

Club has also filed a Petition to Intervene, or Otherwise Participate in Relinquishment Proceedings (Sierra Club's Petition).

BACKGROUND

The background of the case and earlier proceedings are thoroughly described in my earlier Limited Remand Order and Final Order, however, certain pertinent facts warrant repeating for this order. This case arose out of a challenge to an intent to issue an environmental resource permit, a proposed approval of a conceptual reclamation plan, and a modification for a wetlands resource permit (the Permits) for the 4,179-acre Ona-Ft. Green phosphate mine (OFG) and related activities situated in the Horse Creek basin, which is a tributary of the Peace River, located in Hardee County, Florida.

The case was initially tried before an administrative law judge (ALJ) in an eight-week hearing, who issued a 420-page Recommended Order. After review, I entered a Limited Remand Order, and a supplementary 5-day hearing was held, after which the ALJ issued a 57-page Recommended Order on Remand. At the initial hearing, the Petitioners called 15 witnesses and offered 1,437 exhibits, IMC called 13 witnesses and offered 805 exhibits, and DEP called eight witnesses and offered 152 exhibits.¹ The transcript was over 10,500 pages and filled 80 volumes.

In his Recommended Order, the ALJ found that the Authority did not have standing to challenge the Permits, because the proposed mine would have negligible impacts on the Authority's ability to withdraw water from the Peace River.

(Recommended Order, paragraph 777) I adopted this conclusion, stating that "the Authority failed to prove at the final hearing that it will sustain a specific injury to any

¹ The number of exhibits offered at the initial hearing was taken from Lee County and Charlotte County's joint proposed recommended order. The ALJ did not tally the exhibits entered into evidence.

substantial interests protected by the environmental laws administered by DEP.” (Final Order, page 12)

The ALJ also concluded in his Recommended Order that the cumulative impacts issue raised by the Petitioners was irrelevant. (Recommended Order, paragraph 863) I adopted this conclusion in my Final Order (pages 40-42), finding that the plain interpretation of the controlling statute, §373.414(8)(b), Florida Statutes, and implementing rule, BOR 3.2.8,² prevents the Department from considering cumulative impacts to surface waters and wetlands if all the impacts from the proposed project fall within the same drainage basin, in this case the Peace River basin, and the proposed mitigation to offset the adverse impacts is sufficient. Once the ALJ made the factual finding concerning the location and nature of the impacts and elements of the mitigation, which I concluded were sufficient to offset the adverse impacts, cumulative impacts of the OFG were not relevant, as a matter of law. As the ALJ succinctly notes in paragraph 863 of the Recommended Order:

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

The ALJ submitted his Recommended Order on Remand, and the Department issued a Final Order on July 31, 2006, issuing the ERP, CRP, and WRP. Petitioners Charlotte County, Sarasota County, Lee County, and the Authority appealed.

² BOR stands for Basis of Review, which is a rule of the Southwest Florida Water Management District and adopted by the Department by reference in Rule 62-330.200(3)(e), Florida Administrative Code.

ISSUES IN THIS RELINQUISHMENT

While the appeal was pending, the Authority filed a Motion to Temporarily Relinquish Jurisdiction to Lower Tribunal for Further Proceedings to Consider Newly Discovered Evidence of Statutorily-Required Report Completed During Pendency of the Instant Appeal. The Second DCA granted the motion, which provides in full:

Appellant's motion to temporarily relinquish jurisdiction is granted and jurisdiction is relinquished for 45 days.

Appellant shall file a status report within 45 days.

By separate order, Lee County and Charlotte County were granted leave to participate in the proceedings before the Department.

I interpret this order as relinquishing to the Department the authority to rule on the Authority's Motion to Consider Newly Discovered Evidence (Motion) and either enter an order denying the Motion, or if the Motion is granted, to enter an appropriate order facilitating the consideration of that evidence.³ Charlotte, Sarasota, and Lee Counties filed a joint memorandum of law in support of the Motion, and the Department and IMC filed responses in opposition. On May 11, 2007, five days after the orders issued by the Second DCA but over 10 months after the Final Order was entered, the Sierra Club filed a Petition to Intervene, or Otherwise Participate in Relinquishment Proceedings. IMC filed a response in opposition, to which the Sierra Club filed a reply. I have reviewed and considered all of these submittals. As discussed below, I deny the Motion, because, as a matter of law, the Authority cannot meet the requisite standard for reopening a case for newly discovered evidence. Given this ruling, the Sierra Club's Petition becomes moot.

³ IMC urges me to deny the Motion on grounds that there is no statutory authority to reopen the Final Order entered in this case. I do not address that argument, because I assume that the Second DCA has ruled implicitly that such authority exists by relinquishing jurisdiction to me to consider the Motion.

THE GROUNDS FOR RE-OPENING THE FINAL ORDER

There is no rule or statutory authority that directly applies to re-opening a final order based on newly discovered evidence. Thus, I look to the law on re-opening civil judgments under Florida Rule of Civil Procedure 1.540(b) and the cases interpreting that rule for guidance. Rule 1.540(b) provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing. . . .

The case law establishes the criteria a trial court should consider when ruling on a motion for relief from judgment based on newly discovered evidence, all of which must be satisfied:

1. Would the new evidence probably change the result if the case was retried?
2. Was the new evidence discovered since the trial?
3. Could the evidence have been discovered before the trial by the exercise of due diligence?
4. Is the evidence material to the issues?
5. Is the evidence merely cumulative or impeaching?

E.I. DuPont Nemours and Company, Inc., et al. v. Native Hammock Nursery, Inc., 698 So.2d 267 (Fla. 3rd DCA 1997); Barry v. Geico General Ins. Co., 938 So.2d 613 (Fla. 4th DCA 2006); Florida Audubon Society, et al. v. South Florida Water Management Dist., 497 So.2d 672 (Fla. 4th DCA).

THE "NEWLY DISCOVERED EVIDENCE"

In January 2007, the Department issued the "Peace River Cumulative Impact Study, January 2007" (Report). The Report was required by the Legislature in Chapter

2003-423, Laws of Florida, which included major revisions to the statutes that concern the regulation of the phosphate industry in Florida. Paragraphs (1) and (2) of Section 10 of Chapter 2003-423, Laws of Florida, provide as follows:

(1) The Department of Environmental Protection, in consultation with the Southwest Florida Water Management District, shall study the cumulative impacts of changes in landform and hydrology in the Peace River Basin. The study shall evaluate the cumulative impacts of activities conducted in the Peace River Basin prior to state regulation, or pursuant to an exemption, a permit, or a reclamation plan, on water resources of the basin, including surface waters, groundwaters, fisheries, aquatic and estuarine habitat, and water supplies. The study must also include an evaluation of the effectiveness of existing regulatory programs in avoiding, minimizing, mitigating, or compensating for cumulative impacts on water resources of the basin. In addition, the study shall evaluate the environmental benefits, legal issues, and economic impacts of limiting activities, including mining activities, on waters and environmentally sensitive areas around waterbodies by establishing a buffer within the 100-year floodplain of major perennial streams within the Peace River Basin, including the Peace River, Horse Creek, and the Myakka River. The study shall also recommend ways in which any buffer areas recommended as prohibited areas can be considered as mitigation under applicable permitting programs.

(2) Upon completion of the study, the department shall prepare and adopt a resource management plan for the Peace River Basin to minimize any identified existing and future adverse cumulative impacts to water resources of the basin, including surface waters, groundwaters, wetlands, fisheries, aquatic and estuarine habitat, and water supplies. The plan must identify regulatory and nonregulatory actions necessary to minimize existing and future adverse cumulative impacts identified in the study and, where appropriate, must also recommend statutory changes to improve regulatory programs to minimize identified cumulative impacts to water resources of the basin.

Paragraph (2) of the law clarifies that the purpose of the study is to evaluate past activities in the Peace River Basin that have adversely affected resources in order to prepare a management plan to minimize future cumulative impacts to resources and identify regulatory and non-regulatory actions, along with appropriate statutory changes, that would be necessary to “minimize existing and future cumulative impacts.” Thus, the

Legislature intended that the study will provide a framework for future action -- non-regulatory, regulatory, and possibly statutory -- but is not intended to examine any particular project in detail. The Authority's summary of the Report is in accord with my assessment that the purpose of the study is forward-looking. (Authority's Motion, paragraph 25)

The Authority lists several findings in the Report that it contends are relevant to the OFG proceeding and its standing. The pertinent ones are summarized here:

1. Many portions of the Peace River watershed have been considerably altered and cumulatively impacted by agriculture, urban development, and phosphate mining.
2. Phosphate mining activities can alter surface and groundwater hydrology.
3. Spills from phosphate mining activities can result in catastrophic impacts to receiving waters.
4. Approximately 19,000 acres of the more than 105,000 acres of wetlands in the Peace River watershed lost since the 1040s, were converted to phosphate mined lands. Fifteen thousand of the 19,000 acres were lost from 1979 to 1999.
5. Loss of streams and wetlands in the Peace River watershed and baseflow contributions from the upper Peace River adversely affect public water supplies.
6. Changes in water quality in the streams can also adversely affect public water supplies.

In arguing that the Report is material to the OFG permitting proceedings and particularly the issue of cumulative impacts and the Authority's standing, the Authority, and Charlotte, Sarasota, and Lee Counties argue that:

1. "DEP consider the CIS Report because, among other reasons, it was mandated by the Florida Legislature to determine whether cumulatively mining and other development is adversely affecting water resources in the Peace River Basin." (Motion, paragraph 30)
2. "The CIS Study Report is very relevant on the issue of cumulative impacts." (Motion, paragraph 31)

3. “The impacts of phosphate mining demonstrated to exist in the instant case and the *Manson Jenkins* case⁴ and now by the legislatively mandated CIS Report present a serious concern that must be considered in the public interest.” (Motion, paragraph 31)

4. The permit for another, smaller phosphate mine (the Altman mine) located upstream of OFG was denied so the Report results “are highly relevant to the case at bar.” (Charlotte, Sarasota, and Lee Joint Memorandum, paragraph 15)

5. Cumulative impacts have occurred in the Peace River Basin that threaten a public water supply, so “the Authority’s motions clearly present a matter of great public importance.” (Charlotte, Sarasota, and Lee Counties’ Joint Memorandum, paragraph 15)

6. The Report contains findings about the general loss of wetlands, streams, and base flow contributions from the Peace River in the watershed. (Charlotte, Sarasota, and Lee Counties’ Joint Memorandum, paragraphs 24-27)

7. Reopening the case to receive the Report would not prejudice IMC or the Department. (Motion, paragraph 32)

In sum, the Authority and its supporters cite to no provisions in the Report that bear on the OFG mine, or any other particular phosphate mine, or specifically address how the OFG mine would affect the Authority’s standing.⁵ Rather, they argue that the general loss of wetlands and degradation of the environment in the Peace River Basin over the last 50 years and the fact that the Report was mandated by the Legislature makes it material.

APPLICATION OF THE STANDARDS FOR RE-OPENING THIS FINAL ORDER

I conclude that, as a matter of law, the Report does not meet all of the criteria for reopening a case based on newly discovered evidence. The evidence is not material on

⁴ The Authority was also unable to demonstrate standing in the *Manson Jenkins* case, another phosphate mining permit challenge. *Manasota-88, Inc. v. IMC Phosphates Company*, 25 F.A.L.R. 868 (DEP 2002), *aff’d, per curiam*, 865 So.2d 483 (Fla. 1st DCA 2004).

⁵ The Authority has taken this opportunity in the Motion to reargue the standing issues it raised in the Recommended Order. Rather than readdress that issue, I have focused on whether the Report satisfies the criteria for newly discovered evidence, as requested by the Second DCA.

either the issue of cumulative impacts of the OFG mine to surface waters and wetlands or the Authority's standing and could not have changed the outcome of the hearing.

Cumulative Impacts

As described above, the Department is foreclosed from considering cumulative impacts to surface waters and wetlands if the mitigation offsets the impacts of a project within the drainage basin in which they occur. In a challenge to the cumulative impacts rule, the Fifth DCA agreed with the ALJ's assessment in that case that "if a permit applicant proposes mitigation within the same drainage basin and the mitigation offsets the adverse impacts, 'the consideration of cumulative impacts mandated by paragraph (a) [of the rule] is deemed met. No further consideration of cumulative impacts is either necessary or allowed'." Sierra Club v. St. Johns Water Management Dist., 816 So. 2d 687, 692 (Fla. 5th DCA 2002). As described above, I accepted the ALJ's finding that the OFG would not create impacts outside of the Peace River drainage basin and deemed the mitigation to offset the adverse impacts within the basin to be sufficient. The Authority appears to ask me to reconsider that finding, but I am foreclosed from doing so. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985) Thus, as a matter of law, the Report does not satisfy the fourth criterion since it is not material on the issue of cumulative impacts of the OFG mine. Since it is not material evidence, the Authority also fails to satisfy the first criterion that the new evidence will probably change the outcome of a new hearing.

Although these reasons are sufficient, I also note that the Report appears to fail to satisfy two other criteria. First, it is likely that the evidence could have been discovered before trial. The data in the Report was based on historical material, including aerial

photography from the 1940s, 1979, and 1999, publicly available hydrologic and water quality data, and background information from literature sources and legal proceedings, including information from Charlotte County, the Department, and the Southwest Water Management District. (Report, pages 1-16 – 1-18) It appears that all of the information used to develop the Report was available to the Authority at the time of the initial hearing in 2004.

Second, it appears that any evidentiary value the Report has would be merely cumulative; evidence of the impacts of phosphate mining in general were presented at the hearing, and several of the general conclusions in the Report were found independently by the ALJ in the Recommended Order. For example, the Recommended Order discussed the history of impacts of phosphate mining (paragraphs 32-36), the location of the affected wetlands in relation to the 100-year floodplain of Horse Creek (paragraph 58), the amount of overburden and matrix removed and its effect on the aquifer (paragraphs 59-62), the effects of mining on the environment (paragraph 63), and the successes and failures of past wetland (paragraphs 395-431) and stream (paragraphs 446-483) restorations in previously-permitted phosphate mines.

The Authority's Standing

In the Final Order (pages 10-15), I found that the Authority had not proved standing because it did not demonstrate that any impacts from the OFG mine would diminish its ability to draw water from the Peace River for its customers. The ALJ found that the Authority's authorization to withdraw water would be unaffected by any diminution in flows from Horse Creek since its permit to withdraw water is dependant on water flows upriver from confluence of the Horse Creek and Peace River. Further, the

ALJ found any effects on stream flow from Horse Creek would be negligible. Since these findings of fact were supported by competent substantial evidence, I was bound to accept them.

Again, the Report could not support the Authority's claim of standing since it does not address the specifics of the OFG mine, and it makes no blanket findings that all phosphate mines will diminish the availability of surface water in the Peace River, much less at the point the Authority withdraws its water. I must conclude, as a matter of law, that the Report is not material to the issue of the Authority's standing and would probably not change the outcome of a rehearing. Thus, on the issue of standing, the Authority fails to meet the criteria for re-opening the Final Order for the purpose of introducing newly discovered evidence.⁶

SIERRA CLUB'S PETITION TO INTERVENE

In light of my rulings in regards to the Authority's Motion, the Sierra Club's Petition is moot.

⁶ I note that regardless of the standing decision, the ALJ allowed the Authority to fully participate in all proceedings.

CONCLUSION

The Authority and other Petitioners are in essence arguing that the Report is material in this proceeding because it is a general indictment of phosphate mining in Florida. In other words, their position appears to be that no phosphate mines should be permitted. However, there is no blanket prohibition on phosphate mining in Florida, so I must consider the standards for issuance of the Permits regardless of the general historical impact of mining on the Peace River Basin. The Report cannot trump the statutes and rules governing the application of a cumulative impacts analysis or the standards for demonstrating standing. Because there is competent substantial evidence in the record to support the ALJ's finding that the mitigation proposed by IMC is within the same drainage basin and offsets the adverse impacts of the project, the law precludes consideration of the Report in deciding the merits of IMC's permit application. My conclusion that the Report is not material evidence in this case does not mean that the Report is not valuable as a general planning tool for the Peace River Basin, which covers approximately 2,350 square miles,⁷ but it was never intended for the purposes to which the Authority would apply it.

It is therefore ORDERED:

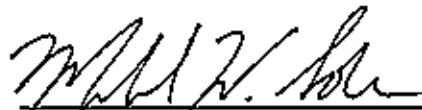
1. The Authority's Motion to Consider Newly Discovered Evidence is DENIED.
2. The Sierra Club's Petition to Intervene, or Otherwise Participate in Relinquishment Proceedings is moot and, therefore, DENIED.

⁷ Page 1-3 of the Report. This equates to 1,504,000 acres. The OFG mine is 4,179 acres or about .3% of the basin.

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 15th day of June, 2007, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



Michael W. Sole
Secretary

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

FILED ON THIS DATE PURSUANT TO § 120.62,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.


CLERK

6/15/07
DATE

CERTIFICATE OF SERVICE

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

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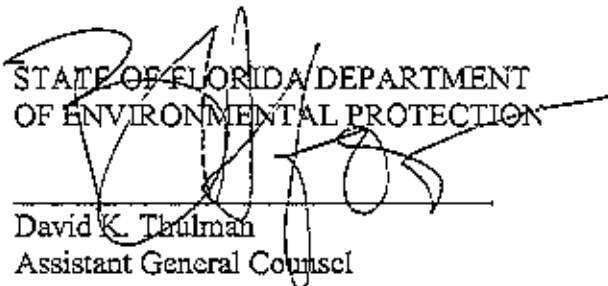
and by U.S. Mail to:

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Robert E. Meale, Administrative Law Judge,
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Alan Behrens
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this 15th day of June, 2007.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

May 2, 2007

CASE NO.: 2D06-3891
L.T. No. : 03-0791

Peace River/manasota
Regional Water Supply

v. State, Dept. Of
Environmental Protection

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion to temporarily relinquish jurisdiction is granted and jurisdiction is relinquished for 45 days.

Appellant shall file a status report within 45 days.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

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Gary P. Sams, Esq.
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pm


James Birkhold
Clerk

