

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

LEE COUNTY,)	
)	
Petitioner,)	
)	OGC CASE NOS. 08-1852
and)	08-1853
)	08-1854
SARASOTA COUNTY,)	08-1855
)	
Intervenor,)	
)	DOAH CASE NOS. 08-3886
vs.)	08-3887
)	08-3888
MOSAIC FERTILIZER, LLC, and)	08-3889
DEPARTMENT OF ENVIRONMENTAL)	
PROTECTION,)	
)	
Respondents.)	
_____)	

FINAL ORDER

On December 18, 2008, an Administrative Law Judge (“ALJ”) with the Division of Administrative Hearings (“DOAH”) submitted his Recommended Order (“RO”) in the above captioned administrative proceeding to the Department of Environmental Protection (“DEP” or “Department”). A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were served to counsel for all the parties. On January 5, 2009, Petitioner Lee County and Intervenor Sarasota County filed Exceptions to the RO. On January 15, 2009, Respondents Mosaic Fertilizer, LLC, and DEP separately filed Responses to the Exceptions filed by Lee County and Sarasota County. This matter is now before me as Secretary of the agency for final agency action.

BACKGROUND

Mosaic Fertilizer, LLC, (“Mosaic”) is a limited liability company authorized to do business in the State of Florida. It was formed by the merger of IMC Phosphates Company and Cargill, Inc., in 2004. Mosaic applied to the Department on October 13, 2006, for permits and approvals to mine, reclaim, and conduct associated activities on property in Hardee County, Florida, known as the South Fort Meade Hardee County tract (“Project”). The Project is located on a 10,856–acre site within the Peace River Basin. Little Charlie Creek, a tributary to the Peace River, enters the site in the northeast part of the tract and flows diagonally across the tract in a general southwest direction. The Project is located to the east of the Peace River, east of the town of Bowling Green, northeast of the City of Wauchula, and just south of the Polk-Hardee County Line in Hardee County, Florida. The Project site is twenty-nine miles from the Sarasota County line and fifty-three miles from the Lee County line. The Peace River eventually empties into Charlotte Harbor near Port Charlotte in Charlotte County.

On June 30, 2008, the Department issued notices of intent to grant Environmental Resource Permit No. 0221122-004 (“ERP”), Conceptual Reclamation Plan Application Code MOS-SFMHC-CP (“CRP”), Variance No. 0221122-005-EV-VE (“DO Variance”), and Variance No. 0221122-006-EV-VR (“Zone Variance”) to Mosaic. Following a Department Order granting an extension of time, Lee County filed a Petition for Formal Administrative Hearing (“Petition”) on August 1, 2008, challenging each of the proposed agency actions. The Petition was referred to the DOAH and the ERP, CRP, DO Variance, and Zone Variance were assigned DOAH Case Nos. 08-3886, 08-3887, 08-3888, and 08-3889, respectively.

On August 11, 2008, Mosaic filed a Motion for Summary Hearing in Tallahassee pursuant to Section 378.205(3), Florida Statutes (2008). That statute provides in part that “[a]dministrative challenges to proposed state agency actions regarding phosphate mines and reclamation pursuant to this chapter [Chapter 378] or part IV of Chapter 373” are subject to the summary hearing provisions of Section 120.574, Florida Statutes, and that the hearing must be conducted within ninety days after a motion for summary hearing is filed, even if the other parties oppose a summary hearing. On August 26, 2008, the four cases were consolidated; the Motion for Summary Hearing in Tallahassee was granted, and the final hearing was scheduled on November 3-7, 10-14, and 17-21, 2008, in Tallahassee, Florida. However, the hearing was completed on November 17, 2008. Because additional discovery beyond that contemplated in a regular summary hearing was determined to be necessary by the ALJ, by Order dated September 4, 2008, a detailed discovery schedule was established. On September 17, 2008, Sarasota County filed its Petition to Intervene in opposition to the proposed agency actions, which was granted. During the course of the proceeding, numerous procedural and discovery disputes arose. The disposition of those matters is found in separate orders entered in these cases by the ALJ. The ALJ conducted the final hearing commencing November 3, 2008. The Transcript of the hearing (twenty volumes) was filed on November 18, 2008. Under the terms of Section 378.205(3), Florida Statutes, the RO was entered by December 18, 2008.

THE RECOMMENDED ORDER

The ALJ recommended that the Department enter a final order granting Mosaic's applications for the ERP, CRP, and two Variances. He ultimately determined that

Mosaic proved its entitlement to the requested approvals by a preponderance of the evidence in the administrative hearing. (RO ¶ 200).

The ALJ found that Mosaic performed extensive and detailed ecological evaluations of the Project site, evaluating historical and aerial photography and other site documentation and conducting extensive examinations in the field, including vegetative, macro invertebrate, and fish sampling and surveying, surface and ground water quality and quantity monitoring, wildlife observations, surveys and trapping, stream mapping and evaluation, soil analysis, and other efforts, both in areas to be mined and areas to be preserved, and in both uplands and in wetlands. He concluded that the level of assessment expended in evaluating the native upland and wetland habitats on the Project site was considerable and provided reasonable assurances that the current condition and relative value of the systems were adequately considered in the permitting process. (RO ¶¶ 4, 10, 13-19). The Project site consists of approximately eighty percent of upland land cover types, including large acreages converted to agricultural uses, such as cattle grazing, citrus production, and row crop production. Virtually all of the native upland vegetation on the site has been destroyed due to the agricultural activities that have been undertaken on the site over time. Only remnant patches of native upland remain on the site. These comprise approximately nine percent of the site and are predominantly within the riparian corridors of Little Charlie Creek and the Peace River and are proposed to be preserved. (RO ¶¶ 6, 8).

The ALJ found that the majority of the wetlands and streams proposed for impact are lower in quality; the higher quality wetlands are typically associated with the riparian stream corridors and are proposed to be preserved. The ALJ determined that the most

complex and least impacted habitats on the site have generally been included in the preserve area. (RO ¶¶ 11, 38). The Project includes disturbance of 751.3 acres of wetlands and other surface waters, which include non-wetland floodplains, cattle ponds, and upland-cut ditches, and mining of 58,769 linear feet of natural and modified natural streams. An additional 1,661 linear feet of stream channel will be disturbed but not mined for six temporary crossings for dragline/utility/pipeline corridors. (RO ¶ 39). The ALJ found that Mosaic will mitigate for impacts to streams and wetlands by creating 641 acres of wetlands and other surface waters and 67,397 feet of stream channel and will also provide a conservation easement to the Department over 2,100 acres of un-mined wetland and upland habitat associated with the major riparian systems. The conservation easement area will be permanently preserved and protected from secondary impacts. (RO ¶ 40). The ALJ noted that Florida Administrative Code Rule 62C-16.0051(4) and (5) provides specific guidance on the classification and reclamation of natural streams. The application reflects that 58,769 feet of the streams identified as numbers 511 and 512 will be impacted. The ALJ observed that Lee County asserted that 2.3 miles of additional unmapped streams should be added to the reclamation obligation. However, the ALJ found that many of the areas alleged to be unmapped streams were depressions, low lying areas, or standing water within wetland areas more accurately identified as marshes or swamps. Also, many of the alleged unmapped streams were located in the no-mine areas, and thus the alleged lack of delineation was of no consequence. (RO ¶¶ 100 and 101). Thus, the ALJ concluded that Mosaic and the Department established that the proposed stream restoration plan is more than adequate to meet the requirements of Florida Administrative Code Rule 62C-16.0051(5)

and will ensure the reclaimed streams maintain or improve the biological function of the streams to be impacted. (RO ¶103).

The ALJ determined that the proposed mitigation will also restore a more appropriate or more natural hydrologic regime that will allow for a better propagation of fish and invertebrates in reclaimed systems. The reclamation plan will maintain the function of biological systems of wetlands to be mined on-site by replacing the wetlands to be impacted with wetlands of the same type and similar topography and hydrology in the post-reclamation landscape. In many cases, it will enhance the function of those systems by improving the landscape position of the wetlands, relocating them closer to the preserved Little Charlie Creek corridor, and moving cattle ponds and pasture away from the corridor. Likewise, the existing streams proposed for mining will be replaced with stream reaches modeled on streams that are comparable or better than the existing, unstable, and eroded streams. Mosaic can reclaim the streams and wetlands to at least as good as or better than existing conditions on the site. (RO ¶ 108).

The ALJ found that in addition to the wetlands and surface waters created to meet mitigation requirements, the Project will also reclaim uplands and will include what is known as “land and lakes” reclamation in the southeastern portion of the site. Utilizing shaped and contoured overburden, Mosaic will create four lakes totaling 180 acres and 43 acres of associated herbaceous littoral zone. This is based predominantly on the mine-wide materials balance showing a need for reclaimed lakes to account for mine voids on the Hardee site, the Polk site, or both. As a result, Mosaic has proposed 180 acres of reclaimed lakes in Hardee County in lieu of 500 acres of reclaimed lakes in

Polk County. This results in eliminating overall reclaimed lake acreage while satisfying Hardee County's request for deep lakes. (RO ¶ 47).

The ALJ found that Mosaic conducted detailed evaluations of post-reclamation floodplains and storm event run-off compared to pre-mining patterns, and the characteristics of reclaimed natural systems. He determined that reclaimed wetlands can be designed and built in a manner that will achieve the required hydroperiods for each wetland type proposed to be disturbed and reclaimed at the site, including the bay swamps. In addition, each of the wetlands must be individually evaluated immediately prior to construction to provide additional verification of site-specific hydrologic conditions to assess, re-model, and verify the final wetland designs. Condition 11c of the draft ERP also requires Mosaic to mimic the existing hydraulic conductivity and gradients near streams to ensure that base flows will be present post-reclamation. The ALJ concluded that all of this will ensure that reclaimed streams will be hydrologically supported, and wetlands with the target hydroperiods requested by the Department will be constructed. (RO ¶¶ 65 and 71).

The ALJ also found that Mosaic presented evidence demonstrating reasonable assurances that the proposed project will not cause adverse flooding to on-site or off-site property. (RO ¶ 75). During mining, the ditch and berm system reduces direct surface water runoff from areas disturbed by mining operations during peak rainfall events. Additionally, Mosaic proposes to preserve from mining the 100-year flood plain of Little Charlie Creek and the Peace River and most of the higher quality small tributaries on the site. The smaller streams to be mined will be restored in a way that maintains or improves pre-mining conditions and will not cause harmful or erosional

flows or shoaling. (RO ¶¶ 76-79). The ALJ found that Mosaic established that the proposed mining and reclamation activities on the site will not adversely impact flows in the Peace River. In addition the Project will not exacerbate the Upper Peace minimum flow (“MFL”) adopted by rule or interfere with the recovery plan. (RO ¶¶ 82-89).

The ALJ determined that the proposed Project will not cause a violation of water quality standards, either in the short-term or long-term. The ditch and berm system and other proposed Best Management Practices (“BMPs”), such as silt fences, will provide water quality protection to adjacent undisturbed surface waters and wetlands during mining and reclamation activities. The actual construction of the ditch and berm and stream crossings will be conducted using BMPs to avoid adverse construction-related impacts. During mining, the ditch and berm system will preclude uncontrolled releases of turbid water to adjacent un-mined areas. (RO ¶¶ 90-91).

The ALJ noted that Mosaic and the Department engaged in a protracted elimination and reduction discussion throughout the review process associated with the Project site’s ERP/CRP applications. The major project design modifications involved the preservation of the named stream channels, the 100-year floodplain of the Peace River and Little Charlie Creek, and the 25-year floodplain of the other named tributaries. These areas will be permanently preserved by a 2,100-acre conservation easement; 1,000 additional acres will remain un-mined. Also, the project design was modified and developed to maximize resource protection by integrating the Polk and Hardee mining operations. The hearing testimony established how the activities at the Hardee operation will be greatly facilitated by relying upon and using the beneficiation plant and infrastructure already in place and permitted at the Polk site. Almost fifty percent of the

clays generated at the Hardee mine will be disposed of in the existing Polk County clay settling areas (“CSAs”), thereby eliminating one proposed CSA altogether and substantially reducing the footprint needed for CSAs on the Project site. The Department established that mine-wide, approximately 320 acres of lakes were eliminated. (RO ¶ 96). The ALJ found that Mosaic eliminated impacts to stream systems to the greatest extent practicable. In addition the proposed location of the CSAs moves them as far from the Peace River and Little Charlie Creek as possible in light of the site topography, and this location avoids all impacts to named stream systems. (RO ¶¶ 98 and 99).

The ALJ found that Mosaic established that the proposed project, as reclaimed, will cause no adverse impacts on the value of functions provided to fish and wildlife and will not adversely affect the conservation of fish and wildlife, including endangered or threatened species and their habitats. Mosaic's reclamation and site habitat management plan will maintain or improve the functions of the biological systems on the site with respect to fish and wildlife, including threatened and endangered species and their habitat. (RO ¶¶ 110-118). Thus, the ALJ concluded that Mosaic provided reasonable assurances that the proposed reclamation plan will maintain or improve water quality and the existing functions of biological systems. Mosaic's reclamation plan for the site therefore satisfies the mitigation requirements of Part IV, Chapter 373, Florida Statutes, and the implementing regulations, as applied to phosphate mining activities through Section 373.414(6)(b), Florida Statutes. (RO ¶¶ 106, 107, 109).

The ALJ further found that all adverse impacts, including any secondary impacts, associated with the Project will be temporary and will be offset by the proposed

reclamation. All of the proposed impacts from the Project will occur within the Peace River Basin, and Mosaic's proposed mitigation will all occur within the Peace River Basin. Therefore, the cumulative impacts review requirements of Section 373.414(8)(a) and (b), Florida Statutes, were satisfied. (RO ¶¶ 144-147).

The ALJ also determined that Mosaic demonstrated that the reclamation and restoration standards in Florida Administrative Code Rule 62C-16.0051 were met. (RO ¶¶ 162-184). Mosaic proposed the Littoral Zone Variance as an experimental technique to improve the quality of the reclaimed lakes. Florida Administrative Code Rule 62C-16.0051(6) provides for a twenty-five percent high-water zone of water fluctuation to encourage emergent and transition zone vegetation, and a twenty percent low water zone between the annual low water line and six feet below the annual low water line to provide fish bedding areas and submerged vegetation zones. These vegetative zones are collectively known as the littoral zone of a lake. Traditionally, these percentages have been met in reclaimed lakes by sloping and creation of a uniform fringe of herbaceous wetland vegetation completely encircling the lake; however, such uniform fringes are not typical around natural lakes, which vary in composition and width. Rather than create a uniform band of vegetation around the lakes, Mosaic has proposed to reclaim the littoral zones around the reclaimed lakes by concentrating them in several broad, shallow areas, including the outlets of the lakes where such outlets occur (Lakes 1, 3 and 4). Of the proposed lakes, one will meet the littoral zone requirement, two will have over twenty percent of the total area in littoral zone, and the remaining lake will have a littoral zone of just under fourteen percent of the total area. (RO ¶ 195).

The ALJ found that the littoral zones will be reclaimed by constructing broad shelves of differing depths and planting the shelves with herbaceous wetland plant species. This design provides the environmental benefit of herbaceous vegetation at the outlet to provide increased filtration of nutrients or sediments of any water overflowing from the lakes during other high water events. This increases environmental benefits at the outlet of the lakes and has the potential to improve water quality downstream. Further, the proposed clustering of the littoral zones in several broad shallow shelves, rather than creation of a thin fringe around the lakes, will benefit wildlife and fish by creating a more extensive wetland ecosystem in lieu of the monoculture typically created by the thin littoral fringe. The proposed littoral zone clustering also creates more useable shoreline for boating, fishing, and recreational activities in the areas where the littoral zones are not clustered, with the added benefit of tending to separate the wildlife usage in the littoral zone clusters from the human usage in the upland forested areas of the shoreline where minimal littoral zones are planned. Since this is an experimental technique that advances reclamation methods by balancing habitat, water quality, and recreational considerations, the ALJ concluded that Mosaic demonstrated that the Littoral Zone Variance met the requirements of Section 378.212(1)(e), Florida Statutes. (RO ¶ 196-197).

The ALJ noted that, given the depth of the proposed reclamation lakes, Mosaic applied for, and the Department proposed to grant, a variance from the water quality standard for dissolved oxygen (“DO”) in the lower portions of the lakes. Class III freshwater water quality standards apply to those portions of the site that constitute surface waters as defined by Florida law. For at least those reclaimed lakes that will

connect offsite to downstream waters or wetlands (Lakes 1, 3, and 4), there is no dispute that Class III water quality standards would apply. The minimum water quality standard for DO in freshwater systems is 5.0 milligrams per Liter (mg/L). The ALJ found that alternatives to the lakes in terms of both size and location were considered. On balance, it was a preferable alternative to use the available sand resulting from mining of the Hardee County portion of the South Fort Meade mine to eliminate lakes and create additional wetlands on the Polk County portion of the mine rather than utilize that sand to eliminate all lakes on the Hardee County portion of the site. This is especially true given the desire of Hardee County for recreational lakes and the Department's preference to reduce the overall acreage of the reclaimed lakes at the South Fort Meade mine. It is not feasible to make the lakes shallower given the available materials. (RO ¶¶ 186-188).

The ALJ also found that there is no practicable means known or available for increasing DO in the deep pockets of lakes of the proposed depths that would not have a potential negative effect. The evidence established that lower DO levels may at times occur in the deep pockets of some of the reclaimed lakes to the same extent and effect as those lower levels occur in natural lakes of similar depths. The ALJ found that the evidence established that reclaimed lakes function well and provide habitat for fish and wildlife. Water quality standards will be met in all of the lakes other than occasional seasonal DO violations in the lower portions of the deepest lake. All water quality standards, including DO, will be met at all lake outlets and discharge points. Thus, the ALJ concluded that Mosaic proved entitlement to the DO Variance for the lakes

pursuant to Sections 373.414(6)(a) and 403.201(1)(a), Florida Statutes. (RO ¶¶ 189-193).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, “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.” § 120.57(1)(l), Fla. Stat. (2008); *Wills v. Fla. Elections Comm’n*, 955 So.2d 61 (Fla. 1st DCA 2007). The term “competent substantial evidence” does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, “competent substantial evidence” refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. See *e.g.*, *Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm’n*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. See *e.g.*, *Rogers v. Dep’t of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep’t of Env’tl. Prot.*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.*, 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the “fact-finder” in these administrative proceedings. See *e.g.*, *Tedder v. Fla. Parole Comm’n*, 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep’t of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ’s decision to accept the testimony of one expert witness over that

of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. See e.g., *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983). An agency has no authority to make independent or supplemental findings of fact. See, e.g., *North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." An agency's review of legal conclusions in a recommended order, are restricted to those that concern matters within the agency's field of expertise. See, e.g., *G.E.L. Corp. v. Dep't of Env'tl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. See, e.g., *Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." See, e.g., *Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Env'tl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such

agency interpretations are “permissible” ones. See, e.g., *Suddath Van Lines, Inc. v. Dep’t of Env’tl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

However, agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with “factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations,” are not matters over which the agency has “substantive jurisdiction.” See *Martuccio v. Dep’t of Prof’l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep’t of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997).

Evidentiary rulings are matters within the ALJ’s sound “prerogative . . . as the finder of fact” and may not be reversed on agency review. See *Martuccio*, 622 So.2d at 609.

Agencies do not have the authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. See, e.g., *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001).

Finally, in reviewing a recommended order and any written exceptions, the agency’s final order “shall include an explicit ruling on each exception.” See § 120.57(1)(k), Fla. Stat. (2008). However, the agency need not rule on an exception that “does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.” *Id.*

RULINGS ON EXCEPTIONS

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or

in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. See, e.g., *Comm'n on Ethics v. Barker*, 677 So.2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing*, 954 So.2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. v. Bradley*, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party “has thereby expressed its agreement with, or at least waived any objection to, those findings of fact.” *Env'tl. Coalition of Fla., Inc. v. Broward County*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); see also *Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So.2d 540, 542 (Fla. 4th DCA 2003).

EXCEPTIONS OF PETITIONER LEE COUNTY

Stream Definition Exception (I)

Lee County takes exception to paragraphs 19, 20, [21], 22, 40, 42-46, 79, 96, 98, 100, 101, [103], 104, 108, 115, 116, 119, 120, 122, 127, 128, 135, 169, and 171 of the RO, and the ALJ's recommendation that the ERP be issued because Lee County believes these paragraphs are based on the ALJ's misapplication of the ERP criteria applicable to streams. Lee County contends that paragraph 20 of the RO shows the ALJ's erroneous legal interpretation and that this alleged error pervades all the cited paragraphs to which it has taken exception. The alleged error is described by Lee County as the ALJ's failure to “credit the statutory definition of ‘stream’ contained in [Section] 373.019(18), [Florida Statutes], and his acceptance of the CRP stream definition contained in rule 62C-16.0051(5), Florida Administrative Code (“F.A.C.”). Lee County's lengthy argument suggests that these definitions are not the same and do not derive from the same statutory scheme. As a result, Lee County argues that the ALJ's

rejection in paragraph 21 of the RO of its evidence that 12,000 feet of natural streams were not identified and delineated was in error.

As pointed out in the Department's response, the ALJ found that the use of the term "stream" for ERP purposes is a subset of the term "other surface waters." (RO ¶ 20). Section 373.019(18), Florida Statutes, defines stream as "any river, creek, slough, or natural watercourse in which water usually flows in a defined bed or channel. It is not essential that the flowing be uniform or uninterrupted. The fact that some part of the bed or channel has been dredged or improved does not prevent the watercourse from being a stream." Section 373.019 also contains definitions for "surface water" and "water" that clearly contemplate "streams" as a subset. See § 373.019(19) and (20), Fla. Stat. (2008). Department rules and the Southwest Florida Water Management District (SWFWMD) Basis of Review (BOR) specifically include streams as "surface water." See section 3.1.0 SWFWMD BOR; Fla. Admin. Code R. 62-340.600(1). As "surface water" streams are covered by the ERP rules and are identified and delineated under Rule 62-340.600, F.A.C. Thus contrary to Lee County's argument, the ALJ did acknowledge that streams are regulated under the ERP program and impacts to streams resulting from non-phosphate projects are evaluated and mitigated.

Rule 62-340.600, F.A.C., titled "Surface Waters," provides that for the purposes of identifying and delineating surface waters under Section 373.421, Florida Statutes, "streams" are included. See Fla. Admin. Code R. 62-340.600(1). Section 373.421, Florida Statutes, mandates a unified statewide methodology for determining the extent of surface waters for the purposes of regulation under Section 373.414, Florida Statutes (ERP permitting). This is implemented through rule chapter 62-340, F.A.C., under

which applicants obtain formal determinations delineating the extent of surface waters and wetlands on their properties for regulatory purposes. The CRP definition of “stream” that Lee County attempts to differentiate from the ERP definition of “stream” is actually one unified definition flowing from the mandate of Section 373.421, Florida Statutes. Rule 62C-16.0051(5), F.A.C., provides in pertinent part that “[s]urface waters other than wetlands, as identified and delineated pursuant to Rule 62-340.600, F.A.C., within the conceptual plan area that are impacted by site preparation, mining or mining operations shall be restored” In 2007, pursuant to Chapter 62-340, F.A.C., the Department issued to Mosaic a formal determination of the landward extent of wetlands and other surface waters for the South Fort Meade Mine. (T. Uebelhoer at 195-196; Mosaic Ex. 75). This formal determination identified all the jurisdictional wetlands and surface waters on the property including streams, ditches and manmade surface waters. (T. Uebelhoer at 195-196; Mosaic Ex. 75). In paragraph 17 of the RO the ALJ found that:

17. A formal wetland jurisdictional determination was issued and published without challenge in 2007 and therefore conclusively establishes the boundaries of the wetlands and surface waters on the site for permitting purposes.

In addition, the ALJ credited the evidence presented by Mosaic and the Department as to the location and length of the natural streams that will be impacted on the Project. (RO ¶¶ 9, 11, 19, 20, 21). The ALJ did not credit the evidence of Lee County witness Kevin Erwin that over 12,000 feet of natural streams were omitted in the application because “[t]his contention was based on after-the-fact approximation of stream location and lengths plotted from memory in a desktop analysis. Further, during his site visit to mark stream locations, Lee County’s expert failed to use a handheld

GPS device or maps.” (RO ¶ 21). These findings and conclusions regarding conflicting evidence and credibility are wholly within the province of the ALJ as the trier-of-fact. I have no authority to reweigh the evidence, attempt to resolve conflicts therein, or judge the credibility of witnesses. See e.g., *Rogers v. Dep’t of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep’t of Env’tl. Prot.*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.*, 652 So.2d 894 (Fla. 2d. DCA 1995). Also, the ALJ’s decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that I cannot alter, absent a complete lack of any competent substantial evidence of record supporting his decision. See e.g., *Collier Med. Ctr. v. State, Dep’t of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm’n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983). As detailed below, I conclude that the ALJ’s findings are supported by competent substantial evidence in the record.

Lee County’s exception acknowledges that in paragraph 45 of the RO “the ALJ correctly explains that pursuant to Section 373.414(6)(b), Florida Statutes, reclamation meeting the requirements of FAC Rule 62C-16.0051 is adequate mitigation under the ERP criteria of Chapter 373, Part IV, if it maintains or improves the functions of the biological systems currently existing onsite.” However, Lee County argues that the ALJ’s error of not utilizing the Section 373.019 definition of “streams,” results in a lack of reasonable assurance by the applicant that demonstrating compliance with the Rule 62C-16.0051 CRP reclamation requirements allows the applicant to comply with Section 373.414(6)(b) and with applicable ERP criteria. I reject Lee County’s contention for the reasons outlined above. Further as pointed out in the Department’s response, there is

no significant difference between the two regulatory programs with regard to streams. As specified in the SWFWMD BOR and the reclamation rules only impacts to natural streams need to be mitigated or reclaimed while impacts to upland cut ditches do not. See § 373.019(18), Fla. Stat. (2008); Fla. Admin. Code R. 62C-16.0051(5), F.A.C. and Section 3.2.2.2 SWFWMD BOR. The reclamation rules and the mitigation rules require mitigation and reclamation of natural streams even if they have been impacted by channelization, canalization or flow modifications. Additionally, both the SWFWMD BOR and the reclamation rules allow for the current condition of the stream to be considered when determining the reclamation and mitigation necessary for impacts to that system. See Fla. Admin. Code R. 62C-16.0051(5) and Section 3.2.3.7 SWFWMD BOR. The SWFWMD BOR and the reclamation rules also contemplate allowing the mitigation or reclamation of a slightly different but similar system than what was present prior to impacts occurring. See Fla. Admin. Code R. 62C-16.0051(5) and Section 3.3.1.1 SWFWMD BOR. Thus, the ALJ's rejection in paragraph 20 of the RO of "Lee County's assertion that 'streams' has some special status by virtue of the definition in Section 373.019(18), Florida Statutes," was based on a correct and reasonable interpretation of the applicable law. Ultimately the ALJ found that Mosaic's reclamation plan, including the stream plan, will maintain or improve the water quality and functions of the biological systems present at the site and therefore is considered appropriate mitigation under Part IV of Chapter 373, Florida Statutes. (RO ¶¶ 106 and 135). These findings and conclusions are based on competent substantial evidence in the record. (T. Keenan at 1492; T. Kiefer at 550, 584; T. Cantrell at 1300; T. Durbin at 836; T.

Coates at 1658-59). Therefore Lee County's exceptions discussed in Section I-Stream Definition Exception are denied.

For the purposes of judicial review under Section 120.68, Florida Statutes, and to fully comply with Section 120.57(1)(k), Florida Statutes, each paragraph mentioned in Lee County's exception is ruled on as follows:

Paragraph 19 of the RO is supported by competent substantial record evidence. (T. Poppleton 375, 379-380; Boote 514-515; Rivera 1385; Keenan 1480; Mosaic Ex. 1S 3670).

Paragraph 20 is supported by competent substantial record evidence. (T. Cantrell 1296-97, 2723-24, 2731-32).

Paragraph 21 is supported by competent substantial record evidence. (T. Erwin 2011, 2015; Cantrell 1296-97; Kiefer 603).

Paragraph 22 is supported by competent substantial record evidence. (T. Cantrell 1223-96; Kiefer 600-01).

Paragraph 40 is supported by competent substantial record evidence. (T. Myers 92-96; Mosaic Ex. 1S 03670-03671).

Paragraph 42 is supported by competent substantial record evidence. (T. Erwin 1889; Cantrell 1296-97, 1337-38). See Fla. Admin. Code R. 62-345.600.

Paragraph 43 is supported by competent substantial record evidence. (T. Cantrell 1296-97, 1337-38).

Paragraph 44 is supported by competent substantial record evidence. (T. Cantrell 2748-49). See Fla. Admin. Code R. 62C-16.0051(5).

Paragraph 45 is supported by competent substantial record evidence. (T. Cantrell 2740). See Fla. Admin. Code R. 62C-16.0051(5).

Paragraph 46 is supported by competent substantial record evidence. (T. Kiefer 603; Boote 481-82; Cantrell 2715-16, 2740).

Paragraph 79 is supported by competent substantial record evidence. (T. Durbin 785-86; Kiefer 550, 582-83; Burleson 937).

Paragraph 96 is supported by competent substantial record evidence. (T. Myers 69-70; Uebelhoer 218; Garlanger 312-14; Cantrell 1214-15, 1357; Coates 1661-64).

Paragraph 98 is supported by competent substantial record evidence. (T. Myers 69-70; Cantrell 1218-19, 1316; Mosaic Ex. 2I).

Paragraph 100 is supported by competent substantial record evidence. (T. Boote 480-84; Mosaic Ex. 1S 3670-71; Erwin 2018-32).

Paragraph 101 is supported by competent substantial record evidence. (T. Cantrell 1297, 2709-10; Rebuttal Exs. 22-24).

Paragraph 103 is supported by competent substantial record evidence. (T. Kiefer 582-83; Cantrell 1298-1300).

Paragraph 104 is supported by competent substantial record evidence. (T. Janicki 2169, 2215, 2185; Mosaic Ex. 123 74501; T. Janicki 2214; Kiefer 561-62; Boote 485-86, 499; Cantrell 1300; Keenan 1469-71).

Paragraph 108 is supported by competent substantial record evidence. (T. Durbin 798-799; Mosaic Ex. 1S 3680; T. Kiefer 583; Boote 483-92; Cantrell 1298-1300; Keenan 1526-31; Rivera 1403-06).

Paragraph 115 is supported by competent substantial record evidence. (T. Durbin 791-92, 798-800; Keenan 1479; Kiefer 586-92).

Paragraph 116 is supported by competent substantial record evidence. (T. Fraser 2320, 2323-33).

Paragraph 119 is supported by competent substantial record evidence. (T. Durbin 794-98; Kiefer 628-745).

Paragraph 120 is supported by competent substantial record evidence. (T. Myers 75-79).

Paragraph 122 is supported by competent substantial record evidence. (T. Durbin 794-96; Kiefer 644-45).

Paragraph 127 is supported by competent substantial record evidence. (T. Kiefer 585; Cantrell 1298).

Paragraph 128 is supported by competent substantial record evidence. (T. Kiefer 585-93, 626-53; Rivera 1413-14; Keenan 1494-96).

Paragraph 135 is supported by competent substantial record evidence. (T. Cantrell 1298-99; Kiefer 569-82).

Paragraph 169 is supported by competent substantial record evidence. (T. Cantrell 1296-97; Coates 245-46).

Paragraph 171 is supported by competent substantial record evidence. (T. Cantrell 2740, 2748-49; T. Kiefer 603; Boote 481-82; Cantrell 2715-16, 2740). See Fla. Admin. Code R. 62C-16.0051(5).

Therefore, based on the foregoing, Lee County's exceptions discussed in Section I-Stream Definition Exception are denied.

Stream Hydrology Exception (II)

Lee County takes exception to paragraphs 71, 106, 109, 110, 119, 122, 127, 128 and 133 of the RO on the basis that these findings are not supported by competent substantial evidence in the record of this proceeding. In reality, Lee County's arguments in this exception are that I should violate the standard of review by reweighing the same evidence presented to the ALJ. Thus, Lee County seeks to have me resolve conflicting evidence in their favor and judge the credibility of expert witnesses. These matters are wholly within the province of the ALJ as the trier-of-fact. See e.g., *Tedder v. Fla. Parole Comm'n*, 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983). If the record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such factual finding in preparing the Final Order. See e.g., *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987).

Paragraph 71 is supported by competent substantial record evidence. (T. Pekas 1043-44, 1055-57; Mosaic Ex. 275; T. Davis 1751, 1841; Jonas 2114). In challenging this finding Lee County argues that the number of bankful flow events for the reclaimed streams demonstrated by Mosaic's hydrologic modeling is excessive and therefore cannot be considered competent substantial evidence. While it is true that Mosaic's bankful flow event modeling predicted 4-17 bankful events, the evidence showed that this was during a 16-month period of time and included rainfall data in which 3 hurricanes occurred in the area which resulted in more bankful events than would be

typical. (T. Burleson 928, 985). Notably, Lee County's assertion that the proper number of bankful events should be 1 to 1.5 per year does not have a record citation and obviously any evidence to that affect was not credited by the ALJ, who described Lee County's numbers as "unrealistic." (RO ¶ 71).

Paragraph 106 is supported by competent substantial record evidence. (T. Keenan 1489-1492; T. Kiefer 550, 583-584; T. Cantrell 1300; T. Durbin 791-92, 807-808, 836; T. Coates 1658-59; Poppleton 387-388).

Paragraph 109 is supported by competent substantial record evidence. (T. Durbin 798-808; Mosaic Ex. 1S 3680; Kiefer 583; Boote 483-92; Cantrell 1298-1300; Keenan 1526-31; Rivera 1403-06).

Paragraph 110 is supported by competent substantial record evidence. (T. Durbin 776-79; Simpson 412-15, 420-22; Mosaic Ex. 2B).

Paragraph 119 is supported by competent substantial record evidence. (T. Durbin 794-98; Kiefer 628-745).

Paragraph 122 is supported by competent substantial record evidence. (T. Durbin 794-96; Kiefer 644-45).

Paragraph 127 is supported by competent substantial record evidence. (T. Kiefer 585; Cantrell 1298).

Paragraph 128 is supported by competent substantial record evidence. (T. Kiefer 585-93, 626-53; Keenan 1494-96; Rivera 1413-14).

Paragraph 133 of the RO is supported by competent substantial record evidence. (T. Boote 486; Kiefer 698-99; Keenan 1471). In challenging paragraphs 119, 122, 127, 128, and 133 of the RO Lee County argues that there is not competent substantial

evidence to support the above findings regarding Mosaic's ability to successfully reclaim streams by citing to the ALJ's findings in the recommended order in *Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Company*, DOAH Case No. 03-0791 ("Ona Case"). First, the record evidence in this case supports the ALJ's findings of fact. (T. Kiefer at 585-593, 626-653; T. Keenan at 1494-96; T. Rivera at 1413-14; T. Cantrell at 1298); See § 120.57(1)(j), Fla. Stat. (2008). Second, Lee County's argument does not suggest or articulate a proposition that the findings in the Ona Case have a *collateral estoppel* effect in this case. See, e.g., *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001).

Therefore, based on the foregoing, Lee County's exceptions in Section II-Stream Hydrology Exception, are denied.

Minimum Flows and Levels Exception (III)

Lee County takes exception to paragraphs 52-53, 55-56, 64, 74, 82-83, 86-89 and the ALJ's recommendation that the ERP and CRP be issued. At first Lee County contends that there is no competent substantial evidence to support the findings that Mosaic provided reasonable assurance that the Project will not adversely impact the Upper Peace MFL pursuant to Section 40D-4.301(1)(g), F.A.C. (RO ¶¶ 83, 84, 88, 89). Later in this exception Lee County challenges the ALJ's findings that Mosaic provided reasonable assurance that the Project will not adversely impact water quantity on the site, adjacent properties, or in the Peace River or Charlotte Harbor pursuant to Sections 40D-4.301(1)(a) and 40D-4.302(1), F.A.C. (RO ¶¶ 52, 53, 55, 56, 64, 74).

Lee County specifically claims that there was no competent substantial evidence presented at the hearing that the MFL would not be impacted during mining. The record

reflects that this is not the case. Department witness John Coates testified that the recharge ditches put in place during mining operations will ensure that there will not be any adverse impacts on the maintenance of the Zolfo Springs MFL. (T. Coates at 1629-1632, 1645, 2670-2672, 2682). During active mining and reclamation activities, the recharge ditch system operates to maintain groundwater levels at pre-mining levels in areas undisturbed by mining. (T. Pekas 1020-24; T. Keenan 1485-87; T. Coates 1629-1632). Thus, during active mining and reclamation, the base flow component of flow will not be adversely affected and will contribute to the Peace River flows including during low flow conditions. (T. Pekas 1020-24; T. Coates 2670-2672). Lee County mischaracterizes Mr. Coates' testimony regarding MFLs as only being based on "Burelson's stormwater modeling." Mr. Coates clearly stated that his opinion that the MFL will not be impacted was based on Mosaic's extensive modeling "and also based on our review of the during-mining activities where the ditch and berm system will be providing hydration to the site during mining, there would also be discharges from – to be permitted in the future, NPDES outfalls." (T. Coates 1645).

Also, contrary to Lee County's assertion, there is competent substantial evidence to support paragraphs 83 and 88 in which the ALJ finds that Dr. Ross' integrated model showed that the MFL at Zolfo Springs would not be impacted during low flow conditions. (T. Ross 2647-2652; Mosaic Rebuttal Ex. 4 and 5). The integrated model actually reflects that during low flows in the Peace River, the post-reclamation landscape at the Project site would yield a long-term increase in low flow conditions by storing some peak flow volumes and releasing them in low flow conditions. (Mosaic Rebuttal Ex. 4, 5; T. Ross 2648-51).

In addition to paragraphs 83 and 88, paragraph 82 is supported by competent substantial record evidence. (T. Ross 1156, 2651; Coates 2670-75). Paragraph 86 is supported by competent substantial record evidence. (T. Ross 1162, 2651; Rebuttal Exs. 4 and 5). Paragraph 87 is supported by competent substantial record evidence. (T. Ross 2648-51). Paragraph 89 is supported by competent substantial record evidence. (T. Coates 1635-45, 2672; Ross 2646-47). Thus, under the standard of review I am bound by these factual findings in preparing this Final Order. See e.g., *Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987).

Lee County further argues that the only evidence by Mosaic concerning hydrologic impacts during mining was generalized testimony regarding the effect of the ditch and berm system on water quantity. (T. Pekas 1020-1024). In a rather convoluted argument Lee County then concludes that the ditch and berm system evidence “does not specifically address low flow conditions.” This is contrary to the competent substantial record evidence that demonstrates that during active mining and reclamation activities, the recharge ditch system operates to maintain groundwater levels at pre-mining levels in areas undisturbed by mining. (T. Pekas 1020-24; T. Keenan 1485-87; T. Coates 1629-1632). During active mining and reclamation, the base flow component of flow will not be adversely affected and will contribute to the Peace River flows including during low flow conditions. (T. Pekas 1020-24; T. Coates 2670-2672). Although Lee County did not present specific challenges to each paragraph listed in this exception, each paragraph is addressed as follows:

Paragraph 52 is supported by competent substantial record evidence. (T. Uebelhoer 191-92; Burleson 895; Pekas 1008-1014, 1020-31, 1040-43, 1048-1050;

Mosaic Exs. 255-258; Ross 1144-47; Davis 1850-51; Coates 1631-32, 1646-47, 1657, 2670).

Paragraph 53 is supported by competent substantial record evidence. (T. Uebelhoer 191-92; Burleson 895; Pekas 1008-1014, 1020-31, 1040-43, 1048-1050; Mosaic Exs. 255-258; Ross 1144-47; Davis 1850-51; Coates 1631-32, 1646-47, 1657, 2670).

Paragraph 55 is supported by competent substantial record evidence. (T. Uebelhoer 191-92; Burleson 895; Pekas 1008-1014, 1020-31, 1040-43, 1048-1050; Mosaic Exs. 255-258; Ross 1144-47; Davis 1850-51; Coates 1631-32, 1646-47, 1657, 2670).

Paragraph 56 is supported by competent substantial record evidence. (T. Uebelhoer 191-92; Burleson 895; Pekas 1008-1014, 1020-31, 1040-43, 1048-1050; Mosaic Exs. 255-258; Ross 1144-47; Davis 1850-51; Coates 1631-32, 1646-47, 1657, 2670).

Paragraph 64 is supported by competent substantial record evidence. (T. Coates 1633-34, 1645-46, 1650-51).

Paragraph 74 is supported by competent substantial record evidence. (T. Uebelhoer 191-92; Burleson 895, 938; Pekas 1008-1014, 1020-31, 1040-43, 1048-1050; Mosaic Exs. 255-258, 275; Ross 1144-47; Davis 1850-51; Coates 1631-32, 1646-47, 1657, 2670).

Therefore, based on the foregoing, Lee County's exceptions in Section III- Minimum Flows and Levels Exception, are denied.

Ditch and Berm Exception (IV)

Lee County takes exception to paragraphs 56 through 63 of the RO on the basis that these paragraphs are not supported by competent substantial evidence. In these paragraphs the ALJ concluded that water quantity and flows in adjacent un-mined wetlands and streams will be maintained during mining by installation and operation of the ditch and berm system.

Contrary to Lee County's assertions, there is competent substantial evidence to support the finding in paragraph 56 that during active mining and reclamation activities, the ditch and berm system operates to maintain groundwater levels in areas undisturbed by mining at pre-mining levels. (T. Pekas 1020-1024; T. Keenan 1485-87; T. Coates 1629-1632). Water levels are actively maintained in the ditches surrounding mining areas to assure that the mining excavations do not drain groundwater from adjacent areas. (T. Pekas 1020-1024; T. Keenan 1485-87; T. Coates 1629-1632). Lee County expert, Phil Davis, even agreed on cross examination that recharge ditches will work properly to hydrate un-mined areas if they are maintained, hydrated and monitored. (RO ¶ 60; T. Davis 1847). Additionally, pursuant to ERP Specific Condition 11.a., prior to mining Mosaic will install monitoring wells at the toe of the berm that will monitor elevations of the water table to ensure that levels will be the same during mining as it was prior to mining. (RO ¶ 58; DEP Ex. 1, pg. 35). Thus, during active mining and reclamation, the base flow component of flow will not be adversely affected. (RO ¶ 58; T. Pekas 1020-1024; T. Keenan 1485-87; T. Coates 1629-1632).

Mosaic conducted comparative pre-, during and post-mining analyses to demonstrate that ground water contributions to the un-mined streams and wetlands will

be protected. (T. Pekas 1022-1024). Mosaic conducted a series of profile models to evaluate the recharge ditches performance at five different locations on the Project site. (T. Pekas 1023; Mosaic Ex. 257). The profile modeling analysis showed that as long as the water level in the recharge ditches are maintained there would be no significant reduction of base flow to the streams or to the wetlands. (RO ¶ 59; T. Pekas 1022-1035; Mosaic Exs. 260-262).

Based upon the profile modeling and the ability of the recharge ditches to hydrate preserved wetlands and streams, recharge wells will not be needed at the site. (RO ¶ 57; T. Pekas 1040). While there is a hard pan layer present at the Project site which could interrupt the recharge ditch's effectiveness, the location of the hard pan is shallower than the depth of the recharge ditch so there will not be any adverse effects from the hard pan. (T. Pekas 1040-1041). Additionally, Mosaic is required by ERP Specific Condition 11 to conduct investigations prior to the construction of the recharge ditch system to determine the pre-construction groundwater conditions. (DEP Ex. 1, pg. 35-38). ERP Specific Condition 11 also requires that if any preserved wetland shows sign of stress Mosaic will have to conduct appropriate remedial actions which would effectively function to calibrate the surface water management system. (DEP Ex. 1, pg. 35-38; T. Coates 1630-1632).

Clearly, competent substantial evidence in the record supports the ALJ's findings regarding the ditch and berm system. I am not authorized to reweigh the evidence and draw different inferences than those drawn by the ALJ. See *e.g.*, *Rogers v. Dep't of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Env'tl. Prot.*, 695

So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.*, 652 So.2d 894 (Fla. 2d. DCA 1995).

Paragraph 56 is supported by competent substantial record evidence. (T. Pekas 1020-1024; T. Keenan 1485-87; T. Coates 1629-1632).

Paragraph 57 is supported by competent substantial record evidence. (T. Pekas 1020-21, 1040-43, 1102; Uebelhoer 191-92).

Paragraph 58 is supported by competent substantial record evidence. (T. Pekas 1020-1024).

Paragraph 59 is supported by competent substantial record evidence. (T. Pekas 1019-24, 1020-31; Mosaic Exs. 255-258).

Paragraph 60 is supported by competent substantial record evidence. (T. Pekas 1024; Davis 1850-51; Coates 1631-32, 1646-47).

Paragraph 61 is supported by competent substantial record evidence. (T. Pekas 1048-50; Coates 2670; Uebelhoer 189-93).

Paragraph 62 is supported by competent substantial record evidence. (T. Pekas 1047-48).

Paragraph 63 is supported by competent substantial record evidence. (T. Pekas 1040, 1067; Coates 1657).

Therefore, based on the foregoing, Lee County's exceptions in Section IV-Ditch and Berm Exception, are denied.

Wetlands Exception (V)

Lee County takes exception to paragraphs [67], 68, 70-71, 73, 106, 108-109, 118, 119, 122, 123, 178 and the ALJ's recommendation that the ERP and the CRP

should be issued on the basis that these findings regarding Mosaic's ability to restore wetlands including bay swamps, are not supported by competent substantial evidence.

Lee County argues that the ALJ did not specifically find that the target wetland hydroperiods would maintain or improve existing biological conditions. However, in paragraph 68 the ALJ found that appropriate ranges for the expected hydroperiods were established. Paragraph 68 states:

Appropriate ranges for the expected hydroperiods and other hydrological characteristics needed for the different types of wetland systems to be created in the post-reclamation landscape were established. In order to reflect natural conditions, the Department specifically requested that the targets for expected hydroperiods of reclaimed wetlands vary across the established range of the hydroperiod for the type of wetland at issue, and these target hydroperiods are summarized in Table E-6 to the draft ERP.

(Emphasis added).

This finding is supported by competent substantial evidence in the record. (T. Pekas 1053-1054; T. Keenan 1487-88). Also, competent substantial record evidence established that Mosaic's reclamation plan will offset any adverse impacts to wetlands, because it will maintain or improve the water quality and functions of the biological systems present at the site prior to mining. (RO ¶ 106; T. Keenan 1492; Kiefer 550, 584; Cantrell 1300; Durbin 836; Coates 1658-59).

Lee County then argues that expert testimony from their expert Kevin Erwin conflicts with the ALJ's finding by challenging the appropriateness of the wetland hydroperiods utilized in Mr. Pekas' model. I am not authorized to reweigh the evidence. See e.g., *Tedder v. Fla. Parole Comm'n*, 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also,

the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting his decision. See e.g., *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

Paragraph 67 is supported by competent substantial record evidence. (T. Pekas 1051; Coates 1626-30).

Paragraph 68 is supported by competent substantial record evidence. (T. Pekas 1053; Kiefer 651-53; Coates 1629-30; Keenan 1482-88; Mosaic Ex. 267).

Paragraph 70 is supported by competent substantial record evidence. (T. Pekas 2624-25; Rebuttal Ex. 1; Mosaic Ex. 1S 3703-06).

Paragraph 71 is supported by competent substantial record evidence. (T. Pekas 1043-44, 1055-57; Mosaic Ex. 275; Davis 1751, 1841; Jonas 2114).

Paragraph 73 is supported by competent substantial record evidence. (T. Pekas 1067; Burleson 938; Kiefer 651-53; Coates 1629-30; Keenan 1482-88).

Paragraph 106 is supported by competent substantial record evidence. (T. Poppleton 387-88; Kiefer 583; Durbin 791-92, 807-08; Keenan 1489-91; Coates 1658).

Paragraph 108 is supported by competent substantial record evidence. (T. Durbin 798-99; Mosaic Ex. 1S 3680; Kiefer 583; Boote 483-92; Cantrell 1298-1300; Keenan 1526-31; Rivera 1403-06).

Paragraph 109 is supported by competent substantial record evidence. (T. Durbin 798-808; Mosaic Ex. 1S 3680; Kiefer 583; Boote 483-92; Cantrell 1298-1300; Keenan 1526-31; Rivera 1403-06).

Paragraph 118 is supported by competent substantial record evidence. (T. Poppleton 387-88; Simpson 409-12; Durbin 776-79; Cantrell 2715-16).

Paragraph 119 is supported by competent substantial record evidence. (T. Durbin 794-98; Kiefer 628-745).

Paragraph 122 is supported by competent substantial record evidence. (T. Durbin 794-96; Kiefer 644-45).

Paragraph 123 is supported by competent substantial record evidence. (T. Kiefer 628-42; Mosaic Exs. 145-150; Mosaic Ex. 2G 7003).

Paragraph 178 is supported by competent substantial record evidence. (T. Simpson 419-21; Durbin 785-88; Keenan 1475).

Therefore, based on the foregoing, Lee County's exceptions in Section V-Wetlands Exception, are denied.

Financial Responsibility Exception (VI)

Lee County takes exception to paragraph 143 and the ALJ's recommendation that the ERP be issued on the basis that the ALJ did not affirmatively find that Mosaic complied with Rule 40D-4.301(1)(j), F.A.C. This rule provides in pertinent part that the applicant provide reasonable assurance the project "will be conducted by an entity with financial, legal, and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued." Lee County acknowledges that the ALJ made findings regarding financial assurance in

paragraph 143, but argues that the evidence supporting the findings is legally inadequate. Lee County contends that the third party estimates from Mosaic's contractors does not satisfy the requirement of Section 3.3.7.7 of the BOR because of Mosaic's ongoing relationship with its contractors. BOR 3.3.7.7 provides that "[t]he costs shall be estimated based on a third party performing the work and supplying materials at the fair market value of the services and materials. The source of any cost estimates shall be indicated." The ALJ found that "Mosaic has provided appropriate cost estimates for financial assurances of reclamation and has satisfied the BOR requirements of providing third-party estimates and draft financial assurance documentation." (T. Kiefer 607-11; Myers 96-107; Claridge 1570-75; Mosaic Exs. 54-59). The ALJ clearly did not give much probative value to testimony that was designed to discredit Mosaic's third-party estimates. I have no authority to reweigh the evidence or judge the credibility of witnesses. See e.g., *Tedder v. Fla. Parole Comm'n*, 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

Although Lee County contends that the ALJ did not affirmatively find that Mosaic possesses the legal and administrative capability of ensuring the activity would be conducted in accordance with the permit, in paragraph 147 of the RO he found that Mosaic "demonstrated by a preponderance of the evidence that the proposed project meets the permitting criteria of Florida Administrative Code Rule 40D-4.301 and associated BOR provisions." Mosaic provided reasonable assurance by presenting evidence that showed it has sufficient ownership interest or legal control over the Project site for the purposes of the filing and agency review of the application. (RO ¶¶ 1,

17, 40, 126; Mosaic Exs. 1A, Attachment A and 75; T. Keenan 1494-96). This information ensures compliance with Rules 40D-1.6105(1) and 40D-4.301(1)(j), F.A.C. See *Charlotte County v. IMC Phosphates Co.*, DOAH Case No. 02-4134 (Dep't of Env'tl. Prot. 2003).

Consequently, based on the foregoing, Lee County's exceptions in Section VI-Financial Responsibility Exception are denied.

Fish Exception (VII)

Lee County takes exception to paragraph 116 where the ALJ determined that requiring fish collection as a success criterion for reclaimed streams is not a requirement of the ERP or CRP rules. While the ALJ is correct that neither the ERP nor the CRP rules specifically require fish collection as a success criterion in the ERP or CRP, it remains an option that the Department may require if it is believed to be necessary. See Section 3.3.6 SWFWMD BOR. Clearly, in this case the ALJ found it to be unnecessary and gave little weight to Dr. Fraser's suggestion that the ERP should be modified to require fish collection. The ALJ also found little probative value in Dr. Fraser's testimony that Mosaic's fish sampling was insufficient. I have no authority to reweigh the evidence, resolve conflicts or judge the credibility of witnesses. See *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

Lee County also contends that the ALJ's finding in paragraph 116 that "Dr. Fraser's discussion of fish in basins where mining has occurred was discredited by his own data showing no reduction in the number of native fish species has occurred over time in those basins" is not supported by competent substantial evidence. However,

contrary to Lee County's assertion and the other cited testimony of Dr. Fraser, the finding is supported by competent substantial record evidence. (T. Fraser 2323-33).

Lee County further argues that there is no competent substantial evidence in the record to support the findings in paragraphs 106, 107, 108, 109, 110, 118, 119, 122, 178, and 181 and the ALJ's recommendation that the ERP and CRP be issued because of the adverse impacts to fish habitat presented by Lee County's evidence. However, the ALJ did not give any credit to Lee County's evidence and I am not authorized to reweigh the evidence. *Id.* In these paragraphs the ALJ found that there will be no adverse impacts to the conservation of fish and wildlife and their habitat because the fish and wildlife function at the Project site post-reclamation will be maintained or improved. There is competent substantial evidence to support the ALJ's findings regarding fish and fish habitat. Although there will be a temporary impact on fish in the areas to be mined, those impacts will be offset through the mitigation and replacement of the wetlands and stream segments. (T. Durbin 778-779, 799). After reclamation, the Project site will provide fish habitat similar to current conditions and in some instances better. (T. Durbin 772, 778-779, 791, 799). Reclaimed systems provide the same type of habitat opportunities that are present in the systems proposed for mining on the Project site. (T. Durbin 772, 778-779, 791, 799). Through the creation of more acres of wetlands and increased linear feet of stream channel there will be an increase in habitat for fish on the site. Finally, Mosaic will preserve the Peace River, Little Charlie Creek, Parker Branch, Lake Dale Branch and Max Branch floodplains, which contain the largest amount of fish habitat on the site. (T. Durbin 770-773, 776-778).

I should note that Lee County failed to take exception to paragraphs 111, 113, and 117 where the ALJ found that the reclamation plan will improve fish habitat on the Project site. Most significantly paragraph 113 states that “the mining and reclamation will not have adverse impacts on fish populations or the conservation of fish. The fish habitat on the site will either be preserved or, if mined, will be replaced with in many cases superior habitat. There will be a net increase in suitable fish habitat post-reclamation.” Consequently, these significant factual findings of the ALJ arrive on administrative review unchallenged and are presumed to be correct. *See Couch v. Comm’n on Ethics*, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); *Dep’t of Corr. v. Bradley*, 510 So. 2d. 1122, 1124 (Fla. 1st DCA 1987) (concluding that a party must alert a reviewing agency to any perceived defects in the findings of fact in a DOAH recommended order; and the failure to file exceptions with the agency precludes the party from arguing on appeal that the agency erred in accepting the facts in its final order).

Therefore, based on the foregoing, Lee County’s exceptions in Section VII-Fish Exception, are denied.

Public Interest Exception (VIII)

Lee County takes exception to paragraphs 148, 149-151, 154, 156 and 160 and the recommendation of issuance of the ERP on the basis that the ALJ did not apply the proper standards when evaluating whether the proposed Project is not contrary to the public interest. Lee County is correct that the determination that proposed activities are not contrary to the public interest is a conclusion of law within the substantive jurisdiction of this agency. However, the seven public interest factors that must be

balanced rely on factual findings made by the ALJ based on a preponderance of the evidence. See *Save Anna Maria, Inc. v. Dep't of Transportation*, 700 So.2d 113 (Fla. 2d DCA 1997); *1800 Atlantic Developers v. Dep't of Env'tl. Regulation*, 552 So.2d 946 (Fla. 1st DCA 1989), *rev. denied*, 562 So.2d 345 (Fla. 1990).

In this exception Lee County notes that “the ALJ’s findings in paragraphs 149-151 are limited to statements regarding the economic importance of the project and a generalized statement in paragraph 149 that Mosaic has demonstrated that both the public and the environment will benefit from the project.” Lee County argues that the conclusions of law in paragraphs 148 and 160 should be rejected because the ALJ’s conclusion that the Project meets the public interest test includes consideration of economic benefits. Although Lee County’s argument is correct that economic benefits described in paragraphs 149-151 should not be considered as part of balancing the seven public interest factors, these were not the sole basis of the ALJ’s proposed conclusions of law. In paragraphs 152-159 the ALJ makes findings regarding each of the seven public interest factors before concluding that they are satisfied and weigh in favor of issuing the ERP permit. Of these, Lee County only challenges the ALJ’s findings in paragraphs 154 and 156 related to conservation of fish and wildlife or their habitat, and impacts to fishing, recreation or marine productivity. However, these findings are supported by competent substantial record evidence as outlined in my ruling in Section VII-Fish Exception. (T. Simpson 420-22; Keenan 1477-79; Durbin 836-40). Therefore, based on the ALJ’s factual findings, I adopt the conclusions of law in paragraphs 148 and 160 in this Final Order.

Consequently, based on the foregoing, Lee County's exceptions in Section VIII-Public Interest Exception, are denied.

DO Variance Exception (IX)

Lee County takes exception to paragraphs 31, 47, and 186-193 and the ALJ's recommendation that the DO Variance should be issued on the basis that there is no competent substantial evidence to support the ALJ's findings regarding the availability of adequate sand tailings. Lee County makes this argument by citing from its cross examination of Mosaic's expert witness – Dr. Garlanger. (T. Garlanger 346-347). Lee County contends that this is the “only evidence” regarding the quantity of sand tailings to be produced and used at the Project site. To the contrary, the challenged paragraphs are supported by competent substantial evidence in the record. In addition, Lee County did not take exception to paragraph 32 where the ALJ determined that Mosaic's proposed materials balance “allows sand tailings preferential use in reclamation of native habitats.” (RO ¶ 32).

Paragraph 31 is supported by competent substantial record evidence in the form of materials balance tables, which were part of Mosaic's application (Mosaic Ex. 112), and the testimony of expert witnesses, other than Dr. Garlanger (T. Myers 73; Garlanger 338-40; Coates 1701; Durbin 812, 815; Rivera 1414).

Paragraph 47 is supported by competent substantial record evidence. (T. Myers 77-80, 90-91; Mosaic Ex. 1S 3679-80; Rivera 1393; Coates 1673).

Paragraph 186 is supported by competent substantial record evidence. (T. Durbin 826-28; Rivera 1394; Mosaic Ex. 3 7170-76).

Paragraph 187 is supported by competent substantial record evidence. (T. Durbin 824, 831-32; Cantrell 1213).

Paragraph 188 is supported by competent substantial record evidence. (T. Rivera 1393, 1421; Myers 79-80, 89-90, 145-46, 160-61; Durbin 812-13).

Paragraph 189 is supported by competent substantial record evidence. (Durbin 833-34; Mosaic Ex. 3 7170-76; Cantrell 1304). See § 373.414(6)(a), Fla. Stat. (2008).

Paragraph 190 is supported by competent substantial record evidence. (T. Durbin 824-829, 831-832; Mosaic Exs. 196-198; Cantrell 1304; Rivera 1649-50; Mosaic Ex. 3 7071-76).

Paragraph 191 is supported by competent substantial record evidence. (T. Durbin 832).

Paragraph 192 is supported by competent substantial record evidence. (T. Durbin 778-79; Rivera 1396-97; Mosaic Ex. 3 7170-76).

Paragraph 193 is supported by competent substantial record evidence. (T. Merriam 2465, 2471-73; Durbin 833-34; Rivera 1396-97; Janicki 2200-2205, 2232-2233).

In this exception Lee County again improperly requests that I reweigh the evidence presented at hearing. A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. See *e.g.*, *Rogers v. Dep't of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Env'tl. Prot.*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.*, 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in

these administrative proceedings. See e.g., *Tedder v. Fla. Parole Comm'n*, 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. See e.g., *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

Therefore, based on the foregoing, Lee County's exceptions in Section IX-DO Variance Exception, are denied.

Littoral Zone Variance Exception (X)

Lee County takes exception to paragraphs 194-197 and the ALJ's recommendation that the Littoral Zone Variance should be issued on the basis that there is no competent substantial evidence to support the findings regarding the availability of adequate sand tailings. I rejected this argument in ruling on Section IX-DO Variance Exception. In addition, nothing in the ALJ's findings in paragraphs 194-197 suggests that the Littoral Zone Variance request is directly related to the availability of additional sand tailings. The ALJ described the request as having the goal of experimenting with different reclamation planting techniques around the shorelines of the reclaimed lakes. The plantings will more closely resemble the littoral zones of natural lakes and provide increased environmental benefits for water quality, wildlife, fish, and recreation. (RO ¶¶ 194-197). The ALJ's findings are supported by competent substantial evidence in the record of this proceeding.

Paragraph 194 is supported by competent substantial record evidence. (T. Myers 80-83; Durbin 819; Rivera 1397-98; Mosaic Ex. 4 7288-95).

Paragraph 195 is supported by competent substantial record evidence. (T. Durbin 819; Rivera 1397-98; Mosaic Ex. 4 7288-95).

Paragraph 196 is supported by competent substantial record evidence. (T. Durbin 816-17, 822-24; Mosaic Ex. 4 7288-95).

Paragraph 197 is supported by competent substantial record evidence. (T. Myers 80-83; Durbin 816-17, 819, 822-24; Rivera 1397-98; Mosaic Ex. 4 7288-95).

Consequently, based on the foregoing, Lee County's exceptions in Section X-Littoral Zone Variance Exception, are denied.

Summary Hearing and Discovery Limitations Exception (XI)

Lee County takes exception "to each of the ALJ's findings of fact and the recommendation of issuance" on the basis that the "ALJ failed to comply with the essential requirements of law by approving the summary hearing process, limiting Lee's ability to conduct meaningful discovery and using Lee's abbreviated case preparation as the basis for discounting the testimony of Lee's witnesses." (Lee County's Exceptions, page 38 ¶ 77). Essentially Lee County is unhappy that the ALJ complied with Section 373.205(3), Florida Statutes, and in the context of conducting a summary hearing under Section 120.574, Florida Statutes, he exercised his sole discretion to rule on procedural, discovery, and evidentiary issues. It is well established that evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. See *Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993). A reviewing agency does not have the authority to modify or

reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. See, e.g., *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001).

Section 378.205(3), Florida Statutes, provides:

Administrative challenges to proposed state agency actions regarding phosphate mines and reclamation pursuant to this chapter or part IV of chapter 373 are subject to the summary hearing provisions of s. 120.574, except that the summary proceeding must be conducted within 90 days after a party files a motion for summary hearing, regardless of whether the parties agree to the summary proceeding and the administrative law judge's decision is a recommended order and not a final order.

By motion Mosaic requested a summary hearing, which the ALJ granted, and he conducted the final hearing within the 90 days as provided in the statute.

Lee County argues that the ALJ's actions and rulings "failed to comply with the essential requirements of law." However, I do not have substantive jurisdiction over the matters that comprise the essence of Lee County's lengthy exception. See *Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997).

Therefore, Lee County's exception in Section XI-Summary Hearing and Discovery Limitations Exception, is denied.

Sequestration of Witnesses Exception (XII)

Lee County takes exception to paragraphs 82-88 and the ALJ's recommendation that the ERP be issued on the basis that the ALJ denied Lee County's motion to invoke the rule of sequestration of witnesses at the beginning of the hearing. (T. 13-16).

Although Lee County's exception does not cite to it, this "rule" is actually a provision of the Florida Evidence Code regarding exclusion of witnesses. See § 90.616, Fla. Stat. (2008). Under the standard of review evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. See *Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993). Agencies do not have the authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. See, e.g., *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001).

Therefore, Lee County's exception in Section XII-Sequestration of Witnesses Exception is denied.

EXCEPTIONS OF INTERVENOR SARASOTA COUNTY

Exception 1 – Specific Conditions for mitigation release

Sarasota County takes exception to paragraph 200 of the RO on the basis that the ALJ failed to address the mitigation release provisions contained in the draft ERP, specifically the language contained in Specific Conditions 18.c. and 18.d. Failure to address these mitigation release provisions resulted in recommended approval of two conditions that violate Department rules and in the case of Specific Condition 18.d., was rejected by this agency's Final Order in the Ona Case. See *Peace River/Manasota Regional Water Supply Authority, et al. v. IMC Phosphates Company, et al.*, DOAH Case No. 03-0791 (DOAH June 16, 2006; DEP July 31, 2006).

Sarasota County's argument is based on this agency's interpretation of the ERP mitigation success requirements of Section 3.3.6 of the BOR. This is a matter within my substantive jurisdiction and I agree that the ALJ fails to address in the RO, the fate of

proposed ERP Specific Conditions 18.c. and 18.d. which Department witness, Christine Keenan, acknowledged should be removed from the final permit. (T. Keenan at 1462-1463 and 1538-1541). Therefore, the conclusion of law paragraph 200 is modified such that Specific Conditions 18.c. and 18.d. shall be deleted from the final agency actions.

Consequently, Sarasota County's first exception is granted.

Exception 2 - Elimination and Reduction of Wetland Impacts

Sarasota County takes exception to paragraphs 9, 14, 23, 38, and 94-99 of the RO on the basis that the ALJ failed to consider Sarasota County's evidence seeking the additional elimination or reduction of wetland impacts. Specifically, Sarasota County asserts that the ALJ failed to consider evidence presented by Sarasota County's professional wetland scientist, Andrea Lipstein regarding elimination and reduction of impacts.

While it is true that the ALJ's role is to consider all evidence presented, resolve conflicts and judge credibility of witness, there is nothing requiring an ALJ to make findings on evidence that is legally irrelevant. Sarasota County acknowledges that pursuant to Section 378.202, Florida Statutes, this agency has previously found that "the extraction of phosphate is important to the continued economic well-being of the people of the state and to the needs of society" and that "it is not possible to extract minerals without disturbing the surface areas." See *Peace River/Manasota Regional Water Supply Authority, et al. v. IMC Phosphates Company, et al.*, DOAH Case No. 03-0791 (DOAH June 16, 2006; DEP July 31, 2006). Thus, in the Ona Case this agency concluded that the statutory language meant that strict proof of compliance with the elimination and reduction of impacts rule is not required of the phosphate industry in

order to obtain an ERP. I find that this interpretation of the relationship between Chapter 378 and Part IV of Chapter 373, Florida Statutes, continues to be a permissible and reasonable interpretation. See, e.g., *Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within its regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." See, e.g., *Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Env'tl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985); *Suddath Van Lines, Inc. v. Dep't of Env'tl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996) (Agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones.

Sarasota County further argues that the ALJ's findings and conclusions regarding the elimination and reduction of impacts are not based on competent substantial record evidence. However, this record is replete with evidence supporting the ALJ's findings and conclusions.

Paragraph 9 is supported by competent substantial evidence. (T. Poppleton 384-86; Durbin 761-63; Mosaic Ex. 1AA 6747; Mosaic Ex. 1S 03671).

Paragraph 14 is supported by competent substantial evidence. (T. Poppleton 378-79).

Paragraph 23 is supported by competent substantial evidence. (T. Kiefer 2614-15).

Paragraph 38 is supported by competent substantial evidence. (Mosaic Ex. 1S 03670-0371; T. Durbin 761-63; Simpson 411-13).

Paragraph 94 is supported by competent substantial evidence. (T. Durbin 761-63; Poppleton 384-87).

Paragraph 95 is supported by competent substantial evidence. (Mosaic Ex. 1S 3670-71).

Paragraph 96 is supported by competent substantial evidence. (T. Uebelhoer 218; Cantrell 1214-15, 1357; Myers 69-70; Garlanger 312-14; Cantrell 1215; Coates 1661-64).

Paragraph 97 is supported by competent substantial evidence. (T. Cantrell 2715-16; Keenan 1482, 1493-95; Rivera 1402-07).

Paragraph 98 is supported by competent substantial evidence. (T. Cantrell 1218-19, 1316; Myers 69-70; Mosaic Ex. 21).

Paragraph 99 is supported by competent substantial evidence. (T. Myers 90; Durbin 761-63; Cantrell 1214-15).

Therefore, based on the foregoing, Sarasota County's second exception is denied.

Exception 3 - Clay and Sand Tailings

Sarasota County takes exception to paragraphs 30-32, 45, and 143 of the RO on the basis that the ALJ erred in his legal conclusion that the transport of clay and sand tailings is "waste disposal" and "mining operations" and not part of mitigation. Sarasota County contends that the interpretation of what must be included in mitigations costs is erroneous and requires remand for additional findings.

This issue was addressed and extensively analyzed in this agency's Final Order in the Ona Case where the determination was made that the transport of both clays and sand tailings are considered mining operations and not reclamation. See *Peace River/Manasota Regional Water Supply Authority, et al. v. IMC Phosphates Company, et al.*, DOAH Case No. 03-0791 (DOAH June 16, 2006; DEP July 31, 2006) (Exhibit B - Limited Remand Order). I conclude that the interpretation concerning "waste disposal" and "mining operations" in this agency's Final Order in the Ona Case continues to be a permissible and reasonable interpretation. See, e.g., *Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

Therefore Sarasota County's third exception is denied.

Exception 4 - Sand Tailings Usage

Sarasota County takes exception to the findings in paragraphs 72, 174, 175, and 188 of the RO on the basis that the findings are contrary to the requirements in Rules 62C-16.0051(8)(b) and 62C-16.0051(9)(b)(2), F.A.C. These rules require that the reclamation plan give the highest priority to the backfilling of mine cuts and restoring the original drainage pattern to the greatest extent possible. Sarasota County argues that these findings are inconsistent with the ALJ's findings in paragraphs 31, 47, 48, and 188 of the RO where he found that some of the sand tailings from the Project would be used to fill voids at the Polk County side of the South Fort Meade mine. However, competent substantial evidence supports the ALJ's finding in paragraphs 72 and 174 that the original drainage pattern of the site would be restored post-reclamation, and in paragraph 175 that backfilling of mine cuts was given the highest priority.

Paragraph 72 is supported by competent substantial record evidence. (T. Burleson 938).

Paragraph 174 is supported by competent substantial record evidence. (T. Coates 1659-1671; Garlanger 312-315, 340; Cantrell 1216; Rivera 1393-94; Burleson 938).

Paragraph 175 is supported by competent substantial record evidence. (T. Myers 65-68; Garlanger 21-23, 314-15, 340; Coates 1670; Rivera 1411; Mosaic Exs. 112, 1T 4066-67).

Paragraph 188 is supported by competent substantial record evidence. (T. Rivera 1393, 1421; Myers 79-80, 89-90, 145-46, 160-61; Durbin 812-13).

Therefore, based on the foregoing, Sarasota County's fourth exception is denied.

Exception 5 - Evidence of Cumulative Impacts

Sarasota takes exception to paragraphs 31, 47, 48, 52, 53, 55, 56, 61, 62, 64, 65, 72, 74, 82-88, 106, 108, 109, 111, 145, 146, 161, 162, 164, 175, and 188 of the RO on the basis that the ALJ improperly considered some but not all evidence of cumulative impacts. Sarasota County argues that in allowing sand tailings from the Project site to be used on the Polk County side of South Fort Meade mine, such that voids will be left at the Project site in Hardee County (the 4 reclaimed lakes that are part of the proposed reclamation plan) that Mosaic has not fully mitigated for the adverse impacts within the Project site. As I ruled in their fourth exception above, the ALJ's findings regarding use of sand tailings in compliance with Rules 62C-16.0051(8) and (9), F.A.C., are supported by competent substantial evidence.

Sarasota County then argues that Mosaic will not offset all adverse impacts to water quantity where the storm water event modeling was only done for pre-mining and post-reclamation conditions. Sarasota contends that Mosaic did not conduct any storm water analyses of water quantity impacts that will occur during mining. Sarasota also contends that Lee County's expert hydrologist estimated that there will be a decline in flow at the Zolfo Springs gauge station during mining while the ditch and berm system is in place. These are the same contentions presented by Lee County in its Ditch and Berm Exception (IV) and its Minimum Flows and Levels Exception (III) above. Based on my rulings on Lee County's Ditch and Berm Exception (IV) and Minimum Flows and Levels Exception (III), Sarasota's contentions are also rejected.

The ALJ properly found that all the mitigation takes place in the same drainage basin as the impacts, the mitigation will offset all adverse impacts, and therefore meets the cumulative impact requirement. See § 373.414(8)(b), Fla. Stat. (2008).

Therefore Sarasota County's fifth exception is denied.

Exception 6 - Littoral Zone Variance

Sarasota County takes exception to paragraphs 196 and 197 and the ALJ's recommendation that the Littoral Zone Variance should be issued on the basis that the reclamation technique used by Mosaic is not experimental. Sarasota County's argument characterizes Department expert witness Orlando Rivera's testimony on this issue as "claims" suggesting that conflicting testimony in the record should be credited instead. Of course, I have no authority to reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. See *e.g.*, *Rogers v. Dep't of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v.*

Dep't of Env'tl. Prot., 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.*, 652 So.2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the “fact-finder” in these administrative proceedings. See e.g., *Tedder v. Fla. Parole Comm'n*, 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. See e.g., *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

Paragraph 196 is supported by competent substantial record evidence. (T. Durbin 816-823; Mosaic Ex. 4 7288-95; Rivera 1398-1399).

Paragraph 197 is supported by competent substantial record evidence. (T. Durbin 816-823; Mosaic Ex. 4 7288-95; Rivera 1398-1399).

Therefore, based on the foregoing, Sarasota County's sixth exception is denied.

CONCLUSION

The Florida courts have held that there are some circumstances under which agency remand to DOAH is not only appropriate, but is actually “dictated.” See, e.g., *Miller v. Dept. of Environmental Regulation*, 504 So.2d 1325, 1327 (Fla. 1st DCA 1987); *Cohn v. Dept. of Environmental Regulation*, 477 So.2d 1039, 1047 (Fla. 3d DCA1985). The subject proceeding does not constitute one of those circumstances where remand to DOAH is dictated. The ALJ fulfilled his role as to factual findings.

The ALJ recommended that the Department enter a final order granting Mosaic's applications for the ERP, CRP, and two Variances. He ultimately determined that Mosaic proved its entitlement to the requested approvals by a preponderance of the evidence in the administrative hearing. (RO ¶ 200). I adopt the ALJ's recommendation in this Final Order, except as modified by my ruling on Sarasota County's first exception.

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised,

It is therefore ORDERED:

- A. The ALJ's Recommended Order (Exhibit A), as modified in the above rulings in this Final Order, is adopted and incorporated by reference herein.
- B. Respondent Mosaic Fertilizer, LLC's application for Environmental Resource Permit No. 0221122-004 is granted, subject to my ruling above regarding deletion of Specific Conditions 18.c. and 18.d.
- C. Respondent Mosaic Fertilizer, LLC's Conceptual Reclamation Plan Application Code MOS-SFMHC-CP is approved.
- D. Respondent Mosaic Fertilizer, LLC's Variance Application No. 0221122-005-EV-VE for dissolved oxygen is granted.
- E. Respondent Mosaic Fertilizer, LLC's Variance Application No. 0221122-006-EV-VR for a littoral zone variance is granted.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk

of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this ___ day of February, 2009, 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 § 120.52,
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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and by hand delivery to:

Justin G. Wolfe, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this _____ day of February, 2009.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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Please see pdf version for Exhibit.