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## **MEMORANDUM**

To: Board Members and Pat Lehman

From: Doug Manson and Laura Jacobs

Re: Counsel Status Report

Date: April 1, 2006

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### Phosphate Reclamation Rules

All lands mined or disturbed by the phosphate industry after 1975 must be reclaimed. On October 29, 2004, the Department of Environmental Protection informed that public that it plans to amend Florida Administrative Code Chapter 62C-16, which is the set of rules that govern the industry's reclamation efforts. Specifically, these rules detail the specific goals (recontouring, revegetation, etc.) that the phosphate industry must achieve before reclamation is deemed to be successful and complete.

On August 4, 2005, the Department of Environmental Protection ("DEP") held a Proposed Reclamation Rule Workshop in Tallahassee, Florida. The purpose was for DEP to discuss submitted amendments to the proposed changes to Chapter 62C-16, Florida Administrative Code, and to take comments from interested parties. The Rule Workshop began with general comments. DEP Rick Cantrell stated that as soon as these proposed rules were adopted, DEP would then begin a complete rewrite of existing mining regulations. Requiring two separate processes is archaic and the two programs need to be merged together. DEP will be proposing one permit for permitting and reclamation. To achieve a complete merger, legislation may be needed. Commissioner Cummings stated that he was attending the meeting at the direction of the Charlotte County Board of County Commissioners to show that the issue of phosphate is one of the county's most important issues. Janet Llewellyn, DEP, stated that they were not going to

rule on proposed amendments during the meeting. Rather, we would find out what amendments were accepted when the revised rule was published. Additional amendments were accepted by DEP through August 15. Following review and consideration of the submitted amendments, a revised rule will be published. The revised rule has not been published.

### Phosphogypsum Stack Rules

On November 12, 2004, the DEP published Notice of Public Workshop to amend Chapter 62-673, Florida Administrative Code, which governs the management of phosphogypsum stacks. The public workshop on rule development took place on December 1, 2004, in Bartow, Florida. At the conclusion of the hearing, the DEP notified all attendees that written comments about the proposed rules would be due no later than December 13, 2004. The Authority timely submitted its written comments.

On January 21, 2005, the DEP gave notice that it will be briefing the Environmental Regulation Commission ("ERC") on February 2, 2005, about the proposed rules. The DEP also released a new draft of the proposed rules on January 28, 2005, in a Notice of Proposed Rulemaking. The ERC met again on February 24, 2005, to discuss adoption of the proposed rules. Charlotte County proposed two amendments to the rules during the meeting, but those amendments were rejected. The ERC has now adopted the new phosphogypsum rules. On March 11, 2005, DEP gave notice of changes to the proposed rules, which incorporated changes by staff and public comments. The new language requires an owner or operator to provide alternate financial assurance within ten days of it no longer meeting the financial test requirements or a financial mechanism is no longer valid. In addition, DEP is authorized to require reports of financial conditions when it has a reasonable belief that financial requirements are not being met.

On June 3, 2005, Notice of Proposed Rule Development was issued for Rules 62-672 and 62-673, Florida Administrative Code. The proposed rule amendments are intended to ensure that phosphogypsum stack systems can be operated to avoid spills of process wastewater or discharges of materials that adversely affect surface or ground waters. They are proposing to provide requirements ensuring those treatment systems, or other water consumption methods, are available and can be operated at rates sufficient to avoid releases of untreated, or inadequately treated process wastewater, during or following periods of chronic or catastrophic rainfall events. In addition, changes to the existing requirements for emergency diversion impoundments are being proposed. Increased reporting requirements when process wastewater levels in the impoundments are trending towards critical high levels is also being proposed.

**On March 31, 2006, DEP gave notice of an adoption hearing of the Environmental Regulation Commission on April 27, 2006 regarding DEP's proposed amendments for Chapters 62-672 and 62-673, F.A.C., respectively.**

### Ona Mine and Ft. Green Southern Reserves

In 1997, IMC Phosphates Company unveiled its plans to operate a phosphate mine on its 20,595-acre property in western Hardee County near the rural community of

Ona. IMC submitted the first parts of its consolidated development application to the various permitting agencies in April 2000. The Authority challenged several of the proposed permits regarding the mine on February 11, 2003. Charlotte County, Hardee County, Alan Behrens, and Desoto Citizens Against Pollution, Inc. filed petitions challenging the proposed permits. The DEP referred these petitions to the Division of Administrative Hearings, and Administrative Law Judge Robert E. Meale consolidated them into a single proceeding. Later in the proceeding, Hardee County voluntarily dismissed its petition, and Lee County and Sarasota County petitioned to challenge the proposed permits.

IMC submitted new plans regarding the Ona Mine to DEP on January 30, 2004. In its new application materials to DEP, IMC reduced the "footprint" of the mine to approximately 4,200 acres. The final hearing was held in May-July 2004. The parties submitted their Proposed Recommended Orders to the ALJ on September 20, 2004. A Recommended Order ("RO") from the ALJ was issued on May 9, 2005. The RO recommended additional permit conditions.

On August 8, 2005, DEP Secretary Castille issued a Limited Remand Order, which sends the case back to the ALJ for additional findings of fact on specified recommended additional permit conditions and Conclusions. The Limited Remand Order states that additional fact finding by the ALJ is needed on several issues including on the closed basin-open basin issue; recharge wells mechanism; sand tailings; ERP financial responsibility. In addition, the ALJ must consider proposed revisions by DEP and IMC to the additional permit conditions that were not previously recommended by him or supported by the findings of fact in the RO. DEP defers ruling on the filed exceptions and ALJ's recommendations, including dismissal of the Authority's petition for lack of standing, until a Recommended Order on Remand is submitted to DEP. The Authority was deemed a party for purposes of the Limited Remand Order.

An administrative hearing was held October 10-14. Rather than extend the hearing, additional testimony was taken through the use of depositions. The ALJ is now reviewing the evidence in order to issue a revised RO. We have no expectation of when a revised RO will be released.

In addition, we are currently waiting on the issuance of an Environmental Impact Statement for the Ona Mine that is being performed by the U.S. Army Corps of Engineers.

According to the Central Florida Regional Planning Council, as a result of the issuance of the Recommended Order by the ALJ, the Application for Development Agreement is being modified to be consistent. Technical meetings are being held to bring the review agencies up to speed. A February - March hearing date is possible.

On November 7th, Mosaic gave notice to DEP of its intent to use a Noticed General Permit for the construction of aerial pipeline, cable and conduit crossings, which replaces an existing pipeline and casing pipe over the Payne Creek Reroute Ditch. DEP gave notice on December 20 that the construction meets the requirements for such permit based upon the submitted drawings and documents. Mosaic now has five years to complete construction.

Altman Tract

The Altman Tract, otherwise known as "Tract S," is a roughly triangular-shaped 2,367.5-acre parcel located within the northern extent of the Horse Creek basin. Specifically, the Altman tract is located in the northeastern corner of Manatee County; it lies east of State Road 37, west of the Hardee County line, south of the Hillsborough County line, and just north of State Road 62.

The Altman tract is part of the Four Corners/Lonesome mine complex and is considered to be an expansion of that mine. The Altman tract and its wetlands drain entirely to the East Fork of Horse Creek. On May 30, 2002, the DEP issued notices of a proposed final agency action for both pending applications for the Altman Tract. The Authority filed its petition for administrative hearing on October 3, 2002, but later settled this case with IMC.

On August 1, 2003, the administrative law judge issued a 120-page Recommended Order that recommended that the DEP deny the Altman permit application. In September, Secretary Struhs issued the DEP's Final Order that denied the permit applications for the Altman Tract.

IMC appealed Secretary Struhs' Final Order to the Second District Court of Appeal in Lakeland. Oral arguments took place on February 8, 2005. The Court affirmed the DEP's Final Order in a per curiam opinion dated February 18, 2005.

On January 29, 2004, IMC also submitted its revised plans to DEP regarding the Altman Tract. In December 2004, IMC (now Mosaic Phosphates Company) submitted additional information in support of the application. Charlotte County has given the DEP notice of some of its concerns with this new application for the Altman Tract.

On October 18, 2005, Mosaic requested that its previously filed modification to an approved conceptual plan for this mine be split into two distinct modifications -- the Lipman Tract addition and the land use changes for the Altman Tract. On October 28, approval of the Lipman Tract addition was issued.

On November 18, 2005, DEP issued a Notice of Intent to Issue a Consolidated Environmental Resource/Wetland Resource Permit and a Notice of Approval of a Conceptual Reclamation Plan Modification. The proposed activity is for mining operations on 1,840.6 acres of uplands, wetlands, and other surface waters within the Altman Tract. Reclamation is proposed for the 1,840.6 acres. The State Road 37 flow-way, the Central Marsh (headwater marsh), and additional uplands and wetlands north and south of the Central Marsh will not be mined. In addition, Mosaic will be required to restore 2,363 linear feet of ditched natural stream that flows into the headwaters of Horse Creek. No clay settling areas are proposed, as the clay from this mining operation will be placed within existing clay settling areas at Four Corners/Lonesome Mine. The mining operations will disturb approximately 429.1 acres of wetlands and waterbodies. Mitigation of these impacts will be for approximately 544.7 acres of wetlands and other surface waters.

The Notice of Approval of a Conceptual Reclamation Plan Modification approves the land use changes for the Altman Tract. This modification revises premining and post reclamation land use and contours for the Altman Tract, including changes associated with updated mining operations, reclamation activity, mapping, and the removal of a state road from the mine boundary. Some of the requirements within DEP's approval are: an update of the Hydrology Analysis and Phosphatic Waste Clay Consolidation Model; the design of reclaimed clay settling area outfall structures to meet specified storm events; a

phased conservation easement to DEP for approximately 559.6 acres; and the State Road 37 Stream Restoration project must be constructed according to the approved plan within one year of the beginning of mining in the Altman Tract.

Charlotte County recently reached a settlement with Mosaic on the new Altman Tract permit.

### Lipman Tract

The Lipman Tract is located within the Four Corners/Lonesome Mine, in Manatee County. The tract is approximately 3.5 miles north of SR 62 and 1.5 miles west of CR 39. The wetlands within the tract are in the Long Branch Basin, which is a tributary to the Little Manatee River (Class III waters).

On October 21, 2005, DEP gave notice of intent to issue an ERP to Mosaic allowing Mosaic to conduct phosphate mining on 304.8 acres of uplands, wetlands and other surface waters. The mine will disturb 4.7 acres of wetlands and 3.8 acres of other surface waters. Reclamation of the 304.8 acres following the completion of mining includes approximately 5.1 acres of wetlands, including 3.0 acres of freshwater marsh and 2.1 acres of mixed wetland hardwood. The mitigation wetlands will be located within the upland forest buffer next to Long Branch. No clay settling areas are proposed, so all reclamation will be underlain by overburden or sand tailings.

On October 28, 2005, DEP gave notice of its approval of Mosaic's request to modify the Conceptual Reclamation Plan for Four Corners/Lonesome Mine. This modification includes an update to the pre-mining and post reclamation land use and contours for the Lipman Tract. By including this tract within the plan, the acreage of the plan has increased to 51,696 acres. The plan still identifies that 7,017 acres are to remain undisturbed by mining operations. However, as a result of enhancement work to be performed in the non-mined areas, there is a change in FLUCCS acreage from pre-mining to post reclamation. This approval still shows that the Altman Tract remains unmined.

### Four Corners/Lonesome Mine

**On March 29, 2006, DEP transmitted a Conceptual Reclamation Plan Modification Application for Conceptual Reclamation Plan MOS-FCL-CPG. DEP is requesting written comments from applicable agencies to concur with or object to the proposed project within fifteen days.**

### South Fort Meade Expansion

Last year, Cargill Fertilizer, Inc. ("Cargill") unveiled its plans to expand its South Fort Meade Mine southward from Polk County into Hardee County. The proposed mine expansion is for a 11,653.8-acre parcel east of the Peace River and U.S. 17, and just south of the Polk/Hardee County line.

On July 10, 2003, Cargill provided a set of pre-application materials to the Central Florida Regional Planning Council, which reviews applications for a Development of Regional Impact ("DRI"). No formal DRI application has been submitted to the Council, and it appears that Cargill delayed submittal of this application

because of its merger with IMC Phosphates into the Mosaic Phosphates Company. The Application for Development Agreement is expected in the fall. At this time, a hearing date cannot be projected beyond a possible Summer 2006 event.

On December 13, DEP received a request from Mosaic to modify an approved reclamation and restoration parcel (GAR-FM-PR6) at the Fort Meade Mine. DEP approved the modification on December 21, by finding that the request is consistent with the approved conceptual plan. The approved modification removes 458 unmined acres from phase II of the reclamation parcel, thus reducing the total acreage of the modified reclamation parcel to 232 acres.

### Wingate Creek Mine

The Wingate Creek Mine is located in eastern Manatee County. The mine is approximately 7,500 acres in size, comprised of a 3,024-acre parcel originally owned by Nu-Gulf Wingate Holdings, L.L.C. and a 4,400-acre parcel originally leased from the Texaco, Inc. by Nu-Gulf. The 4,400-acre parcel is east of the existing mine area, and west of the proposed Ona site. Wingate Creek is a tributary to the Myakka River, which flows through Manatee, Sarasota, and Charlotte counties on its way to Charlotte Harbor and the Gulf of Mexico. The Authority will continue to monitor the Wingate Creek Mine project, particularly any plans concerning the 4,400-acre parcel which is west of the Ona property.

On June 16, 2005, a Notice of Draft Permit for Permit No. 0032522-005-IW1S/NR was issued by DEP for the Wingate Creek Mine. This draft permit is being issued in response to an application by Mosaic Fertilizer, L.L.C., to renew the surface water discharge permit for the discharge of excess process wastewater, stormwater and reclaimed groundwater via two outfalls at Wingate Creek Mine. Outfall D-001 discharges directly into Wingate Creek and Outfall D-002 discharges into Johnson Creek, then into Wingate Creek, a tributary of the Myakka River. DEP has determined that a wastewater permit with authorization to discharge to surface waters of the State under the National Pollutant Discharge Elimination System (“NPDES”) permit is required. Once specified conditions are met, Mosaic Fertilizer L.L.C. is authorized to construct and operate waste clay settling areas. In addition, Outfall D-001 is being moved to a location 5000 feet north of the existing discharge point. On August 12, 2005, DEP’s Bureau of Mine Reclamation held a meeting with the Myakka River Management Coordinating Council to discuss Mosaic Fertilizer, L.L.C.’s NPDES Permit Renewal. DEP stated that it is planning on adding new permit conditions requiring monitoring for turbidity; chronic toxicity testing and stream condition index sampling. DEP is accepting additional comments on this permit renewal through September 14, 2005.

### South Pasture Mine

On April 21, 1994, the United States Army Corps of Engineers (“ACOE”) issued Dredge and Fill Permit No. 199301395 (IP-BL) to CF Industries, Inc. (“CFI”) in connection with the opening of CFI’s South Pasture Mine. On October 16, 1995, the Florida Department of Environmental Protection issued environmental resource permit

number 252607909 to CFI, which granted CFI permission to conduct mining activities on the South Pasture property for the life of that mine.

The South Pasture Mine is located in Hardee County immediately south of State Road 62. CFI divided its South Pasture property into three separate mining areas: A, B, and C. The original ACOE permit and subsequent modifications to that permit approved dredge and fill activities in Areas A and B, which together constitute the middle 6,558-acre portion of the South Pasture property.

On July 18, 2001, the ACOE issued a public notice acknowledging receipt of permit application number 199301395 (IC-PS) MOD #8 (the eighth modification of the original permit) from CFI. In its permit application, CFI seeks permission to conduct dredge and fill activities on the remainder of the South Pasture property, known as Area C. As previously described, Area C actually consists of two separate land masses, separated by Areas A and B. The total acreage of these two portions of the South Pasture property, dubbed "Area C West" and "Area C East," is measured at approximately 8,858 acres. In this newest permit application, CFI's proposes to mine approximately 1,969.4 acres of wetlands and reclaim 2,038.0 acres of wetlands.

On August 13, 2001, the Authority formally requested a public hearing regarding the permit application within the original public comment period. In a newspaper article dated September 20, 2001, the Sun-Herald reported that the EPA recommended a denial of CFI's pending permit application.

In June 2004, after almost three years of reviewing CFI's permit application, and while the Authority, Charlotte County, and Sarasota County were in the midst of the ten-week trial regarding the Ona-Ft. Green Extension, the ACOE granted CFI's permit application. Despite the pending requests for a public hearing, the ACOE elected not to hold such a hearing. Further, the ACOE did not even give the Authority notice of its decision. In a letter dated January 14, 2005, the Authority requested the ACOE's district engineer provide the Authority with written reasons as to why its request for a public hearing was denied. To date, the Authority has not received a response to this letter.

On October 24, 2005, DEP acknowledge receipt of CFI Industries' intent to use a Noticed General Permit for minor activities to install a surface water monitoring station at Coons Bay Branch, a tributary of Payne Creek. According to DEP, the project meets the notice of general permit requirements. CFI Industries has five years to complete the project.

In regards to the South Pasture Development of Regional Impact, the Application for Development Agreement is currently being prepared but is not expected to be submitted until early 2006. The Central Florida Regional Planning Council expects that a late Summer 2006 hearing on the application will be held.

### Payne Creek Mine

On January 30, 2006, DEP issued a Notice of Intent to Issue a Wetland Resource Permit to Mosaic Fertilizer LLC for an area within the Payne Creek Mine known as the Walker Grove Tract, located in Polk County. The Walker Grove Tract is approximately 177.1 acres, and was included within the Payne Creek Mine Conceptual Reclamation Plan that was grandfathered into the wetland resource permitting process. The permit authorizes impacts to approximately 19.3 acres of wetlands and surface waters as a result

of phosphate mining operations. The 19.3 acres of impacted area consists of wetlands, lakes, wetland mixed forest, shrubby wetlands, a ditch, and freshwater marsh. The reclamation plan includes approximately 16.5 acres of freshwater marsh and 4.6 acres of wetland mixed forest. In addition, the plan also includes 57.3 acres of lakes with 20.4 acres of wetlands within the zone of lake fluctuations. The northeast corner of the Walker Grove site lies adjacent to the Little Payne Creek, a tributary of Payne Creek, which is a tributary to the Peace River.

On February 16, 2006, DEP gave notice of a Notice General Permit regarding an aerial pipeline crossing over Little Payne Creek in the Payne Creek Mine. Mosiac Fertilizer, L.L.C. had requested an extension of an existing Notice General Permit, but DEP determined that a new permit would be required. Mosaic Fertilizer, LLC. is planning on removing the 3-24" cased, carrier pipes that were used for reclamation obligations along the north side of Little Payne Creek. Although reclamation has been completed, the pipelines were not removed and the original Notice General Permit has expired.

### **2006 Legislative Session**

**Currently there are two bills moving through the process related to the developments of regional impact ("DRI") process. Senate Bill 1020 by Senator Bennett and House Bill 683 by Representative Traviesa. There are a few changes that the Authority may not support. First, it revises the thresholds for when a change to a mining operation would be considered a substantial deviation, resulting in DRI review. Section 380.06(19)b.5., Florida Statutes, provides that an increase in the average annual acreage mined by 5 percent or 10 acres, whichever is greater, an increase in the average daily water consumption by a mining operation by 5 percent or 300,000 gallons, whichever is greater; or an increase in the size of the mine by 5 percent or 750 acres, whichever is less, constitutes a substantial deviation and additional DRI review is required. Both bills increase the substantial deviation thresholds for mining operations. The increases are as follows:**

- an increase in the average annual acreage mined by 10 percent or 11 acres, whichever is greater;**
- an increase in the average daily water consumption by a mining operation by 10 percent or 330,000 gallons, whichever is greater; or**
- an increase in the size of the mine by 10 percent or 825 acres, whichever is less.**

**In addition, Senate Bill 1020 was recently amended with language that provides that additions or deletions to contiguous lands of existing mining operations do not constitute a substantial deviation. This means that the phosphate industry could substantially increase its operations without additional government review of the regional impact of the revised operations. However, a local government could still comment on any permitting or other land use changes required.**

