STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

FLORIDA CHAPTER OF THE SIERRA CLUB and SAVE OUR SUWANNEE, INC., Petitioners, vs. SUWANNEE AMERICAN CEMENT COMPANY, INC. and DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	OGC CASE NO. 99-1116 DOAH CASE NO. 99-3096

FINAL ORDER

On April 5, 2000, an Administrative Law Judge with the Division of Administrative Hearings (hereafter "DOAH") submitted his Recommended Order to the Department of Environmental Protection, (hereafter "the Department"). The RO indicates that copies thereof were served upon counsels for Petitioners, Florida Chapter of the Sierra Club and Save Our Suwannee (hereafter "Petitioners"), and Co-Respondent, Suwannee American Cement Company, Inc. (hereafter "SAC"). A copy of the RO is attached as Exhibit A. Exceptions to the RO were filed with the Department on behalf of each of the parties and Responses to Exceptions were filed on behalf of the Department and SAC.

Petitioners also filed a Motion to Disqualify the Secretary of the Department, David B. Struhs, from ruling on their Exceptions and issuing the Final Order in this proceeding. Petitioners' Motion to Disqualify was denied in an order entered on May 5, 2000; it is entirely appropriate for the Secretary to resolve issues that cross program lines in a particular case, such as a case involving enforcement issues, permitting issues and land acquisition issues. However, in order to avoid even the appearance of

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impropriety, Secretary Struhs voluntarily withdrew from any participation or involvement in ruling on Petitioners' Exceptions and in preparing and signing the Final Order in this case. In a separate Notice of Voluntary Reassignment entered on May 5, 2000, Secretary Struhs assigned to Deputy Secretary Lisa Edgar the duty to rule on the parties' Exceptions to the RO and to prepare and sign the Final Order in this case. The matter is now before Deputy Secretary Edgar for final agency action.

BACKGROUND

On November 30, 1998, SAC filed its application with the Department for an air construction permit for a proposed dry process, preheater/precalciner type portland cement plant (the "Plant").[1] The proposed Plant would be located near Branford in Suwannee County, Florida. The Plant site covers over 800 acres of land located at the intersection of U.S. Highway 27 and County Road 49. The Plant site is located approximately four miles to the west of the Ichetucknee River, approximately three miles north of the Sante Fe River, and approximately 3.4 miles to the east of the Suwannee River (sometimes referred to collectively as the "Three Rivers"). All of the Three Rivers have been officially designated by the Department as "Outstanding Florida Waters."[2] See Rule 62-302.700, F.A.C.

The Department initially issued a Notice of Permit Denial for the Plant based on a reason other than a determination that the projected emissions from the Plant would not

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[1] "Portland cement" is a dry powder product which is normally used to make concrete when mixed with water and other components. SAC's proposed Plant will have the capacity to produce over 1,000,000 tons per year of portland cement.

[2] An Outstanding Florida Water ("OFW") designation is made to recognize a water body worthy of special protection because of its natural attributes. See Section 403.061(27), Florida Statutes.

comply with the Department's air quality standards.[3] SAC then filed a request for an administrative hearing to contest this initial action of the Department. Petitioners subsequently filed a joint petition seeking to modify the Department's Notice of Permit Denial to include a determination that emissions from the Plant would result in significant degradation of the Santa Fe River through the atmospheric deposition of mercury. The Department forwarded the petitions to DOAH for formal administrative hearings.

Administrative Law Judge Suzanne F. Hood was originally assigned to preside over the administrative proceedings. SAC then filed a Motion to Dismiss the petition filed by Petitioners. SAC contended that Petitioners' allegation of a potential significant degradation of the waters of the Santa Fe River through atmospheric deposition of mercury from the Plant was legally insufficient to support a modification of the Department's Notice of Permit Denial. Judge Hood subsequently held an evidentiary hearing on the issues raised in SAC's Motion to Dismiss. On October 21, 1999, Judge Hood entered a Recommended Order of Dismissal concluding that Petitioners' allegation of potential degradation of the Santa Fe River through atmospheric deposition of mercury from the Plant did not "state a cause of action cognizable under law". Judge Hood thus recommended that the Department enter a final order dismissing the Petition for Administrative Hearing in this case "with prejudice for lack of standing".

However, prior to the entry of a final order ruling on the merits of Judge Hood's

[3] The initial Notice of Permit Denial was based solely on a review of the regulatory history of SAC and its related corporate entities at other installations. The Department's position was that SAC had failed to make reasonable assurances that it had the corporate will to comply with applicable standards. The Department's position was based solely on the negative regulatory history of SAC and its related corporate entities.

Recommended Order of Dismissal, the Department filed in this proceeding a "Notice of Settlement". Attached to the Notice of Settlement was a copy of a Settlement Agreement between the Department and SAC concerning the air construction permit application for the Plant. The Department agreed to issue the air construction permit to SAC, subject to SAC's compliance with certain terms and conditions set forth in the Settlement Agreement. The Settlement Agreement required, among other things, that SAC institute a training and compliance program to ensure that SAC would develop and maintain the corporate will to comply with the environmental laws. In other words, reasonable assurances were made by SAC, which removed the Department's sole basis for issuing its original intent to deny the permit.

Due to the Department's proposed issuance of the air construction permit for the Plant, an order was entered on November 30, 1999, remanding the case back to DOAH for further formal administrative proceedings. The Order of Remand requested that Petitioners be given an opportunity to present "material allegations and proof in response to the new action of the Department agreeing to issue the air construction permit for the Plant." For reasons not pertinent here, Judge Hood recused herself from further participation in this proceeding.

The case was reassigned to Administrative Law Judge Larry J. Sartin (hereafter the "ALJ"). A formal administrative hearing was conducted by the ALJ on February 14, 2000. Expert testimony and documentary evidence were presented by SAC and Petitioners at the formal hearing. The Department adopted the expert testimony of one of its employees who was called as a witness for SAC.

RECOMMENDED ORDER

On April 5, 2000, the ALJ entered his Recommended Order ("RO") now on agency review by the Department. The RO contains the crucial conclusions of the ALJ that the evidence presented at the DOAH hearing established that:

1. The amount of mercury emitted from the proposed Plant that will impact the waters of the State will "not be detectable."
2. Projected emissions from the proposed Plant will not "significantly degrade" any OFW.

3. The Plant will not cause or contribute to a new or existing violation of water quality standards applicable to the Three Rivers and will not reduce the quality of the Three Rivers below their Class III classification.

4. The Plant will not pose a serious danger to the public health, safety, or welfare.

The ALJ ultimately recommended that a final order be entered by the Department "granting SAC's application for an air construction permit subject to the terms of the Draft Permit, amended to reflect the applicant's agreement that mercury emissions from the proposed Plant will be limited to 97 pounds per consecutive 10-month period."[4]

RULING ON PETITIONERS' REQUEST FOR ORAL ARGUMENT

Petitioners' Exceptions to the RO also contain a request for oral argument before the Department. However, Petitioners do not cite any statutes or rules allowing a party to a formal administrative proceeding to present oral argument in connection with exceptions to a DOAH recommended order filed with the reviewing agency. The applicable statutes and rules only authorize the filing of written exceptions to a DOAH

[4] The record reflects that the "10-month" period set forth on page 54 of the RO is an obvious clerical error as noted in the Exceptions filed by SAC and the Department. SAC's agreement made at the DOAH final hearing was to further limit the allowed mercury that may be introduced by raw mill feed and fuels into the proposed Plant's pyroprocessing system to 97 pounds per consecutive "12-month period."

recommended order and written responses to the exceptions. See § 120.57(1)(k), F.S., and Rule 28-106.217, F.A.C.

In any event, I conclude that the issues now before me for consideration are adequately set forth in the written Exceptions and Responses to Exceptions filed by the parties. Consequently, oral argument is not needed for purposes of clarification. Petitioners' request for oral argument is thus denied.

STANDARDS OF AGENCY REVIEW

As a preface to ruling on the various Exceptions to the RO filed by all three parties to this proceeding, it is appropriate to note the standards of review of DOAH recommended orders by agencies under the Florida Administrative Procedure Act. An agency reviewing a DOAH recommended order may not reject or modify the findings of fact of an administrative law judge (formerly "hearing officer"), "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." See subsection 120.57(1)(l), F. S.

A reviewing agency may not reweigh the evidence presented at a DOAH formal hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary matters are within the province of the administrative law judges, as the triers of the facts. Belleau v. Dept. of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Furthermore, a reviewing agency is not free to modify the findings of fact in a DOAH recommended order by interpreting the evidence or drawing inferences

therefrom in a manner proposed by a party that is different from the reasonable interpretations made and inferences drawn by a hearing officer. Id. at 1281-1282.

A reviewing agency also has no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. Brogan v. Carter, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Thus, if the record in this case discloses any competent substantial evidence supporting a pure finding of fact in the RO, I am bound by such factual finding in preparing this Final Order. Bradley, supra, at 1123.

Pursuant to subsection 120.57(1)(l), F. S., an agency may reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules over which the agency has substantive jurisdiction. However, when rejecting or modifying such conclusions of law or interpretations of administrative rules, the agency must state with particularity its reasons for such rejections or modifications. The agency must also make findings that its substituted conclusions of law or rule interpretations are as reasonable or more reasonable than those which were rejected or modified.

RULINGS ON SAC'S EXCEPTIONS

Exception No. 1

SAC's first Exception challenges the reference to the word "cement" in the last line of the ALJ's Finding of Fact No. 6. SAC correctly notes that the record establishes that cement and concrete are not the same, and that cement is one of the components of concrete. (Tr. Vol. 1, page 27) Thus; the correct term in the last line of the ALJ's Finding of Fact No. 6 should be "concrete," rather than cement. This Exception is granted.

Exception Nos. 2, 4, 5, 6, 10, 11, 12, 13, 14, 15, and 18

All of these miscellaneous Exceptions of SAC point out apparent clerical, grammatical, and typographical errors in the RO as follows:

Exception No. 2 - The sum of "$1,000,000" set forth in the last line of Finding of Fact No. 9 appears to be a typographical error and should be replaced with the correct sum of "$100,000,000." (Tr. Vol. 1, page 42)

Exception No. 4 - The word "power" on the first line of Finding of Fact No. 13 is a misspelling of the correct word "powder."

Exception No. 5 - The word "will" on the tenth line of Finding of Fact 25 is a clerical error and should be deleted.

Exception No. 6 - The word "concentrates" on the sixth line of Finding of Fact No. 26 appears to be a misspelling of the correct word "concentrations".

Exception No. 10 - The name "Ichetucknee" is misspelled in the last line of Finding of Fact No. 79.

Exception No. 11- SAC correctly notes that only one of Petitioners' experts, Curtis Pollman, presented any testimony as to the projected deposition of mercury due to emissions from the Plant. Thus, the plural word "experts" on the fifth line of Finding of Fact No. 86 should be replaced with the singular word "expert".

Exception No. 12 - The word "issue" on the fifth line of Finding of Fact No. 92 is a clerical error and should be deleted.

Exception No. 13 - The word "liter" on the last line of Finding of Fact No. 103 is a clerical error and should be replaced with the correct word "kilogram".

Exception No. 14 - The word "liter" on the fifth line of Finding of Fact No. 105 is a clerical error and should be replaced with the correct word "kilogram".

Exception No. 15 - I agree with SAC's contention that there is no competent substantial evidence of record to support the finding in the last sentence of Finding of Fact No. 105 as presently worded. (Tr. Vol. 1, pages 225-226) The language stating "which is 2,500 to 3,000 times lower than the rate considered to be too high" appears to be the result of a syntax error. The quoted language in the last sentence should be transposed to the end of the first sentence of Finding of Fact No. 105.

Exception No. 18 - As previously discussed in footnote 4 of this Final Order, the term "10-month period" as set forth on the last line of the ALJ's Recommendation on page 54 of the RO appears to be a typographical error and should be replaced with the correct term "12-month period." See Finding of Fact No. 53.

These Exceptions of SAC appear to be well-taken and are granted. Nevertheless, the designated clerical, grammatical, and typographical mistakes in the RO are deemed to be harmless "scrivener's" errors having no effect on the ultimate disposition of this proceeding.

Exception No. 3

SAC's third Exception takes issue with the second line of Finding of Fact No. 10 implying that "gypsum" is added to the limestone and sand prior to or at the time the raw materials enter the roller mill. I agree with SAC that the record establishes that gypsum is added to the mixture of feeder materials at a later stage of the process of producing portland cement. (TR. Vol. 1, page 39) Thus, there is no competent substantial

evidence to support this challenged factual finding as worded. SAC's Exception No. 3 is granted, but the ALJ's finding is deemed to be harmless error.

Exception No. 7

This Exception of SAC objects to the portion of the first sentence of Finding of Fact No. 29 consisting of an apparent quote by the ALJ from Rule 62-412.400, F.A.C. I agree with SAC that the ALJ has misquoted the subject portion of Rule 62-412.400, and that the correct quote is "construction or modification of air pollutant emitting facilities in those parts of the state in which the state ambient air quality standards are being met."[5] SAC's Exception No. 7 is granted, but the ALJ's misquotation of a portion of Rule 62-412.400 is deemed to be harmless error.

Exception No. 8

This Exception of SAC objects to the last sentence of Finding of Fact No. 47. However, I agree with the Department's Response to SAC's Exceptions concluding that, when the last sentence is read *in para materia* with the remainder of Finding of Fact No. 47, the reading suggested by SAC is not evident. Consequently, Exception No. 8 is denied.

Exception No. 9

This Exception of SAC objects to the second and third sentences of Finding of Fact No. 65, "to the extent that they suggest that the only type of coal that SAC is authorized to burn is Appalachian coal." SAC correctly points out that the Department's Draft Permit does not limit the type of coal that may be used as a permitted fuel in the Plant, as suggested in the second sentence of Finding of Fact No. 47. (SAC's Ex. No.

[5] A direct quote from an administrative rule is not a pure finding of fact. Rather, it is an application by the ALJ of the regulatory law to the facts.

6, pages 16-17 of 51) I thus find that there is no competent substantial evidence of record to support a finding that the only type of coal that may be used as an authorized fuel at the Plant is limited to "Appalachian" coal. However, there is substantial competent evidence of record supporting the portion of the third sentence of Finding of Fact 65 asserting that "Suwannee American has proposed to initially burn Appalachian coal." (Tr. Vol. 1, pages 43, 107) In view of the above, the word "Appalachian" is deleted from the third line of Finding of Fact No. 65, and SAC's Exception No. 9 is granted to that extent. Exception No. 9 is denied as to the last sentence of Finding of Fact No. 65.

Exception No. 16

SAC's Exception No. 16 takes exception to the second sentence of the ALJ's Conclusion of Law 117 concluding that Petitioner, Save our Suwanee, "has standing to participate in this matter." SAC disagrees with the ALJ's related conclusion that Save our Suwannee's standing in this permit proceeding is based on the provisions of § 403.412(5), F.S.[6] SAC relies on Greene v. Dept. of Natural Resources, 414 So.2d 251 (Fla. 1st DCA 1982), as purported authority for its contention that § 403.412(5) does not authorize Save our Suwannee to file a petition for administrative hearing to challenge the Department's notice of intent to issue the air construction permit for the Plant. SAC's reliance on the Greene decision is misplaced.

[6] Section 403.412(5), F.S., authorizes a citizen of the state to intervene in a permit proceeding by the "filing a verified petition asserting that the activity . . . sought to be permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state." It is undisputed in this proceeding that Save our Suwannee is a corporate citizen of the state and has filed a verified petition alleging that emissions from the proposed Plant will pollute and cause injury to the waters of the Three Rivers and their natural resources.

In the later case of Manasota-88, Inc. v. Dept. of Environmental Regulation, 441 So.2d 1109 (Fla. 1st DCA 1983), the court expressly distinguished the Greene decision. In its Manasota-88 opinion, the court construed the Greene holding to be limited to situations where "there is no licensing or permitting proceedings involved" or where "there is an absence of the statutorily required allegations with respect to injury to the environment." Id. at 1111. The court concluded in Manasota-88 that "[i]t does not follow that a citizen is precluded from initiating § 120.57 proceedings when the department does propose to proceed with the granting of . . . permits." Id. at 1111.

SAC's argument seems to be based on an assumption that a Department permitting matter does not become a "proceeding" for purposes of intervention under § 403.412(5) until DOAH acquires jurisdiction over the matter. However, the Manasota-88 court observed that permitting proceedings commence, for purposes of § 403.412(5), when DER "issues it notice of proposed action," not when the matter is later referred to DOAH for a formal hearing. Id. at 1111. Thus, for purposes of § 403.412(5), this permit "proceeding" commenced on June 22, 1999, when the Department issued a Notice of permit Denial to SAC. Suwannee American could thereafter "intervene" in the permit proceeding by the filing of a verified pleading meeting the requirements of § 403.412(5).

In view of the above, SAC's Exception No. 16 is denied.

Exception No. 17

SAC's Exception No. 17 objects to Conclusion of Law No. 119 wherein the ALJ concluded that the Sierra Club has standing to participate in this formal administrative proceeding. SAC contends that mere "allegations" of potential adverse impacts on a substantial number of Sierra Club members due to the Plant's purported pollution of the

waters of the Three Rivers used by its members for enjoyment and recreation are insufficient to confer standing upon the Sierra Club in this case. I find SAC's contention to be without merit and adopt the ALJ's conclusion that the Sierra Club has standing to participate in this administrative proceeding.

SAC's lack of standing argument seems to be based on the premise that it is the ultimate resolution of the merits of the Sierra Club's allegations that determines the issue of standing, rather than the sufficiency of the allegations set forth in the petition for administrative hearing. However, the case law of Florida holds that standing to participate in an administrative proceeding in which the "substantial interests of a party are determined" is to be demonstrated in the allegations in the petition for administrative hearing. See e.g., Florida Society of Ophthalmology v. Board of Optometry, 532 So.2d 1279, 1286 (Fla. 1st DCA 1988), rev. denied, 542 So.2d 1333 (Fla. 1989); Village Park Mobile Home Assn., Inc. v. State, Dept. of Business Regulation, 506 So.2d 426, 433 (Fla. 1st DCA 1987), rev. denied, 513 So.2d 1063 (Fla. 1987).

Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981), is a landmark decision in this state on standing in administrative proceedings in which the "substantial interests of a party are determined." In its opinion in Village Park, 506 So.2d at 433, the court rendered a lengthy opinion discussing the holding in Agrico Chemical. The court concluded in the Village Park opinion that a petitioner can satisfy the "injury-in-fact" requirement set forth in Agrico Chemical by "demonstrating in his petition either: (1) that he had sustained actual injury in fact at the time of filing his petition; or (2) that he is immediately in danger of sustaining some direct injury as a result of the challenged agency's action." Village Park, 506 So.2d at

433 (emphasis supplied); see also Town of Palm Beach v. Dept of Natural Resources, 577 So.2d 1383, 1388 (Fla. 4th DCA 1991) (concluding that allegations of adverse impact to appellants' properties and the nearby dune system were sufficient to meet the "injury in fact" standing test of Agrico Chemical).

Thus, it is the sufficiency of the allegations in the petition that determine "substantial interests" standing in administrative proceedings, not the ultimate sufficiency of the evidence presented at the formal hearing. See also Sun States Utilities v. Destin Water Users, 696 So.2d 944, 945 n.1 (Fla. 1st DCA) (concluding that when considering standing, the court must accept all material allegations as true); and St. Martin's Episcopal Church v. Prudential-Bache Securities, 613 So.2d 108, 109 n.4 (Fla. 4th DCA 1993) (concluding that the concept of standing should not be confused with the merits of the claim). I would also note the court's ruling in Hamilton County Commissioners v. Dept. of Environmental Regulation, 587 So.2d 1378, 1383 (Fla. 1st DCA 1991), that "since the issues were fully litigated in the proceedings below, the standing issue is moot." Based on the above, SAC's Exception No. 17 is denied.

RULINGS ON THE DEPARTMENT'S EXCEPTIONS

Exception No. 1

The Department's first Exception takes issue with the last sentence of Finding of Fact No. 17 stating that the "Department did not review the application for compliance with water quality impacts." The Department cites to the testimony at the final hearing of Joe Kahn ("Kahn"), who was accepted by the ALJ as an expert in air pollution permitting regulations. Kahn, who is a permitting engineer in the Department's Division of Air Resource Management, stated that he handled the Department's review of SAC's

application for the air construction permit. Kahn rendered opinions at the final hearing that the Plant's projected emissions would meet the applicable ambient air quality standards, prevention of significant deterioration increment requirements, and the best available control technology requirements.

Kahn also testified that he considered the proposed Plant's compliance with the Department's Outstanding Florida Water ("OFW") Rule [62-4.242]. (Tr. Vol. 1, pages 155, 163, 165-66.) Mr. Kahn stated that he did "evaluate the project's impacts for mercury on all media including air, soils, the ambient air, and water." (Tr. Vol. 1, page 166.) Mr. Kahn further testified that his water quality review was limited to determining whether the Department's numerical mercury standard for Class III Waters would be exceeded by the deposition of mercury into the Three Rivers from the projected emissions from the Plant. (Tr. Vol. 1, page 166.) My review of the entire record of the DOAH proceeding indicates that this testimony of Kahn was not contradicted.

Kahn acknowledged, however, that his consideration of the OFW Rule and related water quality impacts did not take place until December of 1999 or January of 2000. (Tr. Vol. 1, pages 155, 163.) This consideration by Kahn of the OFW Rule and related water quality impacts thus took place after the Department's Draft Permit for the Plant was issued. This testimony of Kahn is alluded to in the ALJ's Conclusion of Law 151. Thus, when viewed in conjunction with Conclusion of Law 151, I read the last sentence of Finding of Fact 17 to be a finding that the Department did not review SAC's permit application for compliance with water quality impacts during the review process leading up to issuance of the Draft Permit.

Nevertheless, there is nothing improper about a permit application undergoing additional scrutiny by the Department when a notice of intent to issue a permit is challenged and a formal administrative proceeding ensues. A formal administrative proceeding is not merely a review of prior preliminary agency action, but is a *de novo* proceeding intended to formulate final agency action. See, e.g., Hamilton County Commissioners v. State Dept. of Environmental Regulation, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); McDonald v. Dept. of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

The primary focus at a *de novo* DOAH hearing is not whether the Department correctly evaluated the original application, but whether the evidence presented at the hearing provides reasonable assurance at that time that the proposed project will comply with applicable permitting standards. Clarke v. Melton, 12 F.A.L.R. 4946, 4949 (Fla. DER 1990). Any relevant additional information necessary to provide reasonable assurance that a project will comply with permitting standards may be presented at this *de novo* hearing, and the ALJ "may consider changes and other circumstances external to the application." Hamilton County Commissioners, 587 So. 2d at 1387-88.

I thus find that there is no competent substantial evidence of record to support the ALJ's factual finding in the last sentence of Finding of Fact No. 17. Consequently, the Department's Exception No. 1 is granted. However, this challenged factual finding of the ALJ is deemed to be harmless error in light of the ALJ's subsequent findings and rulings on the water quality issues raised by Petitioners.

Exception No. 2

The Department's second Exception takes issue with Finding of Fact No. 25, to the extent that it "suggests that the three criteria listed in the last sentence . . . are the sole criteria to be considered." The Department states its position that "relevant provisions of Chapter 62-4, F.A.C., also must be applied." For the reasons set forth in the subsequent rulings on the Department's Exceptions 3 through 13, this Exception to Finding of Fact No. 25 is denied as being extraneous and not germane to the final disposition of this case.

Exceptions Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13

All of these related Exceptions deal with the same basic contention raised by the Department. This contention is that the ALJ erred in concluding that SAC was not required to comply with any of the Department's rules dealing with water quality standards in order to be entitled to issuance of the air construction permit for the Plant. The ALJ's conclusion on this issue, however, is not an essential portion of his RO, since he went on to find that the emissions from the proposed plant would not significantly degrade an OFW. Accordingly, I need not reach the issue raised by the Department. The Department's Exceptions are therefore denied, as further explained below.

Notably, the parties in this case filed a Prehearing Stipulation with the ALJ containing a stipulated issue of law that **"Petitioners do not contest that SAC has provided reasonable assurance that the proposed facility will comply with all applicable air quality rules, except as to those requirements related to water quality standards."** (See Conclusion of Law 149) Thus, whether projected emissions from the Plant would comply with the Department's air quality standards, *per se*, was

not a disputed issue before the ALJ at the DOAH final hearing. The only issue before the ALJ at the hearing was Petitioners' claim that emissions of mercury from the Plant would violate the statutes and rules dealing with the prevention of "significant degradation" of Outstanding Florida Waters, maintenance of designated use of surface waters, and certain minimum criteria for surface waters.

This is not a case where a party challenging the issuance of an air construction permit has been allowed to present evidence at a DOAH final hearing of purported water quality violations over the objections of the permit applicant. The DOAH record before me does not contain a Motion *In Limine* filed by SAC seeking to exclude any evidence at the final hearing relating to alleged significant degradation of the waters of the Three Rivers due to emissions of mercury from the Plant.

On the contrary, SAC's attorneys did not object, on grounds of immateriality or irrelevancy, to any testimony being presented at the final hearing concerning the impacts of mercury emissions from the Plant on the water quality of the Three Rivers. The DOAH record before me is replete with expert testimony and documentary evidence concerning the predicted impacts of mercury emissions from the Plant on the water quality of the Three Rivers. This "water quality" evidence admitted without objection is now a part of the record in this case and is required to be considered along with any other record evidence. See Florida Power & Light v. State of Florida Siting Board, 693 So.2d 1025, 1028 (Fla. 1st DCA 1997) (Benton, J. concurring); Tri-State Systems, Inc. v. Dept. of Transportation, 500 So.2d 212, 213 (Fla. 1st DCA 1985), rev. denied, 506 So.2d 1041 (Fla. 1987).

Moreover, SAC's attorneys "opened the door" in their case-in-chief to the water quality evidence being presented at the DOAH hearing. A substantial portion of the expert testimony of SAC's own witnesses, John Koogler, Donald Elias, and Christopher Teaf deals with the issue of the projected impacts of mercury emissions from the Plant on the water quality of the Three Rivers. In fact, the ALJ's Findings of Fact 98 through 108, dealing with the impacts of mercury emissions from the Plant on the Three Rivers, contain repeated references to the testimony of SAC's expert witness, Dr. Teaf.

Despite the ALJ's arguably erroneous conclusion that SAC was not required to comply with the OFW rules and applicable water quality standards, the ALJ wisely continued his analysis. The RO on review contains at least 25 separately numbered Findings of Fact and at least 20 separately numbered Conclusions of Law dealing with the projected impacts of mercury emissions from the Plant on the water quality of the Three Rivers. Consequently, the RO addresses all of Petitioners' water quality concerns over mercury emissions from the proposed Plant.

In view of the above, I conclude that the ALJ's Conclusions of Law 138 through 141, 144 through 146, 150 through 153, and the portion of Conclusion of Law 154 stating that "[b]ased upon the conclusion that Suwannee American is only required to comply with the rules governing air quality standards," are dicta in this case. This dicta does not have any bearing on the ALJ's crucial Conclusions of Law 157-175 concluding that the emissions of mercury from the Plant will not "significantly degrade" any OFW and will not violate any related water quality rule or standard of the Department. Accordingly, the Department's Exceptions Nos. 3 through 13 are denied as being extraneous and not germane to the final disposition of this case.

Exception No. 14

The Department's last Exception deals with an apparent clerical error in the last line of the ALJ's Recommendation on page 54 of the RO. This Exception is granted for the same reason set forth in the prior ruling granting SAC's Exception No. 18.

RULINGS ON PETITIONERS' EXCEPTIONS

Exception No. 1

Petitioners' first Exception objects to the last sentence of the ALJ's Finding of Fact No. 17. This Exception of Petitioners is substantially the same as the Department's first Exception. For the reasons specified in the above ruling on the Department's Exception No. 1, Petitioners' Exception No. 1 is also granted.

Exception Nos. 2-8, 10-11

These Exceptions of Petitioners take issue with Findings of Fact Nos. 47, 64, 70, 71, 84, 85, 96 and 97. In all of these Exceptions, Petitioners disagree with the ALJ's interpretations of, and inference drawn from, the expert testimony presented at the DOAH final hearing. Petitioners essentially reject the testimony of SAC's expert witnesses and repeatedly cite to the testimony of their expert witnesses. Petitioners' Exceptions also are based on their own interpretations of, and inferences from, the evidence of record that are most favorable to their contentions.

As noted in the Standards of Agency Review above, a reviewing agency has no authority to reweigh the evidence presented at a DOAH formal hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary matters are within the province of the ALJ, as the trier of the facts. Also, a reviewing agency is not free to modify the findings of fact in a DOAH recommended order by interpreting the

evidence or drawing inferences therefrom in a manner proposed by a party that is different from the reasonable interpretations made and inferences drawn by a hearing officer. Heifitz, 475 So.2d at 1281-82. I conclude that the ALJ's findings of fact challenged in these Exceptions appear to be reasonable interpretations of, and inferences drawn from, the expert testimony of Dr. John Koogler, Joseph Kahn, Donald Elias, Dr. Christoper Teaf, and Thomas Atkeson. These factual findings of the ALJ are thus adopted.

One of Petitioners' primary contentions in these Exceptions is that the ALJ erred by finding that the deposition of mercury emissions from the Plant would result in a ten percent (10%) or less increase of mercury in the "natural background," and that such increase would "not be detectable." These findings, however, were supported by competent substantial evidence, as detailed below. Furthermore, even assuming for the sake of argument that these findings were not supported by competent substantial evidence, Petitioners' contention that a purported 10.8% increase in natural background mercury from Plant emissions would be detectable still does not warrant findings of similar percentage increases in mercury concentrations in the waters, sediments, and fish of the Three Rivers. The expert testimony of Dr. Teaf relied upon by the ALJ and summarized hereafter in this Final Order indicates to the contrary. (Tr. Vol. 2, pages 214-232.) In view of the above, Petitioners' Exception Nos. 2-8 and 10-11 are denied.

Exception No. 9

This Exception of Petitioner correctly notes a typographical error in the fifth line of the ALJ's Finding of Fact No. 92. This matter has already been resolved in the above

ruling granting SAC's Exception No. 12. Petitioners' Exception No. 9 is thus granted to the extent of the deletion of the word "issue" from the fifth line of Finding of Fact No. 92.

Exception Nos. 12-16, 18-23, 25, 27

These related Exceptions of Petitioners objects to the ALJ's Findings of Fact Nos. 98, 100, 103, 105-106, 108, 110, and the last sentence of 107. The Exceptions also challenge the ALJ's Conclusions of Law Nos. 114-115, 157, 161, 164, 167, 169-170, 172 and 175. The challenged factual findings and legal conclusions of the ALJ deal with the characteristics and results of air quality dispersion modeling performed on behalf of SAC to predict the concentrations of mercury deposited in the surrounding environment from Plant emissions. These challenged findings and related conclusions are based primarily on the interpretative expert testimony of SAC's witnesses, John Koogler, Donald Elias, and Christopher Teaf.

John Koogler received a doctoral degree in engineering, with a specialty in environmental engineering, in the year 1966. Dr. Koogler has specialized in the air pollution control permitting process during his 30-year plus professional career, and has assisted prior applicants in the environmental permitting of other portland cement plants in Florida. Dr. Koogler, a licensed professional engineer in Florida, was accepted by the ALJ as an expert in air quality analysis, air quality dispersion modeling, and best available control technology review. Dr. Koogler's firm, Koogler and Associates, was retained by SAC to prepare the air construction permit being challenged in this proceeding. Dr. Koogler's firm also conducted an ambient air quality impact analysis of emissions from the Plant for SAC. (Tr. Vol. 1, pages 55-97)

Donald Elias has a master's degree in environmental engineering, with a specialty in chemical engineering and air pollution. Mr. Elias' prior experience includes the performance of air quality dispersion modeling, and he has participated in the preparation and review of other cement plant applications in Florida. Mr. Elias, who performed an analysis of the projected air emissions from the Plant, was accepted by the ALJ as an expert in ambient air quality analysis and air quality dispersion modeling. (Tr. Vol. 1, pages 168-185.)

Christopher Teaf has a Ph.D. in toxicology and has been Associate Director of the Center for Biomedical and Toxicological Research at Florida State University since 1983. Dr. Teaf is also President and Director of Toxicology at Hazardous Substance and Waste Management, Research, Inc. located in Tallahassee. Dr. Teaf has testified as an expert in various administrative and judicial proceedings and was accepted by the ALJ as an expert in toxicology, environmental chemistry, and environmental risk assessment. Dr. Teaf evaluated the potential effects of the estimated deposition rates of mercury into the Three Rivers from Plant emissions. (Tr. Vol. 2, pages 207-233)

Based on the air modeling data and corresponding expert testimony presented by SAC, the ALJ repeatedly found that the estimated concentrations of mercury from Plant emissions that will be deposited through atmospheric deposition into the Three Rivers over the life of the Plant are so nominal that they "will not be detectable or measurable." (RO, paragraphs 102, 104, 107, 108, 172, 175) In his "Ultimate Finding of Fact 110," the ALJ thus determined that SAC has provided reasonable assurances that the Plant emissions "will not violate any water quality standards, will not significantly degrade any OFWs, [will not] impair the designated use of the Three Rivers, or pose a

serious danger to the public health, safety, or welfare." These reasonable assurance determinations are repeated in Conclusions of Law Nos. 157, 164, and 167-175.

I agree with Petitioners' observation that the ALJ's determinations in "Ultimate Finding of Fact 110" that SAC has provided the necessary "reasonable assurances" in this case are not pure findings of fact.[7] Whether "reasonable assurance" has been provided in a particular permit proceeding that a proposed project will comply with applicable environmental standards is actually a mixed determination of fact and law which, in the final analysis, must ultimately be made by the Department.[8] See, e.g., Miccosukee Tribe of Indians v. South Florida Water Management District, ER FALR 98:119, p.5 (Fla. DEP 1998), *affirmed*, 721 So.2d 389 (Fla. 3d DCA 1998); Save our Suwanee v. Piechocki, 18 FALR 1467, 1471 (Fla. DEP 1996); Barringer v. E. Speer and Associates, 14 FALR 3660, 3667 n.8 (Fla. DER 1992). Nevertheless, for the following reasons, I concur with the ALJ's determinations that the necessary reasonable assurances have been provided by SAC that the proposed Plant will not "significantly degrade" any OFW or violate any related surface water quality standards:

1. The ALJ's key factual findings that the estimated concentrations of mercury that will be introduced into the Three Rivers from Plant emissions will be so slight that they "will not be detectable or measurable" is supported by the cumulative expert testimony of Donald Elias and Dr. Christopher Teaf and is adopted. Mr. Elias testified

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[7] A reviewing agency or court is not bound by the labels affixed to "findings of facts" and "conclusions of law" in a DOAH recommended order. If a finding of fact or conclusion of law is improperly labeled by an administrative law judge, the label is disregarded and the item is treated as though it were properly labeled. Battaglia Properties v. Land and Water Adj. Commission, 629 So.2d 161, 168 (Fla. 5th DCA 1994).

[8] This "reasonable assurance" standard has been judicially defined to require a permit applicant to establish "a substantial likelihood that the project will be successfully implemented." Metro Dade County v. Coscan Florida, Inc., 609 So.2d 644, 648 (Fla. 3d DCA 1992).

that the low level of deposition of mercury from the Plant would be "undetectable by current monitoring methods." (Tr. Vol. 1, page 181) Dr. Teaf testified that the predicted total surface water concentrations of mercury in the Three Rivers attributable to deposition from emissions over the life of the Plant would be "between 50,000 and 100,000 times below a number that could be measured in water, given present analytical capabilities." (Tr. Vol. 2, page 221-222) Dr. Teaf also testified that predicted total mercury concentrations in the sediments of the Three Rivers attributable to deposition from emissions over the life of the Plant would be "between 10,000 to 100,000 times lower than the detection limit for sediment concentration." (Tr. Vol. 2, page 224) Dr. Teaf referred to this detection limit as the "practical quantization limit" when samples are submitted to a laboratory in Florida.

2. Petitioners also make an alternative argument that, even assuming the atmospheric deposition of the Plant's mercury emissions into the Three Rivers "will not be detectable", SAC still has not provided reasonable assurance that the waters of the Three Rivers will not be significantly degraded. A similar argument was rejected by the Department in Sunset Acres Property Owners Assn. v. Dept. of Environmental Protection, 18 FALR 4472 (Fla. DEP 1996). The Final Order in Sunset Acres concluded that negative effects "which are so slight as not to be detectable or measurable with sophisticated instrumentation are insufficient to support a conclusion of law that the proposed dredge and fill activities will 'significantly degrade' the waters of Florida Bay [an OFW] under Rule 62-4.242(2), Florida Administrative Code." Id. at 4483. Accord Hoffert v. St. Joe Paper Company, 12 FALR 4972, 4987 (Fla. DER 1990) (reasonable assurance does not require permit applicant to address impacts on water quality that

"could not be detected or measured in real life"); Florida Keys Citizens Coalition v. 1800 Atlantic Developers, 8 FALR 5564, 5587 (Fla. DER 1986), *rev'd on other grounds*, 552 So.2d 946 (Fla. 1st DCA 1989) (adverse impact of proposed project in an OFW on fish and wildlife habitat must be "quantifiable" and not merely *"de minimis"*).

3. Petitioners further contend that SAC did not provide reasonable assurance in this case because it failed to establish the existing ambient water quality of the Three Rivers pursuant to Rules 62-4.242(2)(a)2.b and 62-4.242(2)(c), F.A.C. However, in order for the ambient water quality provisions of Rules 62-4.242(2)(a)2 and 62-4.242(2)(c) to apply, there must first be a determination that there is either a "proposed activity or discharge within an OFW" or that the proposed activity "significantly degrades, either alone or in combination with other stationary installations, any OFW." See Save Our Suwanne v. Piechocki, 18 FALR 1467 (Fla. DEP 1996).

4. It is undisputed in this case that the Plant will be located approximately three miles from the nearest of the Three Rivers and is thus not a "proposed activity or discharge within an OFW." (emphasis supplied) Moreover, this Final Order concurs with the ALJ's conclusions that emissions of mercury from the Plant into the air do not constitute "discharges" into the waters of the Three Rivers and there will be no significant degradation of the water quality of the Three Rivers from any "activity" at the Plant. In addition, there is no evidence of record in this case of any other stationary air installations which would contribute to significant degradation of the Three Rivers. Petitioners' reliance on Save Anna Maria v. Dept. of Transportation, 700 So.2d 113 (Fla. 2d DCA 1997), is misplaced. Save Anna Maria dealt with a proposed bridge to be constructed within the boundaries of an OFW and is thus factually distinguishable from

this case, which does not involve an activity within an OFW. This contention of Petitioners is rejected.

5. In his Finding of Fact No. 83, the ALJ found that air quality dispersion modeling tests performed by SAC's experts to estimate the impacts of Plant mercury emissions on the surrounding environment were "reasonable and professionally performed" and thus "reliable". In Finding of Fact No. 86, the ALJ also found that SAC's air modeling results were "supported by the weight of the evidence in this case." The ALJ further found that Petitioners' experts performed no modeling to refute this evidence presented by SAC, and concluded that "Petitioner's experts to the contrary were not persuasive." None of these significant factual findings of the ALJ were challenged in Petitioners' Exceptions and must be accepted on agency review as correct. See Couch v. Commission on Ethics, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); Bradley, supra, at 510 So.2d 1124 (parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in the findings of fact in DOAH recommended orders by filing exceptions).

6. Petitioners' repeated citations to the testimony of their expert witness, Dr. Curtis Pollman, is not persuasive. The decision of an administrative law judge to accept one expert's testimony over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of competent substantial evidence of record from which the finding could be reasonably inferred. See Collier Medical Center v. State, Dept. of HRS, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); Florida Chapter of Sierra Club v. Orlando Utilities Commission, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). I have already concluded herein that the testimony of SAC's expert

witnesses, Dr. Koogler, Joseph Kahn, Donald Elias, and Dr. Teaf constitutes competent substantial evidence in support of the ALJ's findings and conclusion challenged in these Exceptions.

7. The opposing testimony of Petitioners' expert witness, Dr. Pollman, does not invalidate the ALJ's findings and conclusions based on the testimony of SAC's expert witnesses. The Florida case law holds that, if there is competent substantial evidence to support the findings of fact of an administrative law judge (formerly "hearing officer"), it is irrelevant that there may also be competent substantial evidence to support contrary findings. Arand Construction Co. v. Dyer, 592 So.2d 276, 280 (Fla. 1st DCA 1991); Conshor, Inc. v. Roberts, 498 So.2d 622, 623 (Fla. 1st DCA 1986).

8. In these Exceptions, Petitioners essentially disagree with the weight given by the ALJ to SAC's air modeling test results and the corresponding opinion testimony of SAC's expert witnesses. However, as previously noted herein, an agency reviewing a DOAH recommended order may not reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses. I thus decline to substitute my judgment for that of the ALJ on these evidentiary matters.

9. The ALJ found that SAC's initial estimate of 184 pounds per year of mercury emission from the Plant was based on a "worst case scenario." (Finding of Fact No. 51) This factual finding was not challenged in Petitioners' Exceptions and is adopted. SAC's initial estimate of 184 pounds per year of mercury emissions was used by the Department in its Draft Permit as the maximum amount of mercury that could be introduced into the Plant's processing system through feed materials and fuels in a "consecutive 12-month period." (SAC's Exhibit No. 6, page 19 of 51) Thus, the Draft

Permit annual mercury limitation was based on a "worst case scenario," notwithstanding the administrative case law holding that a permit applicant is only required to deal with "reasonably foreseeable contingencies," rather than "worst case scenarios." See e.g., Save our Suwannee, supra, 18 FALR at 1472; Florida Audubon Society v. South Florida Water Management District, 14 FALR. 5518, 5524 (Fla. SFWMD 1992); Rudloe v. Dickerson Bayshore, Inc., 10 FALR. 3426, 3440-41 (Fla. DER 1988).[9]

10. The ALJ's unchallenged Finding of Fact No. 53 finds that SAC agreed at the DOAH final hearing to a further limitation on the maximum amount of mercury allowed to be introduced into the Plant's processing system through feed material and fuel to "97 pounds per consecutive 12-month period." This stipulation of SAC is incorporated into this Final Order as a modification of Emission Limitations and Performance Standard No. 13 found on page 19 of the Draft Permit. Thus, during the course of this *de novo* proceeding, SAC has stipulated to a reduction of over fifty percent (50%) as to the annual total amount of mercury compounds allowed to be introduced into the Plant's processing system. The ALJ further found in Finding of Fact No. 55 that SAC "proved that its estimate of the amount of mercury of 97 pounds per year that will be emitted from the Proposed Plant is reasonable."[10] This significant factual finding was also not challenged in Petitioners' Exceptions and is adopted. Petitioners' Exception Nos. 12-16, and 18-23, 25, and 27 are thus denied.

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[9] Petitioners' suggestion in Exception No. 16 that a permit applicant "must establish its entitlement to the requested permit under 'worst-case' conditions" is thus rejected.

[10] In his Finding of Fact No. 63, the ALJ further found that "[b]y limiting the amount of mercury that goes into the manufacturing process to the amount of mercury allowed by the Draft Permit, the amount of mercury emitted from the Proposed Plant should not exceed the amount of mercury emissions projected by Suwannee American." This crucial factual finding was also not challenged in Petitioners' Exceptions and is adopted.

Exception No. 17

This Exception of Petitioners objects to Conclusions of Law Nos. 138-140, 144, 146, and 150-154. In these paragraphs of the RO, the ALJ essentially concluded that SAC was not required to comply with any water quality rules and standards in order to be entitled to issuance of the air construction permit for the Plant. For the reasons set forth in the above ruling denying the Department's Exceptions Nos. 3-13, Petitioners' Exception No. 17 is also denied as being extraneous and not germane to the final disposition of this case.

Exception Nos. 24 and 26

Exception No. 24 objects to the ALJ's Conclusion of Law 171 concluding that there will be no "discharge" from the Plant into the waters of the Three Rivers within the purview of water quality Rule 62-302.300(16), F.A.C.[11] Exception No. 26 also contends that mercury emissions from the Plant will constitute "discharges" into the waters of the Three Rivers under the related provisions of water quality Rule 62-302.300(17). Petitioners' Exceptions do not cite any legal authority arguably supporting their "indirect discharge" rationale. However, in support of its position that mercury emissions into the air from the Plant do not constitute "discharges" into surrounding surface waters, the Department's Response cites the federal case of Chemical Weapons Working Group, Inc. v. United States Dept. of the Army, 111 F. 3d 1485 (10th Cir. 1997).

In the Chemical Weapons case, the question before the court was whether atmospheric deposition into navigable waters from emissions of a proposed chemical

[11] The term "discharge" is not defined in Chapter 373 or 403, F.S., or in Chapter 62-302, F.A.C., prescribing the Department's surface water quality standards. Furthermore, there appears to be no Florida case law construing this term within the purview of the water quality permitting statutes and rules.

warfare incineration facility would fall within the purview of § 301(f) of the Clean Water Act prohibiting the "discharge of any radiological, chemical, or biological warfare agents . . . into navigable waters." In its Chemical Weapons decision, the federal appellate court affirmed the trial court's decision dismissing the environmental group's claim under § 301(f) of the Clean Water Act. The court concluded in its Chemical Weapons opinion that:

> "We . . . reject Plaintiffs' construction of § 301(f) of the Clean Water Act because it would lead to irrational results. Because Clean Water Act § 301(a) regulates the discharge of any pollutant into navigable waters . . . , Plaintiffs' broad construction of the phrase "discharge . . . into the navigable waters" under § 301(f) would necessarily result in regulation under § 301(a) of any air emission that might possible result in atmospheric deposition into navigable waters. While Plaintiffs argue that the Environmental Protection Agency could issue a nationwide permit for "for sources of water pollution such as cars and chimneys" to the extent § 301(a) would apply, the very thought of regulating car emissions under the Clean Water Act exposes the absurdity of their position. Tellingly, Plaintiffs also fail to cite a single instance in which stack emissions are regulated under the Clean Water Act. We therefore conclude that under the facts of this case, they are not. Although Plaintiffs may be correct in arguing that an object may fly through the air and still be "discharged . . . into the navigable waters" under the Clean Water Act, common sense dictates that Tooele's stack emissions constitute discharges into the air-not water-and are therefore beyond § 301(f)'s reach." (footnote omitted)

Id. at 1490. This analysis by the court in Chemical Weapons of the provisions of the federal Clean Water Act appears to be germane to Petitioners' similar "indirect discharge" theory advanced in this case under Florida's water quality rules and standards.

An "indirect discharge" argument raised by a permit challenger under Florida's Everglades Forever Act was also rejected by the Department in Miccosukee Tribe of

Indians, supra, ER FALR 98:119, p.6.[12] Accord Stop the Outfall Pipe v. Massachusetts Water Resources Authority, 642 N.E. 568, 573 (Mass. 1994) (a proposed wastewater discharge pipe terminating over two miles from a state ocean sanctuary did not discharge "into" the sanctuary). I would also note that Petitioners' "indirect discharge" rationale is expressly rejected in Rule 62-620.200(12), F.A.C. This Department wastewater permitting rule excepts from the "discharge of a pollutant" definition an addition of pollutants [to waters] by any indirect discharger. (emphasis added) I thus conclude that, under the facts presented in this case, the emissions of mercury into the air from the proposed Plant would not constitute "discharges" into the waters of the Three Rivers for purposes of Rules 62-302.300(16) and 62-302.300(17), F.A.C.

CONCLUSION

This case has arrived on agency review in a rather unusual posture. Petitioners challenged the issuance of an air construction permit to SAC, but stipulated in the DOAH proceeding that SAC has provided reasonable assurance that the proposed cement Plant will comply with the Department's air quality rules and standards. (RO, paragraph 149) Therefore, the only matters before the ALJ for consideration at the DOAH final hearing were "water quality" issues. The ALJ heard expert testimony and received exhibits related to Petitioners' claims that emissions of mercury from the Plant would violate the statutes and rules dealing with the prevention of "significant degradation" of Outstanding Florida Waters and related surface water quality standards.

[12] In the Miccosukee Tribe of Indians case, the Petitioners contended that the phrase "discharge into" as set forth in § 373.4592(9)(k), F.S., should be broadly construed to include additional structures discharging "indirectly" into the Everglades Protection Area. This "indirect discharge" argument was rejected in the Department's Final Order, which was subsequently affirmed on appeal.

One of the expert witnesses testifying at the DOAH final hearing was Dr. Teaf, who has been Associate Director of the Center for Biomedical and Toxicological Research at Florida State University for over 15 years. Dr. Teaf testified that the predicted concentrations of mercury in the Three Rivers attributable to deposition of emissions over the life of the Plant would be between 50,000 to 100,000 times below a number that could be detected or measured in water, given present analytical capabilities.

Based on this and related findings, Dr. Teaf was of the opinion that mercury deposition into the Three Rivers from emissions over the lifetime of the Plant would not "significantly degrade" these Outstanding Florida Waters. Petitioners' suggestion that predicted mercury concentrations in the waters of the Three Rivers at least 50,000 times below a number that are detectable in a scientific laboratory would still result in a "significant degradation" of the Three Rivers is not supported by law or reason.

This contention of Petitioners, if adopted, would effectively convert the judicially approved "reasonable assurance" standard to one of "absolute guarantees." However, an "absolute guarantee" burden of proof on permit applicants has been repeatedly rejected in the administrative and judicial case law of this state. See, e.g., Florida Dept. of Transportation v. J.W.C. Company, Inc., 396 So.2d 778, 788-89 (Fla. 1st DCA 1981); Ginnie Springs, Inc. v. Craig Watson, 21 FALR 4072, 4080 (Fla. DEP 1999); Save our Suwannee, Inc., v. Piechocki, 18 FALR 1467,1472 (Fla. DEP 1996); Manasota-88, Inc., v. Agrico Chemical Company, 12 FALR 1319, 1325 (Fla. DER 1990).

It is therefore ORDERED:

A. The RO is modified to reflect the corrections of the clerical and typographical errors designated in the above Rulings on SAC's Exceptions.

B. The ALJ's Conclusions of Law 138-141, 144-146, 150-153, and the portion of 154 stating that "[b]ased upon the conclusion that Suwannee American is only required to comply with the rules governing air quality standards," are deemed to be dicta and are not incorporated into this Final Order.

C. As modified and limited in paragraphs A and B above, the RO is otherwise adopted and incorporated by reference herein.

D. The air construction permit for the Plant bearing "DEP File No. 1210465-001-AC, PSD-FL-259" is ISSUED to SAC, subject to the Draft Permit conditions which are incorporated by reference herein. However, Emission Limitations and Performance Standard No. 13 of the Draft Permit pertaining to mercury is modified by substituting the number "97" for the existing number "184" on the second line.

E. The issuance of this permit is also subject to the final disposition of another pending administrative challenge to the issuance of the Plant permit in Woodhouse v. Suwannee American Cement Company, Inc., DOAH Case No. 00-0702.

Any party hereto 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 Rule 9.110, Florida Rules of Appellate Procedure, with the Department's clerk in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, FL 32399-3000; and by filing a copy of the Notice of Appeal with 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 Department's clerk.

DONE AND ORDERED this 19th day of May, 2000, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

LISA POLAK EDGAR
Deputy 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.

Yolonda K. Peters 5/19/00
CLERK DATE

CERTIFICATE OF SERVICE

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

Patrice Boyes, Esquire
Boyes & Associates, P.A.
Post Office Box 1424
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Peter B. Belmont, Esquire
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Ann Cole, Clerk and
Larry J. Sartin, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
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Tallahassee, FL 32399-1550

and by hand delivery to:

Jack B. Chisolm, Esquire
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this 12th day of May, 2000.

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STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA CHAPTER OF THE SIERRA CLUB and SAVE OUR SUWANNEE, INC.,

Petitioners,

vs.

SUWANNEE AMERICAN CEMENT COMPANY, INC. and DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

Case No. 99-3096

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, in Gainesville, Florida, on February 14, 2000.

APPEARANCES

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and

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EXHIBIT "A"

For Respondent, Suwannee American Cement Company, Inc.:

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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Suwannee American Cement Company, Inc., should be issued an air construction permit for the construction of a portland cement manufacturing plant.

PRELIMINARY STATEMENT

On November 30, 1998, Suwannee American Cement Company, Inc., submitted an application to the Department of Environmental Protection for an air construction permit authorizing the construction and operation of a portland cement manufacturing plant to be located near Branford, Suwannee County, Florida. Additional information to support the application was requested by the Department of Environmental Protection and was provided by Suwannee American Cement Company, Inc.

On June 22, 1999, the Department of Environmental Protection issued a Notice of Permit Denial indicating its intent to deny the permit sought by Suwannee American Cement Company, Inc. The permit application was denied because of a determination that Suwannee American Cement Company, Inc., had failed to provide

assurances that it would comply with all applicable regulations as evidenced by the alleged compliance history of companies related to Suwannee American Cement Company, Inc.

Suwannee American Cement Company, Inc., filed a Petition challenging the proposed denial of its permit application. On July 6, 1999, Petitioners in this case filed a Petition suggesting additional grounds for denying the permit application.

The Petitions were filed with the Division of Administrative Hearings on or about July 21, 1999. Respondent Suwannee American Cement Company, Inc.'s Petition was designated Case No. 99-3095. Petitioners' Petition was designated Case No. 99-3096. Both cases were assigned to Administrative Law Judge Suzanne F. Hood. Judge Hood entered an order consolidating the cases August 17, 1999. A third case was also consolidated with Case Nos. 99-3095 and 99-3096. That case was subsequently dismissed.

On October 21, 1999, Judge Hood entered a Recommended Order of Dismissal in this case. Judge Hood found that Petitioners' Petition failed to include allegations of any cognizable issues. Petitioners had alleged that the permit application should be denied because of rules designed to prevent pollution of Florida's waters. Judge Hood recommended that the Department of Environmental Protection dismiss the Petition because the water quality regulations upon which Petitioners had relied did not apply to the type of permit sought by Suwannee American Cement Company, Inc.

On November 18, 1999, Suwannee American Cement Company, Inc., and the Department of Environmental Protection entered into

a settlement agreement resolving the issues raised in Case No. 99-3095. As a result of this agreement, the Department of Environmental Protection caused notice of its intent to grant the permit to be published. The settlement agreement was filed with the Division of Administrative Hearings on November 19, 1999. Consequently, Case No. 99-3095 was closed.

On November 30, 1999, without ruling on the merits of Judge Hood's Recommended Order, the Department of Environmental Protection entered an Order remanding Case No. 99-3096 to the Division of Administrative Hearings. The Department of Environmental Protection remanded this case with directions to conduct a final hearing. By Order entered December 6, 1999, Judge Hood accepted the remand, reopened this case, and scheduled a final hearing for February 14 through 17, 2000.

On December 17, 1999, Judge Hood entered an Order Granting Motion to Disqualify, recusing herself from further participation in this case. The case was reassigned to the undersigned.

On January 17, 2000, Petitioners moved to amend their Petition. By Joint Prehearing Stipulation, Petitioners abandoned all but one allegation of their amended petition. The only issue raised by Petitioners in this case, therefore, is whether Suwannee American Cement Company, Inc., has failed to give reasonable assurances that its proposed portland cement manufacturing plant will not violate the applicable requirements of Florida Statutes and the rules of the Department of Environmental Protection as they relate to the prevention of significant degredation of Outstanding Florida Waters, the

maintenance of the designated use of surface waters, and certain minimum criteria for surface waters. In particular, Petitioners alleged that Suwannee American Cement Company, Inc., failed to give reasonable assurances concerning the impact on Florida waters from mercury emitted from the proposed plant.

The Joint Prehearing Stipulation filed by the parties contains undisputed findings of fact and undisputed conclusions of law which have been included in this Recommended Order to the extent relevant. The Joint Prehearing Stipulation also contains stipulated issues of fact and law which remain to be decided in this case.

At the final hearing Suwannee American Cement Company, Inc., presented the testimony of Fred W. Koester, John B. Koogler, Ph.D., Joseph H. Kahn, Donald F. Elias, and Christopher M. Teaf, Ph.D. Suwannee American Cement Company, Inc., also offered twenty exhibits. All were accepted into evidence.

The Department of Environmental Protection adopted the testimony of Mr. Kahn. No additional witnesses were called and no exhibits were offered by the Department of Environmental Protection.

Petitioners presented the testimony of Thomas D. Atkeson, Ph.D., and Curtis D. Pollman, Ph.D. Petitioners also offered Exhibits 1-5, 7-8, 10-13, 15 and 17. All were accepted into evidence.

At the conclusion of the hearing, public comment was heard.

A transcript of the hearing was ordered. The Transcript was filed February 21, 2000. Proposed orders were, therefore,

required to be filed on or before March 2, 2000. Proposed Recommended Orders were filed by Petitioners and both Respondents on March 2, 2000.

Petitioners filed a Motion For Leave to Exceed Page Number with its Proposed Recommended Order. It was represented in the Motion that Respondents have no objection to the Motion. The Motion is hereby granted.

The Proposed Recommended Orders filed by the parties have been fully considered in entering this Recommended Order.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, Florida Chapter of the Sierra Club (hereinafter referred to as "Sierra Club"), is a California corporation. Sierra Club's corporate purposes include the exploration and enjoyment of wild places of the State of Florida and the protection and restoration of the quality of the natural and human environment.

2. A number of Sierra Club's members use the Sante Fe, Suwannee, and Ichetucknee Rivers for recreation and enjoyment. Activities include swimming, fishing, and boating.

3. Petitioner, Save Our Suwannee, Inc. (hereinafter referred to as "SOS"), is a Florida corporation. SOS is, therefore, a "citizen" of the State of Florida for purposes of Section 403.412(5), Florida Statutes. SOS timely filed a verified Petition for Administrative Hearing pursuant to Section 403.412(5), Florida Statutes, initiating this proceeding.

4. Respondent, Department of Environmental Protection (hereinafter referred to as the "Department"), is an agency of the State of Florida. The Department is charged with the authority to, among other things, issue air construction permits and provide protection of the waters of the State, including Outstanding Florida Waters (hereinafter referred to as "OFWs").

5. Respondent, Suwannee American Cement Company, Inc. (hereinafter referred to as "Suwannee American"), is a corporation which plans to construct and operate a portland cement manufacturing plant in Suwannee County, Florida.

B. Suwannee American's Proposed Project.

6. Suwannee American plans to build and operate a dry process preheater/precalciner type portland cement manufacturing plant (hereinafter referred to as the "Proposed Plant") on property located near Branford, Suwannee County, Florida. Portland cement is a dry powder product which is normally used to make cement when it is mixed with water and other components.

7. The Proposed Plant will be located on over 800 acres of land (hereinafter referred to as the "Proposed Site") located on U.S. Highway 27 at County Road 49. The Proposed Site is located approximately four miles to the west of the Ichetucknee River's intersection with U.S. Highway 27, approximately three miles north of the Sante Fe River, and approximately 3.4 miles to the east of the Suwannee River.

8. The Proposed Plant will have the capacity to produce 150 tons per hour and 1,191,360 tons per year of portland cement.

9. The Proposed Plant has been designed by Krupp Polysius, a world-wide designer and builder of cement plants. General engineering for the Proposed Plant will be provided by Agra Simons, a nationwide engineering firm. It is anticipated that the Proposed Plant will cost in excess of $1,000,000.00 to build.

10. The primary components in portland cement are limestone and sand. A limerock quarry is located on the Proposed Site. The quarry has been operated since the 1930s. The quarry will be used as a source of limestone and sand for the Proposed Plant.

11. The limestone and sand are stored in bins located on the Proposed Site. Alumina, iron, and gypsum are added to the limestone and sand. The mixture, which is referred to as the "feeder material," is measured and placed on a roller mill where it is finely ground. The ground feeder material is transferred from the roller mill to a storage and homogenizing silo. From the silo the material is measured again and fed into a preheater/precalciner for processing (including heating) and then transferred to a rotary kiln. The material is heated further in the rotary kiln. The feeder material is ultimately burned at temperatures of 2700 to 2900 degrees Fahrenheit.

12. The burning of the material causes a chemical change in the feeder material. This chemical change results in the production of what is referred to as "clinker." The Proposed Plant will have a capacity to produce approximately 750,000 tons of clinker per year. After the clinker is produced it is dropped into an air quenching cooler and, after it is cooled, it is stored in silos at the Proposed Site.

13. The clinker is subsequently ground into a fine power to produce the final product, portland cement. The cement is stored on site until it is shipped from the Proposed Site by truck.

14. More than one and a half tons of feeder material are required to produce one ton of clinker. Therefore, siting the Proposed Plant at a site with a quarry will reduce the cost of operating the Proposed Plant.

15. The process of producing the cement will cause the emission of pollutants into the atmosphere at two major points in the Proposed Plant: (a) the preheater and kiln; and (b) the cooler. A "baghouse" will be employed at the preheater and kiln to collect some of the pollutants in the emissions prior to release into the atmosphere. Mercury is not one of the pollutants which the baghouse is intended to reduce.

C. Suwannee American's Permit Application, the Department's Proposed Decision, and Challenges to the Department's Proposed Decision.

16. Because of the expected emissions of pollutants into the air from the Proposed Plant Suwannee American is required to obtain an air construction permit from the Department. Rule 62-212.400, Florida Administrative Code.

17. On November 30, 1998, Suwannee American filed an application for an air construction permit for the construction of the Proposed Plant. The application was subsequently reviewed by the Department for compliance with the rules governing the issuance of air construction permits. The Department did not review the application for compliance with water quality impacts.

18. On June 22, 1999, the Department issued a Notice of Intent indicating that Suwannee American's permit application was denied. The Notice was published on July 2, 1999.

19. Suwannee American timely filed a Petition for Administrative Hearing challenging the Department's decision to deny the permit application.

20. Sierra Club and SOS also timely filed a Petition for Administrative Hearing asserting additional grounds for denial of Suwannee American's permit application. Sierra Club and SOS asserted that discharges from the Proposed Plant would result in violations of Florida water quality standards.

21. On October 21, 1999, a Recommended Order of Dismissal was entered recommending that the Petition filed by Sierra Club and SOS be dismissed for failure to raise any cognizable issue.

22. On November 18, 1999, the Department and Suwannee American entered into a Settlement Agreement pursuant to which the Department agreed to issue an air construction permit to Suwannee American. A draft permit was attached as Exhibit B to the settlement agreement (hereinafter referred to as the "Draft Permit").

23. On December 1, 1999, without ruling on the substance of the Recommended Order of Dismissal, the Department remanded this case to the Division of Administrative Hearings with instructions to conduct a formal administrative hearing.

D. Emissions Expected from the Proposed Plant Requiring Compliance with Applicable "Prevention of Significant Deterioration" Permitting Program Standards.

24. The Department has established a "prevention of significant deterioration" or "PSD" permitting program in an effort to protect air quality in the State. The PSD program includes standards which must be met by applicants for air construction permits if the potential rate of expected emissions of certain designated air pollutants from a proposed facility meet or exceed certain levels. Rule 62-212.400, Florida Administrative Code.

25. The expected emissions from the Proposed Plant that are subject to PSD review relevant to this case include the following: (a) more than 100 tons per year of sulfur dioxide, nitrogen oxides, carbon monoxide, and particulate matter; and (b) in excess of 40 tons of volatile organic compounds per year. For each of these expected pollutants, PSD program compliance requires a determination of whether the Proposed Plant will: (a) meet "Best Available Control Technology" standards (hereinafter referred to as "BACT"), for the expected pollutants; (b) violate ambient air quality standards will for those expected pollutants; and (c) allow PSD increments for the expected pollutants to be exceeded.

26. Ambient air quality standards are the levels of air pollutants that the Environmental Protection Agency (hereinafter referred to as the "EPA") has determined will not cause adverse impacts to human health or the environment. These standards have

been adopted by the Department. Allowable PSD increments are the incremental increases in air pollutant concentrates that have been established as acceptable without being considered to significantly degraded air quality.

27. The parties stipulated, and the evidence demonstrated, that the Proposed Plant, as approved by the Department and limited by the Draft Permit, will achieve BACT, will not cause a violation of any ambient air quality standard, and will not exceed any applicable PSD increment.

28. The evidence also proved that impacts on air quality from the Proposed Plant on soils and vegetation will not be adverse, and that impacts on visibility will not be significant.

29. Based upon the foregoing, it is concluded that Suwannee American's Proposed Plant complies with the permitting requirements for the "construction or modification of any emissions unit or facility that would cause or contribute to a violation of any ambient air quality standard." Rule 62-212.400(1)(a), Florida Administrative Code. Suwannee American is, therefore, entitled to the issuance of an air construction permit for the Proposed Plant unless it fails to meet water quality standards, to the extent determined applicable to Suwannee American's proposed project.

E. Atmospheric Mercury Emissions.

30. In addition to the emission of air pollutants from the Proposed Plant which triggered PSD review, the Proposed Plant will also emit mercury into the atmosphere. Mercury is a metal that occurs naturally in the environment. The levels of mercury

expected from the Proposed Plant are not, however, high enough to require PSD review with regard to the expected mercury emissions or to authorize the Department to deny an air construction permit based upon the levels of mercury determined by the Department and EPA to be permissible.

31. Mercury can pose a serious danger to the public health, safety, and welfare. Mercury, in the form of methyl mercury, acts as a neurotoxin when consumed. The consumption of fish containing mercury can result in human exposure to mercury which is potentially significant. An indicator of the potential harm to humans from mercury may, therefore, be determined through measuring the mercury level in fish. Measuring the amount of mercury within the water column is not, however, determinative of the potential harm to humans of mercury in the water.

32. Mercury is emitted into the air in an inorganic form. To constitute an immediate danger to humans, the mercury must be converted to methyl mercury, a form of organic mercury, and must be processed through the food chain. This process is referred to as biomagnification. The creation of methyl mercury and the process of biomagnification in water involves a complex interaction of physical, chemical, and biological factors. Numerous factors impact this process, including levels of nutrients, sulfates, dissolved organic carbon, dissolved oxygen, and chloride.

33. The conversion of inorganic mercury to methyl mercury typically begins with the consumption of the inorganic mercury by sulfate-reducing bacteria, the release of methyl mercury into the

water, and the ultimate bioaccumulation of the mercury in fish. Once consumed by single-cell organisms, the mercury moves up the food chain until it ultimately reaches predator fish, such as large-mouth bass, where the concentrations of mercury are ultimately highest. The predator fish are then consumed by humans.

34. Sulfate-reducing bacteria are found in areas with a dissolved organic carbon source to feed on. Wetlands are typically a high source of organic carbon.

35. Because of the complex chemical process involved in the production of methyl mercury, some water bodies are more sensitive to the effects of mercury deposition or the disposition of inorganic mercury from its production source. This finding is supported by the fact that, even though the deposition of atmospheric mercury over South Florida is generally constant, water bodies in the area have responded differently. For example, the Everglades has relatively high levels of mercury while Lake Okeechobee does not.

36. Among the significant factors that impact the conversion of mercury released from a high temperature combustion source to methyl mercury is the form in which mercury is released into the atmosphere.

37. Until approximately ten years ago it was believed that mercury emitted into the atmosphere from a high temperature combustion source was emitted in the form of elemental mercury. Elemental mercury has a longer residence time in the atmosphere.

As a result, elemental mercury has a much smaller impact in the area near the source of its release into the atmosphere and less impact on waters close to the source of the emission.

38. More recent research has proved that mercury is released into the atmosphere in various forms, including particulate mercury and reactive gaseous mercury. Particulate mercury and reactive gaseous mercury have a shorter residence time in the atmosphere than elemental mercury. Particulate mercury and reactive gaseous mercury will, therefore, tend to deposit closer to their source and can have a greater impact on water resources close to the source of the emission. The emission of mercury in different forms into the atmosphere is referred to as "speciation."

39. The precise speciation rate of mercury from a portland cement plant such as the Proposed Plant is not well understood. Suwannee American's experts relied upon speciation rates ranging from 10 to 20 percent particulate and reactive gaseous mercury.

40. Testing data from cement plants concerning the speciation of mercury has been limited. One cement plant was tested on three occasions in a study referred to as the South Florida Atmospheric Mercury Monitoring Study (hereinafter referred to as "SoFAMMS"). The SoFAMMS reported a speciation rate for non-elemental mercury of between 21 and 29 percent.

41. Mercury speciation was also considered in a 1997 EPA Mercury Study Report to Congress. According to the EPA Mercury Study Report, a speciation rate of 80 percent elemental mercury, 10 percent particulate, and 10 percent reactive gaseous mercury

was found. Little relevant evidence concerning the basis for these findings was provided at hearing.

42. Another significant factor in the conversion of mercury released from a high temperature combustion source to methyl mercury is the deposition of the mercury to land or water surfaces after it is released into the air.

43. The deposition of pollutants to land or water surfaces takes place by either dry deposition or wet deposition. Dry deposition takes place through the diffusion of the pollutant in the atmosphere until it contacts a surface to which it adheres. Wet deposition takes place when the pollutant is either incorporated into droplets as rain forms which then fall, or the pollutant gets washed out as droplets of rain falls through the atmosphere.

F. Suwannee American's Estimates of Mercury Emissions.

44. Mercury emitted from the Proposed Plant will come from feeder material and the fuel used to heat the feeder material during the operation of the Proposed Plant.

45. The amount of mercury created and emitted from the Proposed Plant, regardless of its speciation or deposition rates, based upon the laws of physics, will not exceed the amount of mercury going into the Proposed Plant through feeder materials and fuel used to heat the feeder material.

46. In its initial application Suwannee American estimated that mercury emissions from the Proposed Plant would be limited to 20 pounds per year. This estimate was based upon a document, "AP-42," issued by the EPA. AP-42 deals with cement plant

facilities utilizing baghouses for the control of emissions, which Suwannee American had proposed with its initial application.

47. AP-42 emission factors were not based upon site-specific data and no background information is contained in AP-42 concerning the characteristics of the sources from which the factors were derived. AP-42 does rate the reliability of the emission factors for various sources referenced in AP-42, including portland cement plants, taking into account the different types of air pollution control technology used by the sources. The emission factors are rated for reliability from "A" to "E," with "A" being the most reliable and "E" being the least reliable. The emission factors for the results of portland cement plants reported in AP-42 were rated "D." The emission rate of mercury from cement kilns with baghouses reported in AP-42 was 20 pounds per year.

48. After review of Suwannee American's initial application, the Department questioned Suwannee American's estimated mercury emission and requested additional information to support its projection.

49. In response to the Department's request for additional information, Suwannee American eliminated the proposed use of a baghouse and submitted new calculations concerning mercury emissions for its newly configured Proposed Plant. Suwannee American's new estimate was that mercury emissions would not exceed 184 pounds per year.

50. Suwannee American's projection was based upon estimates of mercury emissions determined by three different methods of calculating emissions used by Suwannee America's environmental consultant:

a. First, the mercury content of the feeder material and fuel to be used at the Proposed Plant was estimated. Based upon this estimate, it was concluded that mercury emissions would be approximately 120 pounds per year;

b. Secondly, emissions from 12 to 15 operating cement plant facilities in the United States were reviewed. The average mercury emission from these plants was calculated and applied to the estimated production rate of the Proposed Plant. Based upon this analysis, Suwannee American estimated that mercury emissions would be approximately 140 pounds per year; and

c. Finally, AP-42 emission factors for cement plants utilizing electrostatic precipitators were considered. Based upon this analysis, Suwannee American estimated that mercury emissions would be approximately 184 pounds per year. It was this estimate that was accepted by the Department and added as a limitation in the Draft Permit.

51. Suwannee American's estimate of mercury emissions was based upon a "worst case scenario."

G. The Draft Permit Limitation on Mercury Emissions.

52. The Department accepted Suwannee American's estimate of mercury emissions from the Proposed Plant. The Draft Permit expresses the limitation on the amount of mercury that may be emitted by limiting the amount of mercury that may be introduced

into processing at the Proposed Plant to 184 pounds per consecutive 12-month period. This limitation applies to the total combined amount of mercury introduced in the form of feed materials and fuel.

53. At the final hearing Suwannee American agreed to a further limitation on the amount of allowed mercury in Draft Permit condition 13 that may be introduced into processing at the Proposed Plant to 97 pounds per consecutive 12 month period. This estimate was based upon a more detailed analysis of expected mercury emissions performed by Suwannee American after Sierra Club and SOS questioned the impact of mercury emissions from the Proposed Plant.

54. The EPA recommended in a letter to the Department dated December 23, 1999, that mercury emissions from the Proposed Plant be limited to 20 pounds per year.

55. Suwannee American proved that its estimate of the amount of mercury of 97 pounds per year that will be emitted from the Proposed Plant is reasonable.

56. Although mercury is subject to PSD review, no PSD review of Suwannee American's mercury emissions was performed nor required because it has projected that its emission of mercury will not exceed 200 pounds per year.

H. Air Emissions Monitoring.

57. The Draft Permit requires continuous monitoring of stack emissions for a number of pollutants which are expected to be emitted from the Proposed Plant, including sulfur dioxide,

nitrogen dioxide, opacity, and volatile organic compounds. Stack gas flow rate is also required to be monitored continuously.

58. Continuous monitoring for mercury is not required. Instead, the Draft Permit only requires an initial stack test for mercury to determine compliance with the limitation on the amount of mercury emissions from the Proposed Plant. This test will only determine the amount of mercury emitted during the limited period of the test.

59. Continuous monitoring of compliance with the limitation on mercury introduced into processing at the Proposed Plant is to be accomplished through testing of the "input" materials. For this purpose, "input" materials are deemed to consist of the feeder material and fuel used in the manufacturing process at the Proposed Plant.

60. A schedule for testing input materials is included in the Draft Permit in Specific Condition 27. The Draft Permit provides for the following schedule of testing:

a. During the first quarter of operation of the Proposed Plant, testing of input materials for mercury content is to be based upon daily samples of feed materials and fuel for each month. A sample from the composite of the daily samples for each of the months during the quarter is to be analyzed;

b. For the next three quarters of operation, daily samples for one month during each quarter are to be taken and a sample from the composite of the daily samples for that month is to be analyzed for mercury levels;

c. For each year after the first year of operation of the Proposed Plant, daily samples are to be taken during one month during the year and a sample from the composite of the daily samples for that month is to be analyzed for mercury levels, except as follows:

(1) If there is a change in feed material or fuels, the frequency of testing is to revert to b. for the next three quarters; or

(2) If the monthly composite shows a total monthly mercury throughput of greater than 7.7 pounds per month, the frequency of testing is to revert to b. for the next three quarters or until the monthly throughput is less than or equal to 7.7 pounds per month, whichever is longer.

61. The Draft Permit also provides that the Department may require special compliance tests if it has good reason to believe that emission standards are being violated.

62. No other monitoring of mercury emissions from the Proposed Plant is required by the Draft Permit to ensure that the limitation of the amount mercury in the feeder materials and fuel will be met. Nor is there any requirement in the Draft Permit to determine the speciation rate of mercury emitted from the Proposed Plant.

63. By limiting the amount of mercury that goes into the manufacturing process to the amount of mercury allowed by the Draft Permit, the amount of mercury emitted from the Proposed Plant should not exceed the amount of mercury emissions projected by Suwannee American.

64. The monitoring requirements of the Draft Permit are reasonable, effective, and enforceable.

I. Fuel Proposed for the Proposed Plant's Operation.

65. Fuel is required to heat the feeder material in the preheater/precalciner and the rotary kiln. Suwannee American has been authorized by the Department to burn Appalachian coal, petroleum-coke, natural gas, and up to 40 percent tires as fuel in its operation of the Proposed Plant. Suwannee American has proposed to initially burn Appalachian coal, which has been determined to be available in the quantities necessary to operate the Proposed Plant.

66. Mercury levels in coal can amount to a high percentage of mercury emissions from a portland cement plant. The type of coal used by Suwannee American, therefore, will play a significant role in determining whether the projected mercury emissions from the Proposed Plant can be achieved.

67. Suwannee American has estimated that coal used by it at the Proposed Plant will contain 143 parts per billion of mercury. This level of mercury in coal will result in approximately 35 pounds of mercury emissions per year from the Proposed Plant.

68. Mercury content of coal used as fuel in the Proposed Plant can vary widely. The average and median mercury content for all Appalachian coal is high: 466 parts per billion and 566 parts per billion, respectively.

69. Although Suwannee American had not entered into a contract or a letter of intent for the purchase of coal-containing levels of mercury consistent with its estimated

emissions at the time of the formal hearing of this case, coal which will meet those estimates is commercially available in amounts necessary to meet permit conditions concerning mercury emissions and Suwannee American is committed to acquiring coal of the necessary grade.

70. The evidence proved that Suwannee American can purchase coal necessary for the operation of the Proposed Plant which will ensure compliance with the conditions of the Draft Permit concerning mercury emissions.

71. The evidence also proved that the conditions of the Draft Permit concerning mercury emissions can be enforced regardless of the difficulty that may be encountered by Suwannee American in finding coal with low enough mercury content for use at the Proposed Plant.

J. Mercury Deposition.

72. Obviously, since the Proposed Plant is not yet operational, it is not possible to accurately determine where mercury emitted from the Proposed Plant will be deposited or the "deposition" of mercury emitted. Air quality dispersion modeling, however, can facilitate estimates of the expected impacts of the Proposed Plant on air quality and on the surrounding area.

73. Computer programs are used to facilitate air dispersion modeling. These programs simulate the behavior of pollutants released into the atmosphere. The programs take into consideration meteorological data, such as wind speed and

direction, and information concerning the amount of pollutant to be reduced and its rate of speciation.

74. A number of variables used in air dispersion modeling can affect modeling outcomes. The accuracy of assumptions concerning those variables can impact the reliability of the modeling outcomes. Significant variables include emission rates, speciation rates, and deposition. To the extent that any or all of these variables are uncertain, there will be an equivalent uncertainty in the modeling results concerning concentrations and ultimate deposition rates of pollutants released into the atmosphere.

75. At the request of the Department, Suwannee American performed modeling to determine the likely deposition of mercury emissions from the Proposed Plant. The modeling was performed to determine the impact of mercury emissions on Class I PSD areas, such as St. Marks and Bradwell Bay, and the area within five miles of the Proposed Plant. A five-mile radius takes into account the location of the Ichetucknee, Sante Fe, and Suwannee Rivers (hereinafter jointly referred to as the "Three Rivers").

76. Initial modeling was performed using the most conservative assumptions: (a) that 100 percent of the mercury emitted would be emitted in the form of particulate matter or reactive gaseous mercury; and (b) that approximately one-third of the mercury emitted would be deposited in the vicinity of the Proposed Plant.

77. Suwannee American's initial modeling resulted in an estimate that, based upon its preliminary estimate that 184

pounds of mercury would be emitted per year from the Proposed Plant, 20 to 50 micrograms per meter squared per year of mercury will be deposited near the confluence of the Sante Fe and Ichnetucknee Rivers.

78. Suwannee American's initial modeling estimates, based upon its estimate that 184 pounds of mercury would be emitted per year from the Proposed Plant, also indicated that one-third of the mercury emitted from the Proposed Plant would be deposited within the 1,384 square miles of the Sante Fe River basin. The amount of mercury deposited at the confluence of the Sante Fe and Ichetucknee Rivers was estimated to be 15 micrograms per square meter per year. The assumptions that went into this modeling were unreasonably conservative.

79. Subsequent to Suwannee American's initial modeling, additional modeling was performed by Suwannee America to determine the deposition rate of mercury in the area of the Three Rivers at the request of the Department. Based upon the additional modeling, Suwannee American developed "isopleths" or contour lines depicting where the maximum annual concentrations of mercury would be expected to be found. Isopleths were also developed to depict the quantity and location of maximum annual mercury deposition. Suwannee American's isopleths could be off by as much as a kilometer, underestimating the concentrations of mercury in the area of the Icthnetucknee and Sante Fe Rivers.

80. In its subsequent modeling Suwannee American made the same assumptions concerning the amount of mercury emitted and the speciation of the emitted mercury it made in its initial

modeling: (a) that 184 pounds of mercury would be emitted per year; and (b) that 100 percent of the mercury would be emitted in the form of particulate matter or reactive gaseous mercury.

81. A month before the formal hearing of this case, Suwannee American performed a third round of modeling of mercury deposition. The additional modeling was based upon the emission of 97 pounds of mercury per year and the following speciation rate: (a) 80 percent elemental mercury; (b) 10 percent particulate matter; and (c) 10 percent reactive gaseous mercury. Two modeling tests were performed for Suwannee American using these assumptions.

82. The first modeling test used the original dispersion modeling prepared for Suwannee American with a 10 percent correction for the emission rate. The second modeling test used dispersion parameters contained in an 1997 EPA Mercury Study Report to Congress.

83. The modeling performed by Suwannee American was reasonable and professionally performed. The results of the modeling are, therefore, reliable.

84. Suwannee American's modeling just prior to the formal hearing estimated, based upon the assumption that 97 pounds of mercury would be emitted per year from the Proposed Plant, a deposition rate of mercury in the vicinity of the Sante Fe River of 3.5 micrograms per square meter per year based upon the first modeling and 1.6 to 2.6 micrograms per square meter per year within a five-mile radius from the Proposed Plant based upon the second modeling. These projections indicate that mercury

emissions from the Proposed Plant will result in the deposition of less than 10 percent of the amount of mercury already existing in the natural background.

85. Background mercury, or mercury normally found in the natural background, is estimated to be 25 micrograms per square meter per year. A 10 percent increase in background mercury would not be detectable.

86. The estimated deposition of mercury from the Proposed Plant suggested by Suwannee American's modeling is supported by the weight of the evidence in this case. Petitioners performed no modeling to refute Suwannee American's estimates. The testimony of Petitioners' experts to the contrary was not persuasive and has been rejected.

K. The Current State of Mercury in the Three Rivers.

87. The Three Rivers have all been declared OFWs. Rule 62-302.700, Florida Administrative Code.

88. The Three Rivers have also been declared Class III waters and, therefore, have a designated use of recreation, and the propagation and maintenance of a healthy, well-balanced population of fish and wildlife. Rule 62-302.400, Florida Administrative Code.

89. An OFW designation is made to recognize exceptional recreational and/or ecological significance of a water body. See Section 403.061(27), Florida Statutes, and Rule 62-4.245, Florida Administrative Code.

90. After elevated levels of mercury were found in the tissue of fish taken from the Everglades of South Florida, the

State undertook testing of fish in fresh and coastal waters throughout the state. Based upon its findings, the State established two levels of advisories concerning mercury levels in fish tissue.

91. One level of mercury level advisory established by the States is a "limited consumption" advisory. This advisory is issued when the mercury levels in fish taken from a water body are found to range from 0.5 parts per million to 1.5 parts per million. "Limited consumption" advisories are issued by the State's Health Officer to protect public consumption of excessive amounts of mercury.

92. The second and highest level of advisory concerning mercury levels in fish tissue is a "no consumption" fish advisory. This advisory is issued when mercury levels are found to exceed 1.5 parts per million. When issued, the public is warned not to eat issue fish at all from waters to which the advisory applies. Only one "no consumption" fish advisory is currently in effect in Florida.

93. On May 19, 1989, the State issued a "limited consumption" advisory for the Suwannee River and its tributaries recommending the limited consumption of large mouth bass taken from the Three Rivers. This advisory has not been withdrawn.

94. The last testing of fish from the Sante Fe River was performed in 1989. The levels of mercury found from those tests ranged from 0.55 to 1.27 parts per million.

95. Sampling of fish from the Suwannee River has been performed annually, except during 1997, since 1989. In 1999, mercury levels ranged from 0.44 to 1.57 parts per million.

96. Mercury levels throughout the State indicate a slight declining trend in the amount of mercury found in fish.

97. Despite the advisory concerning the level of mercury in large mouth bass taken from the Three Rivers, mercury levels in the Three Rivers are within acceptable water quality standards for mercury established by the Department's rules. No Department rule prohibits the issuance of a permit which otherwise meets all the requirements concerning the levels of mercury emissions into the air or water specified in the Department's rules because of an outstanding mercury level in fish advisory.

L. The Impact of Mercury Emissions from the Proposed Plant on the Three Rivers.

98. No one disputes that some amount of mercury emitted from the Proposed Plant will find its way into the Three Rivers. At issue is whether the amount of mercury that makes its way into the Three Rivers will be adverse to the public health, safety, and welfare. Suwannee American has given reasonable assurances that it will not.

99. Using Suwannee American's projections concerning the amount of mercury to be emitted from the Proposed Plant (97 pounds per year), the speciation rate of the mercury (80, 10, 10), and the deposition of mercury from the Proposed Plant, Suwannee American caused the potential effects of mercury on the Three Rivers to be analyzed using modeling and algorithms or

equations contained in the Health Risk Assessment Protocol for Combustion Facilities prepared by the EPA. The impact of mercury on water quality, sediments, and the tissue of fish in the Three Rivers was projected by Suwannee American. The projections were made by Dr. Christopher Teaf.

100. The assumptions used by Dr. Teaf were conservative and reasonable.

101. Dr. Teaf predicted that surface water mercury concentrations from the Proposed Plant in the Three Rivers will be less than 0.00000000006 milligrams per liter over a 100 year period. Department surface water quality standards allow .000012 milligrams per liter of mercury. Therefore, the level of mercury allowed by the Department's rules is approximately 200,000 times higher than that expected from the Proposed Plant.

102. The projected surface water mercury concentrations for the Proposed Plant are between 50,000 and 100,000 times below detectable amounts of mercury in surface water samples.

103. Dr. Teaf also predicted that mercury concentrations in sediment of the Three Rivers as a result of operation of the Proposed Plant will be 0.0000003 milligrams per kilogram. This amounts to approximately 500,000 times less than the Department's Threshold Effects Level for mercury in sediment of 0.13 milligrams per liter.

104. Projected sediment concentrations of mercury are between 10,000 and 100,000 times less than a detectable or measurable quantity.

105. Finally, Dr. Teaf predicted that methyl mercury concentrations in fish tissue from the Three Rivers as a result of the Proposed Plant will be 0.0002 milligrams per kilogram. The level of mercury in fish tissue considered to cause concern is 0.5 milligrams per liter, which is 2,500 to 3,000 times lower than the rate considered to be too high.

106. The projected levels of mercury in fish tissue are 100 times lower than detectable limits for mercury in fish tissue and would have no impact on current health advisories.

107. Dr. Teaf's predicted mercury levels from the Proposed Plant may be somewhat low to the extent that they rely upon a speciation rate of 80 percent elemental mercury. Even if a 0 percent elemental mercury speciation rate is assumed to be more appropriate, however, the mercury which reasonably can be expected to be found in the water column, sediments, and the tissue of fish in the Three Rivers will still be below acceptable standards and detectable amounts.

108. Mercury in the Three Rivers attributable to the Proposed Plant will not be detectable or measurable. Therefore, Suwannee American has provided reasonable assurances that the Proposed Plant will have no impact on the Three Rivers or their use, will not pose a danger to the public health, safety, or welfare, and will comply with all applicable statutes and all Department rules.

M. Ultimate Findings of Fact.

109. Suwannee American has provided reasonable assurances that the construction and operation of the Proposed Plant will not violate any air pollution permitting requirements.

110. Suwannee American has also provided reasonable assurances that mercury emissions from the Proposed Plant will not violate any water quality standard, will not significantly degrade any OFWs, impair the designated use of the Three Rivers, or pose a serious danger to the public health, safety, or welfare.

CONCLUSIONS OF LAW

A. Jurisdiction.

111. The Division of Administrative Hearings has jurisdiction of the parties to, and the subject matter of, this proceeding. Section 120.57, Florida Statutes (1997).

B. Burden of Proof.

112. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the proceeding. Antel v. Department of Professional Regulation, 522 So. 2d 1056 (Fla. 5th DCA 1988); Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 249 (Fla. 1st DCA 1977).

113. In this proceeding, it is Suwannee American that is asserting the affirmative: that the Department should issue an air construction permit. Suwannee American, therefore, had the ultimate burden of proof. Suwannee American was required to meet

its burden by the preponderance of the evidence. J.W.C. Co., supra.

114. In order for Suwannee American to meet its burden of proof, it was required to present a prima facie showing of entitlement to the air construction permit taking into account the objections raised by Petitioners. Suwannee American met its burden.

115. Following the presentation of Suwannee American's prima facie case, Petitioners had the burden of proving the allegations of their Petition as modified by the stipulated issues of law contained in the Joint Prehearing Stipulation. The evidence presented by Petitioners in support of their Petition was required to be of at least equivalent quality to the evidence presented by Suwannee American. See Hoffert v. St. Joe Paper Company, 12 F.A.L.R. 4972 (Fla. Dept. of Env. Reg. 1990). Ultimately, Suwannee American was required to prove that it was entitled to the permit which it has applied for. Suwannee American met its burden.

C. Standing.

116. SOS has argued that it has standing to institute this proceeding pursuant to Section 403.412(5), Florida Statutes:

> In any administrative . . . proceedings authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction . . . a citizen of the state shall have standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing,

polluting, or otherwise injuring the air, water, or other natural resources of the state.

117. SOS is a citizen of the State and it filed a verified Petition in this matter. SOS, therefore, has standing to participate in this matter. Suwannee American's assertion that SOS's participation is limited to that of an Intervenor too narrowly construes Section 403.412(5), Florida Statutes.

118. Sierra Club is not a citizen of the State and, therefore, has not relied upon Section 403.412(5), Florida Statutes, to support its standing in this matter. Instead, Sierra Club has asserted that it is a "substantially affected" person as those terms are used in Section 120.57, Florida Statutes, and interpreted in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981).

119. The substantial effect alleged by Sierra Club is the impact on its members who use the Three Rivers for recreation and enjoyment, including swimming, fishing, and boating. The alleged adverse impacts are sufficient to support Sierra Club's standing to participate in this proceeding.

D. Petitioners' Challenge.

120. In the Joint Prehearing Stipulation filed by the parties, Petitioners stipulated to "Disputed Issues of Fact and Law" which must be addressed in this proceeding. The disputed issues of fact and law, other than issues concerning Petitioners' standing, agreed to by the parties are as follows:

1. Whether the Applicant must establish that certain surface water quality standards (listed below) will not be violated.

2. If the Applicant must establish in this proceeding that water quality standards will not be violated, whether the Applicant has provided reasonable assurances that the emissions of mercury from the proposed facility will not violate the following specific water quality standards related to Outstanding Florida Waters, the classification of surface waters and the minimum criteria for surface waters.

a. Rule 62-4.242(2)(a), Fla. Adm. Code, "Antidegradation Permitting Requirements; Outstanding Florida Waters" and rule 62-302.700, "Special Protections, Outstanding Florida Waters." Specifically, whether the emissions of mercury from the proposed facility will "significantly degrade" any of the following OFWs: the Sante Fe River, the Suwannee River, and the Ichetucknee River.

b. Rule 62-302.400(1), Fla. Adm. Code, "Classification of Surface Waters" (describing he designated use of Class III waters as "recreation, propagation and maintenance of a healthy, well-balanced population of fish and wildlife"). Specifically, Petitioners contend that emissions of mercury from the proposed facility will impair the designated use of the waters identified in Para 2.a. above as Class III waters and as otherwise prohibited in rules 62-302.300(14), (15), (16) and (17), Fla. Adm. Code.

c. Rule 62-302.500(1)(a)6, Fla. Adm. Code, "Surface Waters, Minimum Criteria".

* * *

121. These issues have all been addressed and disposed of in this Recommended Order. To the extent that Petitioners asserted any additional issues in their Proposed Recommended Order, those issues have been rejected. The Joint Prehearing

Stipulation signed by Petitioners defined the scope of the issues appropriately considered in this matter.

E. The Department's Broad Authority to Protect the Air and Waters of the State Through Permitting.

122. The Department has been charged with broad responsibilities and given broad powers to protect the air and waters of the State of Florida. Chapter 403, Florida Statutes, the "Florida Air and Water Pollution Control Act" (hereinafter referred to as the "Act").

123. The Department's broad powers and duties are generally described in Section 403.061 of the Act. Those powers and duties include, in part, the following:

> The department shall have the power and the duty to control and prohibit pollution of air and water in accordance with the law and rules adopted and promulgated by it and, for this purpose, to:
>
> . . . .
>
> (6) Exercise general supervision of the administration and enforcement of the laws, rules, and regulations pertaining to air and water pollution.
>
> (7) Adopt, modify, and repeal rules and regulations to carry out the intent and purposes of this act. . . .
>
> * * *
>
> (9) Adopt a comprehensive program for the prevention, control, and abatement of pollution of the air and waters of the state . . . .
>
> (10) Develop a comprehensive program for the prevention, abatement, and control of the pollution of the waters of the state.

> In order to effect this purpose, a grouping of the waters into classes may be made in accordance with the present and future most beneficial uses. . . .
>
> (11) Establish ambient air quality and water quality standards for the state as a whole or any part thereof . . . .
>
> * * *
>
> (14) Establish a permit system whereby a permit may be required for the operation, construction, or expansion of any installation that may be a source of air or water pollution and provide for the issuance and revocation of such permits and for the posting of an appropriate bond to operate.
>
> * * *
>
> (27) Establish rules which provide for a special category of water bodies within the state, to be referred to as "Outstanding Florida Waters," which water bodies shall be worthy of special protection because of their natural attributes. Nothing in this subsection shall affect any existing rule of the department.

124. The Act includes specific guidance for the general issuance or denial of permits for any "stationary installation" that is reasonably expected to be a source of air or water pollution. Section 403.087 of the Act provides the following:

> (1) A stationary installation that is reasonably expected to be a source of air or water pollution must not be operated, maintained, constructed, expanded, or modified without an appropriate and currently valid permit issued by the department, unless exempted by department rule. . . .

125. The term "installation" is defined in Section 403.031(4), of the Act as:

> any structure, equipment, or facility, or appurtenances thereto, or operation which

> may emit air or water containments in quantities prohibited by rules of the department.

See also Rule 62-4.020(6), Florida Administrative Code.

126. In order to qualify for issuance of a permit authorized by Section 403.087 of the Act the applicant for the permit must show, if its installation "may reasonably be expected to be a source of pollution," that the "installation is provided or equipped with pollution control facilities that will abate or prevent pollution to the degree that will comply with the standards or rules adopted by the department . . . ."

127. The Department is required to provide for the issuance, denial, modification, and revocation of permits required by Section 403.087(1) of the Act for stationary installations through duly promulgated rules. Section 403.087(2) of the Act. It is, therefore, reasonable for applicants for permits from the Department to assume that the rules of the Department contain all the requirements for the issuance of permits.

128. Section 403.087(5) of the Act provides, in part, the following concerning the issuance of permits:

> (5) The department shall issue permits to construct, operate, maintain, expand, or modify an installation which may reasonably be expected to be a source of pollution only when it determines that the installation is provided or equipped with pollution control facilities that will abate or prevent pollution to the degree that will comply with the standards or rules adopted by the department . . . ."

Again, it is contemplated that rules adopted by the Department establish the standards with which an applicant must comply in order to obtain any permit required by the Act.

129. In addition to the broad responsibilities and powers concerning pollution of the air and waters given the Department pursuant to the Act, the Department is authorized to impose stricter permitting and enforcement provisions for OFWs. Section 403.061(34) of the Act. Those stricter permitting and enforcement provisions are, however, also required to be imposed by the adoption of rules by the Department.

130. The authority of the Department to protect the air and waters of the State is clearly broad enough to authorize the Department to control or prohibit the direct or indirect discharge of pollutants into the air or the waters of the state. The Act, however, just as clearly contemplates that the Department will exercise its authority and responsibility through the adoption of rules.

F. The Department's Rules.

131. The Department has in fact promulgated a broad array of rules governing the issuance of permits authorized by the Act:

a. Chapter 62-4, Florida Administrative Code, provides rules governing the issuance of permits generally;

b. Department rules beginning at Chapter 62-204, Florida Administrative Code, deal with air quality in the State; and

c. Department rules beginning at Chapter 62-301, Florida Administrative Code, govern the protection of the waters of the State.

132. The purpose and scope of Part I, Chapter 62-4, Florida Administrative Code, includes, in part, the following:

> This Part sets forth procedures on how to obtain a permit from the State of Florida Department of Environmental Protection. This Part also provides requirements and procedures for the issuance, denial, renewal, extension, transfer, modification, suspension, and revocation of any permit required by the Department of Environmental Protection. . . .

Rule 62-4.001, Florida Administrative Code.

133. Part I, Chapter 62-4, Florida Administrative Code, provides: definitions; exemptions from permitting; general procedures, including processing fees, applicable to all permits; procedures for processing permits once received by the Department; and other rules dealing with permitting in general.

134. The purpose and scope of Part II, Chapter 62-4, Florida Administrative Code, includes, in part, the following:

> This Part sets forth additional requirements for Department permits, exemptions from permitting, requirements for mixing zones and zones of discharge, and related requirements. . . .

Rule 62-4.200, Florida Administrative Code.

135. Part II, Chapter 62-4, Florida Administrative Code, provides general requirements for specific types of permits. Rules are provided for construction permits and operating permits.

136. Rule 62-4.210, Florida Administrative Code, provides guidance concerning permits to construct any installation or facility "which will reasonably be expected to be a source or air or water pollution . . . ." Rule 62-4.220, Florida

Administrative Code, provides guidance concerning operating permits.

137. Rule 62-4.242, Florida Administrative Code, provides "antidegradation permitting requirements" for OFWs. Rule 62-4.242(2), Florida Administrative Code, provides, in part:

> (2) Standards Applying to Outstanding Florida Waters.
>
> (a) No Department permit or water quality certification shall be issued for any proposed activity or discharge within an Outstanding Florida Waters, or which significantly degrades, either alone or in combination with other stationary installations, any Outstanding Florida Waters, unless the applicant affirmatively demonstrates that:
>
> * * *
>
> 2. The proposed activity or discharge is clearly in the public interest, and either
>
> a. A Department permit for the activity has been issued or an application for such permit was complete on the effective date of the Outstanding Water designation; or
>
> b. The existing ambient water quality within Outstanding Florida Waters will not be lowered as a result of the proposed activity or discharge, except on a temporary basis during construction for a period of not to exceed thirty days; lowered water quality would occur only within a restricted mixing zone approved by the Department; and, water quality criteria would not be violated outside the restricted mixing zone. . . .
>
> * * *
>
> (c) For the purpose of this section the term "existing ambient water quality" shall mean (based on the best scientific information available) the better water quality of either (1) that which could reasonably be expected to have existed for the baseline year of an Outstanding Florida Water designation or (2) that which existed

during the year prior to the date of a permit application. It shall include daily, seasonal, and other cyclic fluctuations, taking into consideration the effects of allowable discharges for which Department permits were issued or applications for such permits were filed and complete on the effective date of designation.

* * *

138. When considered in isolation, Rule 62-4.242, Florida Administrative Code, could be interpreted to support a conclusion that all permit applications, whether they be for permits involving the emission of pollutants into the atmosphere or the discharge of pollutants into OFWs or other activities within OFWs, must comply with the conditions for the issuance of a permit quoted in Conclusion of Law 137. Reading Rule 62-4.242, Florida Administrative Code, and the other chapters of rules found in Chapter 62, Florida Administrative Code, together, however, does not support such an interpretation.

139. Considering all of the Department's rules together, while Chapter 62-4, Florida Administrative Code, provides general requirements governing the application for, and the issuance of, all types of permits the Department has authority to issue, the specific requirements which must be complied with depend upon whether a permit is being sought for a proposed facility that will emit pollutants into the atmosphere or a proposed facility that will discharge pollutants into the waters of the State. Nothing in the Department's rules supports a conclusion that a facility seeking a permit for one activity must also comply with the requirements for another activity.

140. If the Department had intended that an applicant for a permit authorizing the emission of pollutants into the atmosphere must comply with the specific requirements for a permit authorizing a discharge of pollutants into the waters of the State, the Department could have easily provided in Chapter 62-4, Florida Administrative Code, that all applicants for permits must meet both the requirements for air emission permits and water discharge permits. The fact that the Department has not adopted such a rule supports a conclusion that there is no such requirement imposed on applicants.

G. The Rules Governing Permits to Emit Pollutants Into the Atmosphere.

141. The rules governing proposed facilities that will emit pollutants into the atmosphere begin at Chapter 62-204, Florida Administrative Code:

> (1) This chapter establishes maximum allowable levels of pollutants in the ambient air, or ambient air quality standards, necessary to protect human health and public welfare. This chapter also establishes maximum allowable increases in ambient concentrations for subject pollutants to prevent significant deterioration of air quality in areas where ambient air quality standards are being met. It further specifies approved air quality monitoring and modeling methods.

Rule 62-204.100(1), Florida Administrative Code.

142. General requirements for stationary sources of air pollution are provided in Chapter 62-210, Florida Administrative Code:

> The Department of Environmental Protection adopts this chapter to establish general requirements for stationary sources of air

> pollutant emissions. This chapter provides criteria for determining the need to obtain an air construction or air operation permit. It establishes public notice requirements, reporting requirements, and requirements relating to estimating emission rates and using air quality models. This chapter also sets forth special provisions related to compliance monitoring, stack heights, circumvention of pollution control equipment, and excess emissions.

Rule 62-210.100, Florida Administrative Code.

143. Chapter 62-212, Florida Administrative Code, provides rules governing the preconstruction review of stationary sources of air pollution:

> The Department of Environmental Protection adopts this chapter to establish the preconstruction review requirements for proposed new emissions units or facilities, and proposed modifications. The requirements of this chapter apply to those proposed pursuant to Chapter 62-210, F.A.C. This chapter includes general preconstruction review requirements and specific requirements for emissions units subject to prevention of significant deterioration (PSD) and nonattainment-area preconstruction review . . . .

Rule 62-212.100, Florida Administrative Code.

144. Reading the rules governing emission of pollutants into the air as a whole, it is clear that the Department did not intend to also require compliance of the rules governing discharges into the waters. This conclusion is consistent with the Department's review of the permit application in this case and the Department's prior practices in reviewing permit applications.

H. The Rules Governing Permits to Discharge Pollutants Into the Waters.

145. The rules governing the protection of Florida's waters begin at Chapter 62-301, Florida Administrative Code. Chapter 62-301, Florida Administrative Code, defines the "surface waters of the state." Chapter 62-302, Florida Statutes, establishes "surface water quality standards" that apply to the surface waters of the state. Those rules deal with facilities that will "discharge" pollutants into the waters of the state.

146. Reading the rules governing water quality as a whole, it is clear that the Department did not intend to apply the rules governing discharges into the waters of the state to facilities that will emit pollutants into the atmosphere which will eventually end up in the waters of the state. This conclusion is consistent with the Department's review of the permit application in this case and the Department's prior practices in reviewing permit applications.

I. The Permit Sought By Suwannee American; Suwannee American's Compliance with Air Emission Standards.

147. Suwannee American's Proposed Plant will emit pollutants into the atmosphere. Therefore, Suwannee American was required to obtain an air construction permit.

148. The issuance of air construction permits is governed by Rule 62-212.400, Florida Administrative Code, which provides, in part:

> 62-212.400 Prevention of Significant Deterioration (PSD).

The provisions of this rule generally apply to the construction or modification of air pollutant emitting facilities in those parts of the state in which the state ambient air quality standards are being met.

The provisions of this rule also establish various requirements for existing emissions units and facilities in such areas, including specific construction/operation permit requirements.

(1) General Prohibitions.

(a) Except as provided in Rule 62-212.500, F.A.C., the Department shall not permit the construction or modification any emissions unit or facility that would cause or contribute to a violation of any ambient air quality standard.

* * *

(2) Applicability. This subsection establishes the criteria for determining whether or not a proposed new facility or modification to a facility is subject to the preconstruction review requirements of this rule, either in whole or in part. The preconstruction review requirements of this rule include the applicable provisions of: Rules 62-212.400(4), F.A.C., General Provisions; 62-212.400(5), F.A.C., Preconstruction Review Requirements; 62-212.400(6), F.A.C., Best Available Control Technology (BACT); and 62-212.400(7), F.A.C., Construction/Operation Permit Requirements; all as modified by the applicable provisions of Rule 62-212.400(3), F.A.C., Exemptions and Exclusions. A proposed new facility or modification that is not subject to the preconstruction review requirements of this rule, either in whole or in part, may be subject to review requirements under other rules of this chapter.

* * *

149. The parties stipulated and the evidence in this case supported the following conclusion of law:

> . . . [Suwannee American] has provided reasonable assurance that the proposed facility will comply with all applicable requirements including all applicable air quality rules, except as to those requirements related to water quality standards . . . .

J. Suwannee American was not Required to Comply with Rules Governing the Discharge of Pollutants into the Waters of the State.

150. In light of the specific direction of the Act that the Department adopt by rule all requirements which an applicant must meet in order to obtain a permit to pollute the air or waters of the State and, more importantly, the manner in which the Department has adopted and applied those rules, Suwannee American was not required to comply with any rule governing the pollution of the waters in this case.

151. While the Department may have the statutory authority to impose such a requirement, it must do so by rule or by a policy of the Department fully explained and supported at hearing. See Section 120.57(1)(e), Florida Statutes. The Department has done neither. When the Department initially reviewed Suwannee American's application in this case, the policy now argued by counsel for the Department was not followed. That policy was not even asserted as the position of the Department until raised by Petitioners in their challenge to the Department's proposed agency action. Therefore, rather than formulating agency policy and applying it in this case, the Department is asserting a policy which a citizen, the Petitioners, has insisted should be the policy of the Department.

152. The Department's rules, when read as a whole, indicate that an applicant for a permit to construct facilities which will emit pollutants into the atmosphere must only comply with those rules governing such emissions and any other provision of the Act or rules that specifically deal with such activities. The Departments' rules also indicate, when read as a whole, that an applicant for a permit to construct facilities which will discharge pollutants into the waters must only comply with those rules governing such discharges.

153. The Conclusions of Law reached by Judge Hood in the Recommended Order of Dismissal previously entered in this case and not ruled upon by the Department are hereby accepted and incorporated into this Recommended Order by reference.

154. Based upon the conclusion that Suwannee American is only required to comply with the rules governing air quality standards, Suwannee American has proved that it is entitled to the issuance of the air construction permit at issue in this case.

155. Despite the foregoing conclusion, in light of the position take by counsel for the Department in this proceeding, Petitioners' assertion that the Draft Permit should not be issued because mercury emissions from the Proposed Plant will violate water quality standards will be addressed. Petitioners' assertions will be addressed even though it may be within the authority of this forum to make the ultimate decision on this issue. See Section 120.57(1), Florida Statutes.

K. Impacts of Mercury Emissions on OFWs.

156. Petitioners have argued that the Proposed Plant will violate Rule 62-4.242(2)(a), Florida Administrative Code:

> (a) No Department permit or water quality certification shall be issued for any proposed activity or discharge within an Outstanding Florida Waters, or which significantly degrades, either alone or in combination with other stationary installations, any Outstanding Florida Waters, unless the applicant affirmatively demonstrates that:
>
> . . . . . .
>
> 2. The proposed activity or discharge is clearly in the public interest, and either
>
> a. A Department permit for the activity has been issued or an application for such permit was complete on the effective date of the Outstanding Water designation; or
>
> b. The existing ambient water quality within Outstanding Florida Waters will not be lowered as a result of the proposed activity or discharge, except on a temporary basis during construction for a period of not to exceed thirty days; lowered water quality would occur only within a restricted mixing zone approved by the Department; and, water quality criteria would not be violated outside the restricted mixing zone. . . .

157. The evidence in this case proved that no permit to discharge within an OFW is being sought in this case and that projected emissions from the Proposed Plant will not "significantly degrade" any OFW. See Environmental Confederation of Southwest Florida v. Cape Cave Corp., DOAH Case No. 83-2567. Therefore, Rule 62-4.242(2)(a)2, Florida Administrative Code, does not apply to this matter even if Suwannee American is required to comply with the Department's water quality rules.

158. If the Department rejects the foregoing conclusion, then Suwannee American was required to prove that the operation of the Proposed Plant will be "clearly in the public interest . . . " and that its permit application is either grandfathered or "existing ambient water quality" within the Three Rivers will not be lowered. Rule 62-4.242(2)(a)2.a. and b., Florida Administrative Code.

159. Suwannee American's application is not grandfathered because it was not filed before the designation of the Three Rivers as OFWs.

160. Rule 62-4.232(2)(c), Florida Administrative Code, defines the terms "existing ambient water quality" as follows:

> (c) For the purpose of this section the term "existing ambient water quality" shall mean (based on the best scientific information available) the better water quality of either (1) that which could reasonably be expected to have existed for the baseline year of an Outstanding Florida Water designation or (2) that which existed during the year prior to the date of a permit application. It shall include daily, seasonal, and other cyclic fluctuations, taking into consideration the effects of allowable discharges for which Department permits were issued or applications for such permits were filed and complete on the effective date of designation.

161. Suwannee American proved that its Proposed Plant will not lower the existing ambient water quality of the Three Rivers.

162. Suwannee American, however, failed to prove that the Proposed Plant will be clearly in the public interest.

163. Petitioners have also asserted that the Proposed Plant will violate Rule 62-302.700, Florida Administrative Code:

> (1) It shall be the Department policy to afford the highest protection to Outstanding Florida Waters and Outstanding National Resource Waters. No degradation of water quality, other than that allowed in Rule 62-4.242(2) and (3), F.A.C., is to be permitted in Outstanding Florida Waters and Outstanding National Resource Waters, respectively, notwithstanding any other Department rules that allow water quality lowering.

164. As concluded, supra, the Proposed Plant will not violate Rule 62-4.242, Florida Administrative Code. Therefore, the Proposed Plant will not violate Rule 62-302.700, Florida Administrative Code.

L. Impacts of Mercury Emissions on the Designated Use of Class III Florida Waters.

165. The Three Rivers are classified as Class III waters. The designated use for Class III waters is established by Rule 62-302.400(1), Florida Administrative Code:

> Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife.

See also Rule 62-302.400(10), Florida Administrative Code.

166. Rule 62-302.300(14), Florida Administrative Code, provides the following concerning the protection of water bodies:

> (14) Existing uses and the level of water quality necessary to protect the existing uses shall be fully maintained and protected. Such uses may be different or more extensive than the designated use.

167. The evidence in this case proved that the existing uses of the Three Rivers and the level of water quality necessary to protect those uses will be maintained and protected even if the Proposed Plant is permitted.

168. Rule 62-302.300(15), Florida Administrative Code, provides the following concerning the protection of water bodies:

> (15) Pollution which causes or contributes to new violations of water quality standards or to continuation of existing violations is harmful to the waters of this State and shall not be allowed. Waters having water quality below the criteria established for them shall be protected and enhanced. However, the Department shall not strive to abate natural conditions.

169. The evidence proved that the Proposed Plant will not cause or contribute to a new violation of water quality standards applicable to the Three Rivers. The evidence also proved that there is no existing violation of water quality standards applicable to the Three Rivers. Therefore, the Proposed Plant will not cause a continuation of an existing violation.

170. Rule 62-302.300(16), Florida Administrative Code, provides the following concerning the protection of water bodies:

> (16) If the Department finds that a new or existing discharge will reduce the quality of the receiving waters below the classification established for them or violate any Department rule or standard, it shall refuse to permit the discharge.

171. The evidence proved that there will be no "discharge" from the Proposed Plant. Furthermore, the evidence proved that the Proposed Plant will do nothing to reduce the quality of the Three Rivers below their Class III classification.

172. The evidence in this case proved that the emissions of mercury from the Proposed Plant will not be detectable. As a consequence, Suwannee American has given reasonable assurance that the Proposed Plant will not violate the surface water classification of the Three Rivers.

M. Impacts of Mercury Emissions on Minimum Criteria for Surface Waters; Will Mercury Emissions Pose a Serious Danger to the Public Health, Safety, and Welfare.

173. The parties have stipulated that Suwannee American has provided "reasonable assurances that the proposed facility will not cause any violation of the numeric water quality standard for mercury in Rule 62-302.530(42), Fla. Admin. Code."

174. Petitioners have argued, however, that mercury emissions will violate Rule 62-302.500(1)(a)6, Florida Administrative Code, which provides:

> (1) Minimum Criteria. All surface waters of the States shall at all places and at all times be free from:
>
> (a) Domestic, industrial, agricultural, or other man-induced non-thermal components of discharges which, alone or in combination with other substances or in combination with other components of discharges (whether thermal or non-thermal):
>
> . . . .
>
> 6. Pose a serious danger to the public health, safety, or welfare.

175. The evidence proved that the amount of mercury emitted from the Proposed Plant that will impact the waters of the State will not be detectable. Therefore, Suwannee American has given reasonable assurances that the Proposed Plant will not pose a serious danger to the public health, safety, or welfare.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Department of Environmental Protection granting Suwannee American Cement Company, Inc.'s application for an air construction permit subject to the terms and conditions of the Draft Permit, amended to reflect the applicant's agreement that mercury emissions from the Proposed Plant will be limited to 97 pounds per consecutive 10-month period.

DONE AND ENTERED this 5th day of April, 2000, in Tallahassee, Leon County, Florida.

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.