

**IN THE FLORIDA SECOND
DISTRICT COURT OF APPEALS**

SIERRA CLUB

Appellant

v.

**IMC PHOSPHATES COMPANY, and
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,**

Appellee.

Fla. 2d DCA Case No. 2D07-3284

BRIEF OF APPELLANT SIERRA CLUB

Appeal from the Florida Department of Environmental Protection's Final Order dated June 15, 2007. (OGC Case Nos. 03-0205, 03-0206, 03-0250, 03-0287, 03-0295, 03-1661, 04-0465, 04-0466, 04-0485; and DOAH Case Nos. 03-0791, 03-0792, 03-0804, 03-0805, 03-1610, 04-1062).

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STATEMENT OF THE ISSUES

- I. Whether the Florida Department of Environmental Protection erred by denying the Peace River/Manasota Regional Water Supply Authority's Motion to Consider Newly Discovered Evidence and consequently denying Sierra Club's Petition to Intervene or Otherwise Participate in Relinquishment Proceedings?
- II. Whether Sierra Club Meets the Requirements for Intervention in the Relinquishment Proceedings and Any Further Proceedings on Remand?
- III. In the Alternative, Whether Sierra Club should be Allowed to Participate in the Relinquishment Proceedings and Any Further Proceedings on Remand as Amicus Curiae?

STATEMENT OF THE CASE AND FACTS

A. Nature of the Case and DEP Opinion on Review

This appeal arises out of the Florida Department of Environmental Protection's ("DEP") issuance of a Conceptual Reclamation Plan ("CRP"), and a Consolidated Environmental Resource Permit ("ERP") and Wetland Resource Permit ("WRP") modification to IMC-Phosphates Company ("IMC"). The permits would allow phosphate mining and reclamation activities to take place on a 4,197-acre parcel known as the Ona-Ft. Green Extension (hereinafter "the Ona Mine"). Department

of Environmental Protection, Order on Peace River Manasota Regional Water Authority's Motion to Consider Newly Discovered Evidence and Sierra Club's Petition to Intervene (hereinafter DEP Jun. 15, 2007 Order) at 2.

Several parties to the DEP proceedings appealed the issuance of the permits, including the Peace River/Manasota Regional Water Supply Authority, Charlotte County and Intervenor Lee County (Fla. 2d DCA Case Nos. 2D06-3834 and 2D06-3891). DEP Jun. 15, 2007 Order at 1. Subsequent to the lodging of the appeals, DEP released the Peace River Cumulative Impact Study ("PRCIS") in January 2007. The PRCIS was completed pursuant to direction from the legislature in Chapter 2003-423, § 10, Laws of Florida, to study the cumulative impacts of human activity in the basin and evaluate the effectiveness of existing regulation. DEP Jun. 15, 2007 Order at 5-6.

Because the PRCIS provides a crucial study of the nature and impact of phosphate mining in the Peace River Basin and provides concrete proposals for mitigating impacts in the Basin, the appellants in the aforementioned appeals moved this Court to relinquish jurisdiction to enable the DEP to consider the PRCIS, which would enable the DEP to remand the matter to the Administrative Law Judge (ALJ) for reconsideration of the Ona Mine permits' terms and issuance.

On May 2, 2007, this Court issued two orders granting the motion to relinquish jurisdiction in Case Nos. 2D06-3848 and 2D06-3891 for consideration of the new PRCIS evidence.

On May 4, 2007, Sierra Club received notice of this Court's relinquishing jurisdiction for further proceedings (See Sierra Club's Petition to Intervene at 7, ¶ 17); and on May 11, 2007, pursuant to Sections 120.569 and 120.57, Florida Statutes and Florida Administrative Code Rules 28-106.205 and 28-106.201, Sierra Club moved to intervene or otherwise participate in any and all proceedings authorized pursuant to the orders relinquishing jurisdiction. DEP Jun. 15, 2007 Order at 4. Sierra Club moved to intervene because it has members who participated in the development of the PRCIS and Sierra Club is acting to ensure that the PRCIS is fully considered in the Ona Mine permitting process. *See* Sierra Club's Petition to Intervene at 5-6, ¶ 10-13.

However, on June 15, 2007, DEP issued an order denying Peace River/Manasota Regional Water Supply Authority's Motion to Consider Newly Discovered Evidence. The DEP stated that it would not consider the newly completed PRCIS and its findings. Peace River/Manasota Regional Water Supply Authority has filed an appeal of that decision, which is case no. 2D07-3116 (travels with the aforementioned appeals and is consolidated for record purposes).

The DEP's June 15, 2007 Order also denied Sierra Club's petition to intervene. The DEP's reasoning was that inter alia: 1) the PRCIS was "not material on 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"; and that 2) The DEP "is foreclosed from considering cumulative impacts" *as a matter of law* since it accepted the ALJ's finding that mitigation proposed for the Ona Mine was sufficient. DEP Jun. 15, 2007 Order at 8-9. As a result, it found Sierra Club's petition to intervene moot. In other words, in DEP's opinion there could be no further proceedings for Sierra Club to intervene in, and that required denial of Sierra Club's petition. *Id.* at 11.

Sierra Club has timely appealed that DEP decision, which is traveling with the other appeals of the June 15, 2007 Order (2D07-3116, which has been consolidated with Case Nos. 2D06-3891 and 2D06-3848).

B. Sierra Club's Interest in the Case

Sierra Club's Petition to Intervene describes the Sierra Club's interest in the PRCIS and in seeing that the PRCIS is utilized by DEP, including in DEP's consideration of the Ona Mine permit. To summarize, Sierra Club is a non-profit environmental membership organization that has as its purpose "to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect

and restore the quality of the natural and human environments.” Sierra Club’s Petition to Intervene, ¶ 9. The Sierra Club has over 750,000 members nationwide, including many who use Florida’s waters for recreation and for the enjoyment of flora and fauna. *Id.*

Sierra Club has a Florida Chapter, which has over 30,000 members in this State. *Id.* Many Florida Chapter members obtain their drinking water from treated water from the Peace River. The Florida Chapter has approximately 11 members in Hardee County, 360 Charlotte Harbor Group members, 1,000 Calusa Group members and 2,000 Manatee-Sarasota members, who are impacted or are at risk of being impacted via downstream impacts of the Ona Mine. *Id.* The Sierra Club has members in Florida whose recreational, aesthetic, business and/or environmental interests have been, are being, and will be, adversely affected by the issuance of the permit for the Ona-Ft. Green Extension. *Id.* at ¶ 10-16.

Sierra Club's Florida Chapter and its members are actively involved in species and habitat protection in Florida, as well as siting, water quality, and wetlands issues. *Id.* at ¶ 10. Sierra Club has been working to protect, preserve and restore the Peace River basin and other areas to be effected by the proposed Ona-Ft. Green Extension and related actions. *Id.*

Sierra Club arranges trips involving rivers, streams and lakes for its members in Florida, including the Peace River and Charlotte Harbor areas, and works on

legislative issues pertaining to these resources, gathers and distributes information on these resources to its members, monitors federal and state agency work on these issues, and, when necessary, engages in litigation to enforce environmental laws. Sierra Club members use and enjoy the Peace River, Horse Creek, Charlotte Harbor and related areas for outdoor recreation and scientific study of various kinds, including nature study, birdwatching, photography, fishing, canoeing, swimming and a variety of other activities. *Id.* at ¶ 11.

Sierra Club members participated in the formulation of the Peace River CIS that is at issue on remand from the Florida Second District Court of Appeal. For example, the chair of the Florida Chapter's Greater Charlotte Harbor Group, Sue Reske, attended at least four of the stakeholders' meetings held by DEP on the Cumulative Impact Study; and members Ruth Bromberg and Jim Reske also attended meetings. Member Marion Ryan of the Polk County group attended probably close to, if not, all of the meetings and her husband John Ryan also attended many hearings. Thus they have an interest in ensuring that the CIS is adequately considered in the relinquishment and remand proceedings. *Id.* at ¶ 12.

Sierra Club members have also been active in the issue of phosphate mining in the Bone Valley and have followed the proposed Ona Mine. *Id.* at ¶ 13. For example, member Ray Jasica has spoken on the phosphate topic at a nature festival booth. In the Calusa Group (Lee, Collier, Henry, and Glades Counties) Cindy

Kraft, Treasurer, came from Naples to Port Charlotte's Nature Festival during a down-pouring day in the Winter of 2006 specifically so that IMC would not be represented without a countervailing environmentalist perspective. *Id.* In the Summer of 2005, Sue Reske started work on the creation of the Greater Charlotte Harbor Group as a direct result of her concern over phosphate mining already occurring and proposed for the watershed. *Id.* In doing so, she contacted by phone some 70+ members. The majority were concerned with this issue, among others. In January of 2006, the group's General Meeting Topic was Phosphate Mining, and this meeting was attended by more than 30 people. *Id.* The chapter's General Meeting for the month of May 2007 was on the topic "What's New with the Phosphate Mining Issue." At these meetings the group has discussed the Cumulative Impact Study on many occasions, and included it as agenda items. One of the County Commissioners spoke about it at one of the meetings. Ms. Reske has also discussed this Study at a Charlotte County Assembly Steering Committee, on which three Sierra Club Group members sit. *Id.*

The activities authorized or required by the proposed CRP and the Consolidated ERP and WRP will on an individual or cumulative basis, cause adverse environmental impacts to wetlands, lakes, streams, estuaries, fish and wildlife, or other natural resources used by Sierra Club members. *Id.* at ¶ 14. As a result, Sierra Club will suffer substantial injury in fact that is of immediate sufficiency.

The type of substantial injury suffered is of the nature that these proceedings are designed to protect. *Id.* at ¶ 15.

For the reasons set forth above, as further described in the Petition to Intervene, Sierra Club meets the substantial interest requirements for standing under Sections 120.569 and 120.57 Florida Statutes¹ and requested leave to intervene or otherwise participate in support of the Authority, Charlotte, Sarasota, and Lee Counties in the relinquishment proceedings. However, since DEP refused to re-open the proceedings, Sierra Club was denied participation. Sierra Club therefore seeks to have this Court order the re-opening of proceedings and allow Sierra Club to participate in those proceedings, or any further proceedings on any remand that may result from the appeal of the underlying Ona Mine permit.

SUMMARY OF THE ARGUMENT

The Court should reverse DEP's Jun. 15, 2007 Order because DEP erred when it refused to consider the newly completed Peace River Cumulative Impact Study ("PRCIS") pursuant to this Court's Order relinquishing jurisdiction and further erred by holding Sierra Club's Petition to Intervene as moot. DEP erroneously

¹ "Associational Standing" is still available even after the recent amendments to Section 403.412, Florida Statutes. For example, DEP has interpreted the changes to Section 403.412(5) as not affecting rights under the APA. Lawrence E. Sellers Jr. and Cathy Sellers, *Intervene means "intervene": The Florida Legislature revises citizen standing under F.S. §403.412(5)*, 76-NOV Fla. B.J. 63,65-66 (2002)(citing DEP Final Bill Analysis, HB 813, at pp. 6-7).

concluded that it was foreclosed from considering cumulative impacts if mitigation within the same basin offsets the adverse effects of the proposed project. Rather, the legislature has clearly directed DEP to consider cumulative impacts through Section 373.414, Fla. Stat., and the more recent directive to complete the PRCIS in Section 10, Chapter 2003-423, Laws of Florida.

The scope of data and comprehensive analyses contained in the PRCIS constitutes significant new evidence that require re-opening the proceedings on the Ona Mine so that the PRCIS information and conclusions can be taken into account. The Legislature mandated completion of the PRCIS in 2003, prior to hearings and decision-making in this matter. Furthermore, the PRCIS raises many new factual issues that require DEP to remand the case to the ALJ for additional fact finding.

Sierra Club has a substantial interest in this matter that meets the requirements for intervention under Section 28-106.205, Fla. Stat. Sierra Club timely filed its petition to intervene and will suffer injury of sufficient immediacy from the Ona Mine project. The injury includes harm to the environmental, aesthetic, recreational and / or business interests of Sierra Club members; which are the type of injuries that DEP's environmental permitting processes are designed to protect. Sierra Club meets the associational standing test and the standing requirements under the Florida Environmental Protection Act and should therefore be permitted

to intervene. In the alternative, Sierra Club requests the Court allow it to participate as Amicus Curiae in the proceedings on the Ona Mine.

ADOPTION OF OTHER BRIEFS

Sierra Club hereby adopts the briefs of appellants Peace River/Manasota Regional Water Supply Authority, Charlotte County and Intervenor Lee County in Fla. 2d DCA Case Nos. 2D06-3848 and 2D06-3891 as well as appeal No. 2D07-3116.

STANDARD OF REVIEW

When reviewing the DEP's final order, this Court "shall provide whatever relief is appropriate irrespective of the original form of the petition." § 120.68(6)(a), Fl. Stat. (2007). The DEP's findings of fact shall be set aside when not supported by "competent, substantial evidence in the record." § 120.68(7)(b), Fla. Stat. The DEP's conclusions of law are reviewed *de novo*. See § 120.68(7)(d) and (e). A lower court's order on a motion to intervene is reviewed for abuse of discretion. *Barnhill v. Florida Microsoft Anti-Trust Litigation*, 905 So.2d 195 (Fla. 3d DCA 2005).

ARGUMENT AND CITATION OF AUTHORITY

I. THE DEP ERRED BY REFUSING TO RE-OPEN PROCEEDINGS TO CONSIDER THE PEACE RIVER CUMULATIVE IMPACT STUDY.

A. DEP can and must Consider the PRCIS as Evidence of Cumulative Impacts.

The DEP refused to re-open the proceedings because it believed that “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.” DEP Jun. 15, 2007 Order at 9.

The DEP’s finding was a repetition of its approval of the ALJ’s interpretation of Subsections 373.414(1) and (8), Fla. Stat. in his recommended order. *See* DEP Jul. 31, 2006 Final Order at 24, 40-42; and ALJ May 9, 2005 Recommended Order at 378 (Finding of Fact no. 863): “[I]f DEP deems the mitigation adequate, cumulative impacts are irrelevant by statute.” and 340-343 (Finding of Fact no. 794).

The DEP’s opinion was erroneous for two reasons. First, the DEP erred on the facts because the mitigation measures in this case were not adequate to completely offset adverse effects. Second, the DEP erred on the law because cumulative impacts should be taken into account under Section 373.414, Florida Statutes (2007), even if mitigation measures are adequate. Prior case law to the contrary

overlooked or misapprehended the legislative intent in that statute. Even if it was correct before the PRCIS that mitigation excused a cumulative impacts analysis, the legislature's direction of DEP to conduct the PRCIS has indicated its intent that cumulative impacts must be considered in the permitting process for phosphate mines.

1. Consideration of Cumulative Impacts is not Excused by the Permit's Mitigation Measures

The DEP held that since the Ona Mine's mitigation measures were deemed adequate to "offset the adverse impacts," no consideration of cumulative impacts was necessary or allowed. DEP Jun. 15, 2007 Order at 9.

The DEP is wrong on this issue because the ALJ did not find that the mitigation measures "offset" any and all adverse impacts from the mine, i.e. he did not find that the impacts were reduced to zero or rendered non-existent. Rather, the ALJ found that the mitigation measures rendered adverse impacts from the mine "negligible." ALJ May 9, 2005 Recommended Order, ¶ 777. Even if the impacts were "negligible," as a matter of definition there was still some impact, i.e. the impact was not completely eliminated, and thus there is still some impact to consider in a cumulative impacts analysis. In this situation, the reasoning that mitigation excuses the need for a cumulative impacts analysis does not apply. Compare *Sierra Club v. St. Johns River Water Management*, 816 So.2d 687, 689

(Fla. 5th DCA 2002)(“[I]f the proposed mitigation would offset the project’s adverse impacts . . . further cumulative impact analysis would not be required because *there would be no “leftover” unmitigated impacts* in the basin that could cumulate.”)(emphasis added); and *id.* at 692: “[I]f the adverse impacts of a proposed regulated activity will be *fully offset* by mitigation . . . then there are no ‘leftover’ impacts that could cumulate.” (Emphasis added). In the instant case, the mitigation did not *fully* offset the effects, therefore there is some leftover unmitigated impact to cumulate, and the cumulative impacts analysis is required under Section 373.414, Fla. Stat.

Even if the impact is negligible, i.e. it is individually insignificant, that does not necessarily mean that it will be insignificant when considered with the impacts of other mines in a cumulative impacts analysis. In this regard see the definition of “cumulative impact” in the analogous federal regulations for the National Environmental Policy Act:

“Cumulative impact” is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7 (emphasis added). Thus even the “negligible” impacts of the Ona Mine could have a cumulative impact when considered with the impacts of other past, present and reasonably foreseeable future mines. The ALJ and DEP’s

legislature to decree that DEP must consider the cumulative impacts of phosphate mine permits in the PRCIS while prohibiting DEP from considering those cumulative impacts in the permitting process under Section 373.414. Thus, regardless of whether DEP's interpretation of Section 373.414 was correct before the PRCIS statute, that statute has changed matters. The current legislative intent is that DEP must consider cumulative impacts, and that includes its analyses under Section 373.414.

The PRCIS statute further addresses mitigation, stating:

The study must also include an evaluation of the effectiveness of existing regulatory programs in . . . mitigating, or compensating for cumulative impacts . . . The study shall also recommend ways in which any buffer areas recommended as prohibited areas can be considered as mitigation under applicable permitting programs.

Paragraph 1, Section 10, Ch. 2003-423 Laws of Florida (emphasis added).

Thus the legislature was cognizant of the relationship between mitigation and cumulative impacts, and the need to consider cumulative impacts in determining whether mitigation measures are adequate. Despite this directive, DEP is refusing to consider cumulative impacts in connection with the mitigation measures in this case. See ALJ Recommended Order, ¶ 863 and DEP Jul. 31, 2006 Final Order (approval of the ALJ opinion) at 40-42.

The DEP skirts these issues in its June 15, 2007 Order by deeming that the PRCIS was only forward looking. June 15, 2007 Order at 7. However, the

legislature's directive for the PRCIS was made in November 2003. The hearing before the ALJ regarding the Ona Mine permits had not yet occurred; nor had DEP's approval of the ALJ's order. Hence these actions were still in the future when the legislature acted.

The Ona Mine permit process was not fully complete when the PRCIS was issued. That is because the permit was on appeal before this Court. Thus DEP could re-open proceedings and consider the PRCIS in the Ona Mine permitting process. This Court implicitly recognized this in granting the Motion to Relinquish. Indeed, if DEP was correct that the PRCIS cannot be considered in regards to the Ona permit and can only be considered in *future* permits, that would mean that this Court's relinquishment and remand were without any basis and were meaningless. Sierra Club submits, therefore, that the DEP's refusal to re-open proceedings was contrary to the mandate of this court as well as to the legislative intent in ordering the DEP to prepare the PRCIS.

The absurdity of DEP's position is shown by considering the consequences of its interpretation of the PRCIS statute in relation to Section 373.414. Under DEP's interpretation of the law, if mitigation is found adequate then cumulative impacts can *never* be considered in the permit process. Thus, even future permits would not take cumulative impacts into account in determining the sufficiency of mitigation measures; and, once the mitigation measures were found adequate they

are actually prohibited from considering cumulative impacts by the statute. Under DEP's interpretation the PRCIS could *never* be taken into account in the permitting process. That clearly defeats the intent of the legislature that the long-term, cumulative impacts of phosphate mining throughout the basin must be taken into account and addressed by DEP. Excluding permitting from that would make the PRCIS an empty exercise, a study to be put upon the shelf and not used, which would defeat the purpose of the PRCIS statute.

**3. *Sierra Club v. St. Johns River Water Mgmt. District* should
Not be Applied to this Case**

Both the DEP and ALJ rely on the 2002 ruling in *Sierra Club v. St. John's River Water Mgmt.*, 816 So.2d 687 (Fla. 5th DCA 2002). As demonstrated above, that case is factually distinguishable and may no longer be good law when the legislative intent of the PRCIS is taken into account. In addition, that opinion overlooked or misapprehended certain facts and aspects of the law; hence it should not be applied to the instant case.

St. John's was based on the mistaken premise that it would be "impossible" to "completely offset" an individual project's adverse impacts and cumulative impacts caused by other past, present and future projects. *Id.* at 693. But the court overlooked that it is possible for mitigation measures to accomplish that. For instance, Section 373.414(1)(b), Fla. Stat., refers to offsite mitigation, regional

mitigation and mitigation banking. There is no reason, and the *St. John's* court stated none, why a permittee could not buy sufficient credits, conservation easements or create wetlands to *more* than offset its impacts, thereby reducing its effect to less than zero or ensuring no net loss of wetlands. In other words, it is possible for mitigation measures to actually improve the *status quo*.

The *St. John's* court mistakenly assumed that considering cumulative impacts in a proposed project's mitigation is an all or nothing proposition. The court concluded that it would be "impossible" for a single project to completely offset cumulative adverse impacts of past projects. *Id.* (emphasis added). That is not necessarily so – as explained above regarding mitigation banking and credits. However, the court also failed to consider the possibility of partially, rather than completely, offsetting the cumulative impacts within the same drainage basin. For example, if the mitigation was of high quality and exceeded the acreage impacted by the permitted project, that mitigation could conceivably offset past, cumulative impacts within the basin. Thus the *St. John's* court wrongly limited the issue in reaching its conclusion and based the opinion on a faulty hypothetical.

St. John's also provides an incomplete analysis of the statutory scheme. It refers to other statutes that defined impacts as including individual and cumulative impacts. *See id.* at 693-94. But it overlooked Section 373.016(2), Fla. Stat., which states: "The department and the governing board shall take into account cumulative

impacts on water resources and manage those resources in a manner to ensure their sustainability.” And further, “the governing board shall construe and apply the policies in this subsection as a whole, and no specific policy is to be construed or applied in isolation from other policies in this subsection.” Section 373.016(3)(j), Fla. Stat. This indicates that DEP and the ALJ “shall” consider cumulative impacts, and that it would be error for them to exempt cumulative impacts from their permitting analysis, apart from whether they are required to consider cumulative impacts under Section 373.414. Put another way, Section 373.414 should not be read in such a way as to defeat the policy stated in Section 373.016(2), but the DEP and ALJ decision do just that.

B. The PRCIS is New Evidence that Justifies Re-Opening the Proceedings.

The DEP also refused to consider the PRCIS because it was allegedly not “new evidence,” and was allegedly merely cumulative of what was already in the record. Jun. 15, 2007 Order at 9-10. The DEP erred in this regard first by finding that “the evidence could have been discovered before trial” and, therefore, could not provide grounds for re-opening proceedings. *Id.* at 9. Regardless of whether some of the studies and evidence underlying the PRCIS pre-existed the trial, it is indisputable that the PRCIS did not exist at that time; therefore it is “new evidence.”

Second, the PRCIS did much more than just repeat pre-existing studies and evidence. It analyzed the studies and evidence and drew conclusions from them on the nature of the impact from phosphate mining in the basin. For example:

- “The net amount of wetland loss attributed to phosphate mining between 1979 and 1999 is 13,397 acres.” (PRCIS at 5-76).
- “The current regulatory framework has failed to minimize cumulative impacts.” (PRCIS at 5-98)
- “Over time, phosphate mining has continued to move south as the ore reserves in the upper portion of the watershed were removed (Appendix G and GIS map portfolio). Degraded water quality and occasional catastrophic fish kills were associated with some phosphate mining areas following accidental discharges from clay settling areas and mining operations (See Appendix E).” (PRCIS at 4-24)

Therefore, the PRCIS was not merely cumulative of what was or could have been in the record. It constituted a new DEP analysis that had been undertaken at the direction of the legislature, and which justified re-opening these proceedings as new evidence.

C. Because DEP is Precluded from Deciding Disputed Issues of Fact, it was Required to Remand to the ALJ for Further Proceedings to Issue a Supplemental Recommended Order Concerning this New Evidence.

DEP is prohibited by Sections 120.569 and 120.57, Florida Statutes, from deciding disputed issues of fact. That is the province of the ALJ. However, that is precisely what the DEP did in the relinquishment proceedings. The existence and content of the PRCIS raises many factual issues, such as whether in light of the

current status, historical condition and projected future condition of the Peace River, additional mitigation measures should be required for the Ona Mine and other phosphate mines. Therefore, it was improper for DEP to refuse to remand to the ALJ and implicitly (if not explicitly) decide these factual questions itself.

II. SIERRA CLUB MEETS THE REQUIREMENTS FOR INTERVENTION.

Because it refused to re-open the proceedings, the DEP did not rule on the merits of Sierra Club's Petition to Intervene. Nevertheless, this Court should grant Sierra Club's petition because the Sierra Club has a substantial interest in this matter and timely filed the petition.

Intervention is to be liberally granted. *National Wildlife Federation Inc. v. Glisson*, 531 So.2d 996, 997-998 (Fla. 1st DCA 1988) *citing* *Miracle House Corp. v. Haige*, 96 So.2d 417 (Fla. 1957). Fla. Admin. Code, Rule 28-106.205 permits intervention for parties whose substantial interest will be affected by the proceeding and who file petitions for leave to amend within at least twenty (20) days before the final hearing, unless good cause can be shown. To meet the "substantial interest" test for standing, a proposed intervenor must show: (1) the petitioner will suffer injury in fact that is of sufficient immediacy and (2) that his or her substantial injury is of a type or nature that the proceeding is designed to protect. *Mid-Chattahoochee River Users v. Florida DEP*, 948 So. 2d 794, 796

(Fla. 2d DCA 2006)(citing *Agrico Chem Co. v. Dep't of Env'tl. Regulation*, 406 So.2d 478, 482 (Fla. 2d DCA 1981)).

Although Sierra Club did not move to intervene in the underlying administrative hearing, Sierra Club did promptly move to intervene upon receiving notice of this Court's relinquishment to allow FDEP to consider the PRCIS. Sierra Club members participated in numerous public meetings on the preparation of the PRCIS and they have a substantial interest in seeing that the PRCIS is fully considered by DEP and remanded to the Administrative Law Judge for further proceedings. *See* Sierra Club Petition to Intervene at 5-6.

A. Sierra Club Meets the Substantial Interest Test for Standing.

As set forth in the Statement of Facts, *supra*, Sierra Club members will suffer immediate injury in fact that is of the sort intended to be protected by the DEP permitting process. Sierra Club's Petition to Intervene, ¶ 9. The Sierra Club has over 30,000 members in the State of Florida and approximately 3,371 members in the area immediately impacted by the Ona Mine. *Id.* Members of the Sierra Club actively work to protect the natural resources in the Peace River Basin and frequently use the area for recreational, educational, and leisure activities. *Id.* at ¶ 10-11. Many Sierra Club members participated in the development of the PRCIS and have been working on phosphate mining issues on an on-going basis, including the Ona Mine. *Id.* at ¶ 12-13.

The Ona Mine activities authorized by DEP through the July 31, 2006 Final Order will on an individual and / or cumulative basis cause adverse environmental impacts to wetlands, lakes, streams, estuaries, fish and wildlife, or other natural resources used by Sierra Club members. *Id.* at ¶ 14. Sierra Club pled the above-cited facts on interest and injury in its Petition for Intervention to DEP, providing plentiful evidence that the Club will suffer a substantial injury of immediate sufficiency, as necessary to meet the intervention test of Rule 28-106.25. Further, Sierra Club's substantial injury is of the type that the permit proceedings were designed to protect – environmental and public health.

B. Sierra Club Timely Moved to Intervene upon Receiving Notice of this Court's Remand to DEP to Consider the PRCIS.

Sierra Club's petition to intervene was filed less than 10 days after this Court's May 2, 2007 Order relinquishing jurisdiction to DEP for consideration of the new evidence. This Court's order constitutes a significant new development that could not have been addressed in the earlier proceedings. The order was also a new development germane to the Sierra Club as it implicates the specific interests of the Sierra Club and its members in the PRCIS. The Court's order therefore constituted good cause for Sierra Club's petition to intervene in accord with Florida Administrative Code, Rule 28-106.205.

Further, Sierra Club's petition met the time requirement of Rule 28-

106.205 for being filed at least twenty (20) days prior to the final hearing. Sierra Club petitioned to be involved in hearings considering the new evidence, the PRCIS. A final hearing to review the new evidence had not been scheduled when Sierra Club sought intervention; thus the petition was timely and met the guidelines of the Florida Administrative Procedure Act (APA).

The issuance of a final order by DEP does not preclude Sierra Club's motion to intervene; particularly where the Appeals Court has relinquished jurisdiction to DEP to consider additional evidence, as is the case here. In *Litvak v. Scylla Properties, LLC*, 946 So.2d 1165, 1173-1174 (Fla. 1st DCA 2006), the court cited a string of cases holding that intervention may be granted after final decree and/or for purposes of appeal. Citing *Ramos v. Philip Morris Cos.*, 714 So.2d 1146, 1147-48 (Fla. 3d DCA 1998); *State ex rel. Shevin v. Metz Constr. Co.*, 285 So.2d 598, 599 (Fla.1973); *State ex rel. Shevin v. Kerwin*, 279 So.2d 836, 837 (Fla.1973); *Wags Transp. Sys., Inc. v. City of Miami Beach*, 88 So.2d 751, 752 (Fla.1956); *Lieberman v. Lieberman*, 43 So.2d 460, 463 (Fla.1949); *Reopelle v. Reopelle*, 587 So.2d 508, 509 (Fla. 5th DCA 1991); *Allen v. Sch. Bd. of Broward County*, 522 So.2d 1036, 1037 (Fla. 4th DCA 1988); *City of Hialeah Gardens v. Dade County*, 348 So.2d 1174, 1180 (Fla. 3d DCA 1977); *Herold v. Hunt*, 327 So.2d 240, 241 (Fla. 4th DCA 1976); and *Hardy v. O'Grady*, 159 So.2d 908, 910-11 (Fla. 3d DCA

1964). Sierra Club seeks to be involved in remand proceedings to consider the PRCIS and /or in appeal proceedings.

C. Sierra Club Meets the Standing Requirements of the Environmental Protection Act.

As an association, Sierra Club has standing to intervene or otherwise participate in this proceeding on behalf of its members because its members would otherwise have standing to sue in their own right; the interests it seeks to protect are germane to the organization's purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Florida Home Builders Ass'n v. Department of Labor and Employment Security*, 412 So. 2d 351, 353 (Fla. 1982)(adopting the rule in *Hunt v. Washington State Apple Ass'n*, 432 U.S. 333, 343 (1977)).

The Florida Environmental Protection Act provides that citizens:

[S]hall have standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water or other natural resources of the state. . . . A citizen's substantial interest will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter.

§ 403.412(5), Fla. Stat. Standing is a question of law to be reviewed de novo. *Mid-Chattahoochee*, 948 So.2d at 796. The allegations in the pleadings are to be

taken as true when determining standing. *Id.* As proven in Paragraphs 5-6, and 9-14 of Sierra Club's Petition to Intervene, and described *supra*, Sierra Club members have a substantial interest in the Ona Mine permitting, particularly the PRCIS, and will suffer injury due to the environmental damage caused by the mine.

III. IN THE ALTERNATIVE, SIERRA CLUB SHOULD BE ALLOWED TO PARTICIPATE AS AMICUS CURIAE IN THIS APPEAL AND IN ANY REMAND TO FDEP FOR FURTHER PROCEEDINGS

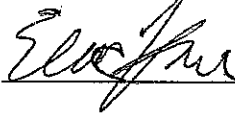
Alternatively, Sierra Club requests the Court allow it to participate in any further proceedings as Amicus Curiae. As demonstrated *supra*, Sierra Club has a strong interest in ensuring the PRCIS is considered by DEP in its decision on the Ona Mine permits. Sierra Club members are dedicated to habitat protection, including water quality and wetlands issues, and have been involved in phosphate mining issues in the Peace River Basin. Sierra Club members use the Peace River for numerous recreational, aesthetic, environmental and/ or business interests. The resulting environmental damage from the proposed Ona Mine would cause substantial harm to the interests of Sierra Club. As a non-profit environmental organization with experience in resource conservation and protection, Sierra Club can assist the tribunal in resolution of this matter.

CONCLUSION

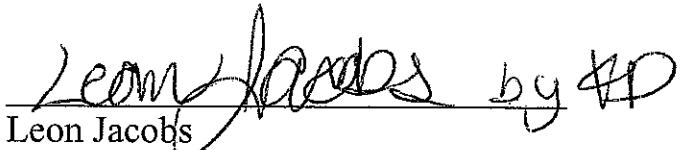
For the reasons set forth above, Sierra Club respectfully requests that this Court issue an order that reverses the FDEP's denial of the Manasota Regional Water Supply Authority's Motion to Consider Newly Discovered Evidence and denial of Sierra Club's Petition to Intervene or Otherwise Participate in Relinquishment Proceedings, and further:

- 1) denies or vacates the permit issued pursuant to application for CRP No. IMC-ONA-CP, ERP No. 0169281-001, and Ft. Green WRP No. 0142476-004 for the proposed Ona Mine;
- 2) In the alternative, remands this matter to the FDEP and the ALJ to conduct further proceedings and issue a supplemental recommended order concerning the Peace River CIS;
- 3) Allows Sierra Club to participate in those further proceedings and any other proceedings that may occur on any remand in this matter;
- 4) In the alternative, allows Sierra Club to participate as *amicus curiae* in any further proceedings; and
- 5) Grants such other relief as this Court finds just and proper.

Respectfully Submitted,




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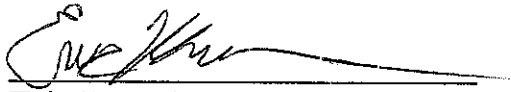
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that the original and three (3) true and correct copies of the Brief of Appellant Sierra Club were sent via **Federal Express** Overnight Mail to the Second District Court of Appeal, 1005 E. Memorial Blvd., Lakeland, FL 33801. A true and correct copy of the foregoing was served by **U.S. Mail** on Francine Ffolkes, Esq. and Justin Wolfe, Esq., Florida Department of Environmental Protection, 3900 Commonwealth Blvd., The Douglas Building, Mail Station 36, Tallahassee, FL 32399-3000; Steven L. Brannock, Esq., 100 N. Tampa St., Suite 4100, Tampa, FL 33602; Roger W. Sims, Esq., Rory C. Ryan, Esq., Robert Rhodes, Esq., Holland & Knight, LLP, 200 S. Orange Ave., Suite 2600, Orlando, FL 32801; Gary P. Sams, Esq. and Frank E. Matthews, Esq., Hopping Green & Sams, P.A., 123 S. Calhoun St., Tallahassee, FL 32314; Douglas Manson, Esq., Carey, O'Malley & Manson, P.A., 712 S. Oregon Ave., Tampa, FL 33606; John R. Thomas, Esq., 233 Third Street North, Ste. 102, St. Petersburg, FL 33701; Edward P. de la Parte, Jr., Esq., Post Office Box 2350, Tampa, FL 33601-2350; Martha Y. Burton, Esq., Charlotte County Attorney's Office, 18500 Murdock Circle, Port Charlotte, FL 33948; David Owen, Esq. and Susan M. Henderson, Esq., Lee County Attorney's Office, P.O. Box 398, Ft. Myers, FL 33902; Gary K. Oldehoff, Esq. and David Pearce, Esq., Sarasota County Attorney's Office, 1660 Ringling Blvd., 2nd Floor, Sarasota, FL 34236; Alan Behrens, 8335 S.R. 674, Wimauma, FL 33598; Claudia Llado and Robert E. Meale, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, FL 32399-1550; and on this 10th day of August, 2007.


Eric E. Huber

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font, margin, and other format requirements of Rule 9.210 of the Florida Rules of Appellate Procedure (2007 Edition).



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