.

Based on the many underlying findings of the ALJ adopted in this Final Order, I concur with his ultimate conclusion that IMC failed to provide the necessary reasonable assurances that its Modified CRP will meet all the applicable phosphate mine wetlands reclamation standards set forth in Chapter 378, Fla. Stat., and Chapter 62-16C, F.A.C. I also concur with the ALJ's related conclusion that IMC failed to provide reasonable assurance that its Modified CRP offered as mitigation to offset the adverse impacts of its proposed mining activities will meet the mitigation requirements of § 373.414(6)(b), Fla. Stat. In addition, I concur with the ALJ's final conclusion that IMC did not provide reasonable assurance that it proposed mining activities will comply with all the applicable criteria set forth in Ch. 40D-4, F.A.C., and the District's BOR.

IMC's basic reclamation concept for disturbed wetlands on the Tract, as described by the ALJ, is to replace an existing diverse system of high-quality wetlands at the site with a deep freshwater marsh. (Paragraphs 106-108.) This basic reclamation concept was viewed by the ALJ to be totally unacceptable. I also view this land reclamation concept to be inconsistent with the objectives of Chapters 378, Fla. Stat., and 62-16C, F.A.C.

It is therefore ORDERED:

A. The ALJ's Recommended Order (Ex. A), as modified by the rulings in this Final Order, is otherwise adopted and incorporated by reference herein.

B. IMC Phosphates Company's Consolidated Environmental Resource/Wetland Resource Permit application bearing DEP File No. 0155875-004-EI is DENIED.

C. IMC Phosphates Company's related Modified Conceptual Reclamation Plan application bearing DEP code IMC-FCL-CPD is DISAPPROVED.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to § 120.68, Fla. Stat., by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the DEP clerk 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 DEP clerk.

DONE AND ORDERED this ___ day of September, 2003, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

____

DAVID B. STRUHS
Secretary
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

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

_______________________________ _______________
CLERK DATE

CERTIFICATE OF SERVICE

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

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Ann Cole, Clerk and
J. Lawrence Johnston, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
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Tallahassee, FL 32399-1550

and by hand delivery to:

Francine M. Ffolkes, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this ____ day of September, 2003.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

____
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