IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CLEARWATER LAND AND
MINERALS FLA, LLC,

Appellant,

v. Case No. 1D2025-1719

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
and APALACHICOLA BAY AND
RIVER KEEPER, INC.
d/b/a APALACHICOLA RIVERKEEPER,

Appellees.
_____/

ON APPEAL FROM THE
FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

ANSWER BRIEF OF APPELLEE, APALACHICOLA RIVERKEEPER

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FORMAT OF CITATIONS

Citations to the Record are in the format (R____). Citations to the findings of fact and conclusions of law in the Recommended Order found at R611-63 are in the format (RO ¶ ___). Citations to stipulated facts in the Amended Joint Prehearing Statement found at R412-31 are in the format (SF___).

Citations to the Transcript for proceedings on December 9, 2024, are in the format (TR Day 1, _____). Citations to the Transcript for proceedings on December 10, 2024, are in the format (TR Day 2, _____). Citations to the Transcript for proceedings on December 11, 2024, are in the format (TR Day 3, _____). Because of a significant number of errors in the transcript, an Amended Errata was filed with the Division of Administrative Hearings, which can be found at R592-99.

STATEMENT OF THE CASE AND FACTS

Introduction

Appellee, Apalachicola Bay and River Keeper, Inc. d/b/a Apalachicola Riverkeeper ("Riverkeeper"), provides this statement of the case and statement of the facts below because Appellant,

Clearwater Land and Minerals FLA, LLC's ("Clearwater") statement of the case and facts contained facts that were not supported by the record, omitted pertinent facts, and contained an overly argumentative presentation of the facts.

Statement of the Case

This case involves an appeal of a final order ("FO") of the Florida Department of Environmental Protection ("DEP" or "Department") denying an oil and gas drilling permit (the "Project") that was sought by Appellant, Clearwater Land and Minerals FLA, LLC ("Clearwater").

Statement of the Facts

I. The Sensitive Nature and Character of the Apalachicola River and Bay System

Located within the greater floodplain of the Apalachicola River, the Project Site ("Project Site" or "Site") is located in a state, nationally and globally designated sensitive area and environment. (TR Day 2, pp. 198-201, 212-213, 243-44, 250-51; R3347-51).

The Apalachicola River ("River") flows from the confluence of the Flint and Chattahoochee rivers at the Georgia-Florida border, where those rivers join to form Lake Seminole behind the Jim Woodruff Dam. (R3347-3349, 3351). From there, the River travels 107 miles

through the high bluffs of Grand Ridge and Cody Scarp to the Gulf coastal lowlands. (R3347-49, 3351-61). The largest flow of any river in Florida then reaches Apalachicola Bay creating a rich estuary. (R3347-49, 3351-61).

The Apalachicola River Basin and Apalachicola Bay ("Bay") comprise one of the most ecologically diverse natural areas with state, national and international significance and recognition. (TR Day 2, pp.198-201, 212-213, 243-44, 250-51; R3336-3535). The habitats within the River and Bay system provide essential feeding and nesting grounds for a diverse assemblage of upland, coastal and estuarine wildlife, including more than 300 species of birds, 1,300 species of plants, 40 species amphibians, 80 species of reptiles, 50 species of mammals, and 180 species of fishes, several of which are threatened or endangered. (TR Day 2, p. 209-10; R3336-3535).

In 1983, the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") designated the Apalachicola Biosphere Region. (TR Day 2, p. 200; R3347). The Apalachicola River is designated as an Outstanding Florida Water ("OFW") under Rules 62-302.700(9)(i)1. and (9)(m)1, Florida Administrative Code. The

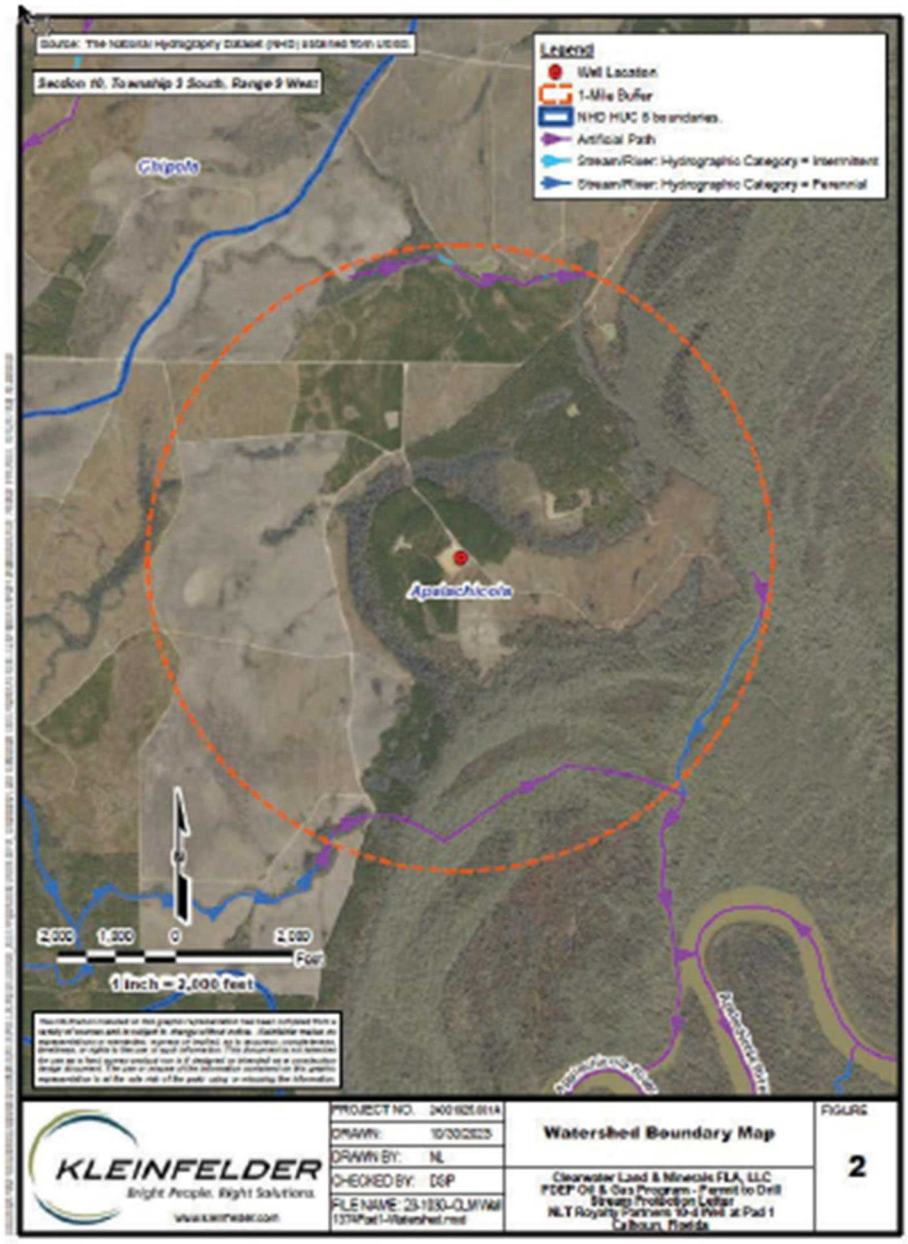
Apalachicola River flows directly into Apalachicola Bay, which, itself, is also designated as an OFW under Rule 62-302.700(9)(f)2, Florida Administrative Code, and a State Aquatic Preserve under Rule 62-302.700(9)(h)2, Florida Administrative Code. The Apalachicola National Estuarine Research Reserve, an Outstanding Florida Water pursuant to Rule 62-302.700(9)(m)1, Florida Administrative Code, includes the Apalachicola River, Apalachicola Bay, East Bay, St. Vincent Sound and St. George Sound. All or portions of Apalachicola Bay, East Bay and its tributaries, St. George Sound and St. Vincent Sound, are designated Class II – Shellfish Propagation or Harvesting Waters pursuant to pursuant to Rule 62-302.400(17)(b)19, Florida Administrative Code.

Other special waterbodies associated with the Apalachicola River system that are downstream from the Project Site include the Chipola River (a "Special Water" OFW pursuant to Rule 62-302.700(9)(i)6, Florida Administrative Code) and the Port St. Joe Canal (designated a Class I-Treated Potable Water Supply pursuant to Rule 62-302.400(17)(b)23, Florida Administrative Code).

The Apalachicola River Basin, including the area where the Project Site is located, is ranked as the #1 area in the State of Florida for acquisition, conservation, restoration and management by the Department's Florida Forever Program. (R3330-35). The State of Florida has invested tens of millions of dollars to protect this very sensitive floodplain. (TR Day 2, p. 250).

The Project Site is located within the state and federally recognized floodplain of the Apalachicola River. (R3213, SF14, R3748-49). National Wetland Inventory and other mapping provided by Clearwater documented surface waters and wetlands within the Project boundary as well as within one mile of the proposed well. (R2267-70; 2400; 3739-40). Two ponds and two floodplain streams are within a one-mile radius of the proposed Project Site. (SF8; R2263-64, 2267-70). One of the two ponds is known as Brown Lake and is located approximately 4,950 feet east southeast of the proposed surface hole location. (SF9; R2263-64, 2267-70). Brown Lake slough connects Brown Lake to the Apalachicola River which is approximately 4,820 feet southeast of the surface hole location and can be seen on Clearwater's maps. (SF10; R2263-64, 2267-70).

Exhibit 2. Stream Protection Letter (Application Attachment 8)



The Project Site is surrounded by a cypress slough. (TR Day 2 pp. 87, 202-09, 235; R3213-24; R2263-64, 2267-70). An unnamed pond is approximately 2,300 feet southeast of the surface hole drilling location. (SF11; R2263-64, 2267-70). There are unnamed riverine and floodplain channels within the one-mile radius of the proposed well location. (SF12; TR Day 2, pp. 202-09). Based on the location, if a spill were to occur, it would have catastrophic consequences due to the proximity of the well to the nearby streams, wetlands, and bodies of water in terms of not being able to adequately clean up the spill. (TR Day 2, pp. 208-13; TR Day 3, p. 111; R2263-64, 2267-70; R3213-24).

Threatened and endangered species, including mussels and sturgeon, exist in the habitat similar to and near to the Project Site. (TR Day 2, pp. 208-09). The Florida Fish and Wildlife Conservation Commission ("FWC") sent DEP a letter, with copies to Clearwater's representatives, Mr. Campbell and Mr. Murawski, stating that the Project Site is located near, within, or adjacent to potential habitat for the following federally and state listed species: reticulated flatwood salamander, eastern indigo snake, Gulf sturgeon, purple

bankclimber, fat threeridge, Chipola slabshell, oval pigtoe, southern elktoe, and Barbour's map turtle. (R3225-27). The letter noted that the application materials did not include a wildlife assessment or a wildlife survey report. (R3225-27; TR Day 2, pp. 89-90, 93-94, 131). The letter goes on to note that the proposed Project is located adjacent to the Apalachicola River and an unnamed tributary, and that the Apalachicola River is habitat for several federally listed mussel species. (R3225-27). It also notes that FWC has observed 5,652 federally proposed or listed freshwater mussels downstream of the proposed Project Site. (R3225-27). The letter concludes by recommending coordination with the U.S. Fish and Wildlife Service ("USFWS") Panama City Ecological Service Field Office. (R3225-27).

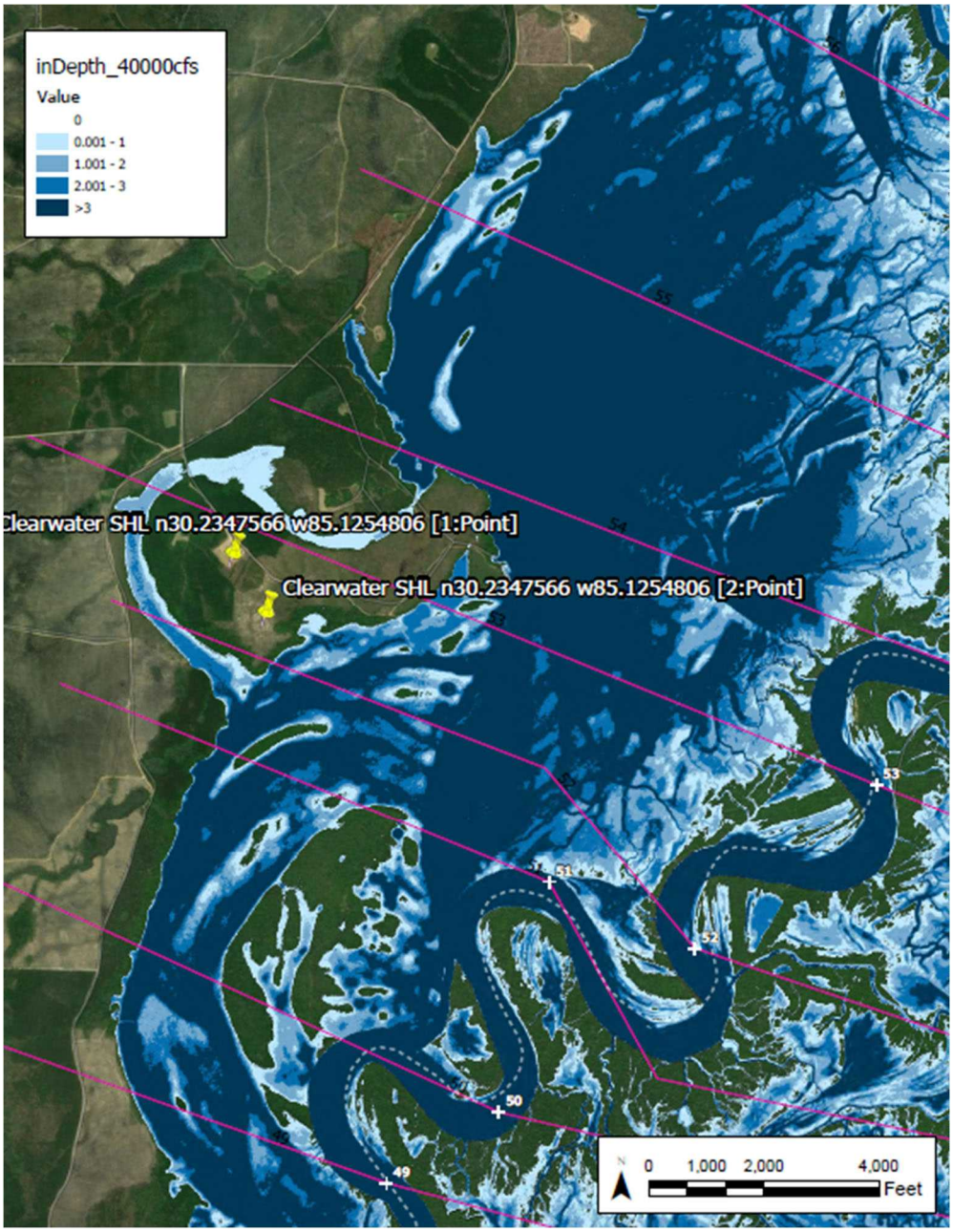
Clearwater did not conduct an endangered species survey or assessment as part of its application or during this case. And neither the Department nor Clearwater contacted FWC or USFWS to consult with them regarding the letter concerning threatened and endangered species. (TR Day 2, pp. 89-90, 93-94, 131).

The Department and Clearwater in this case, took an exceedingly narrow view of the Project and considered only the

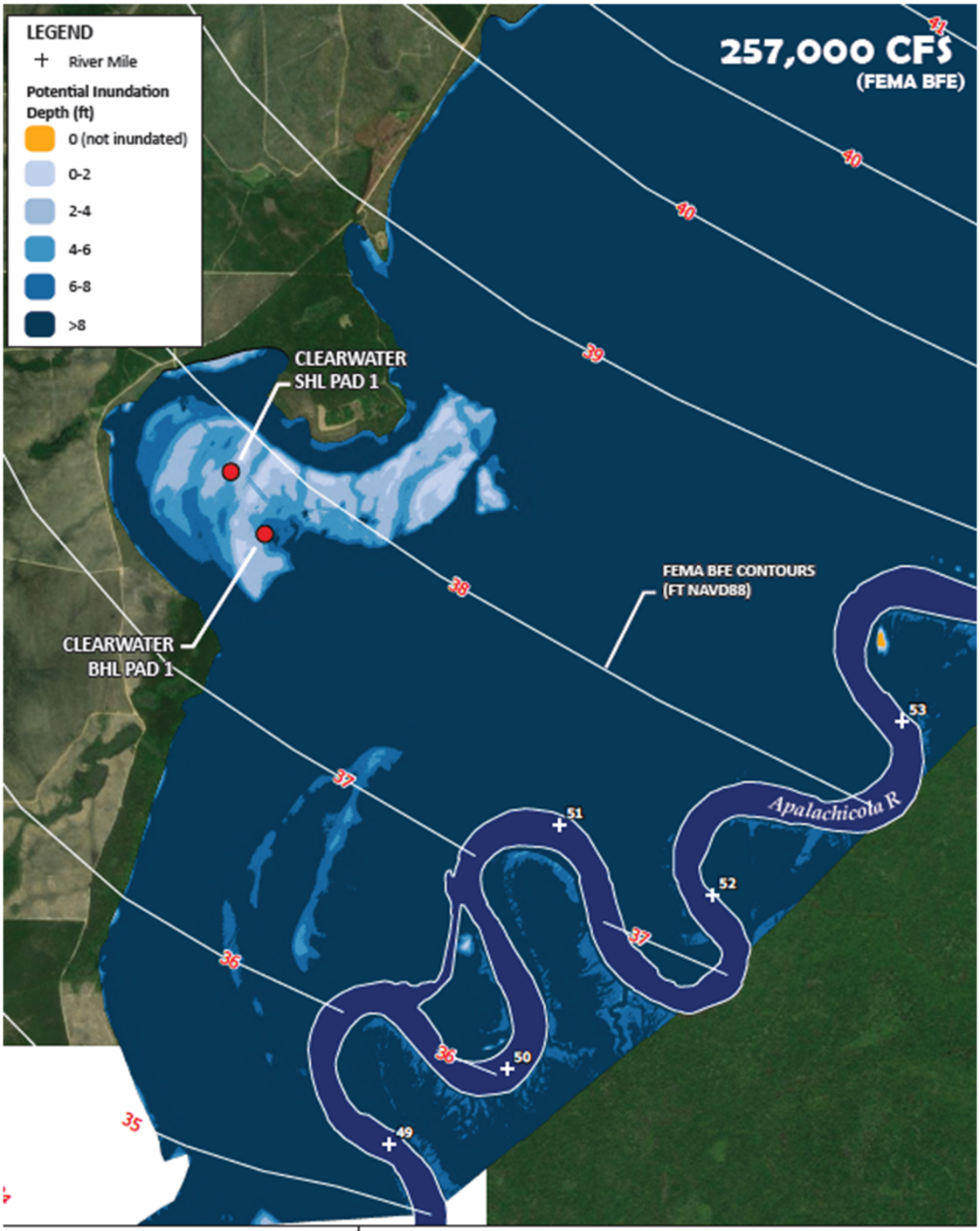
immediate pad location – the footprint of the pad – in considering whether the Project is located in a sensitive area or sensitive environment. (TR Day 2, p. 132). The Department also did not consult with the Department's Apalachicola National Estuarine Reserve ("ANERR") – the agency's internal source of expertise on research and resource protection of the Apalachicola River and Bay system – for its input or concerns regarding the Project. (TR Day 2, pp. 89-90, 93-94, 131)

II. The Project's Design

The Project is in a Federal Emergency Management Agency ("FEMA") "AE" Flood Zone. (SF 14; R3747-48). Clearwater did not consider relocating the Project to a different site. (TR Day 1, p. 240). The width of the floodplain in the Project area is two and a half to three miles. (TR Day 2, pp. 208-09). The Project Site is in an area that would be expected to be surrounded by floodwaters on an annual basis (R3217; R3879; TR Day 2, pp. 231-32):



In the event of the FEMA Base Flood Elevation, the Project Site would be completely surrounded by floodwaters up to 4 feet deep (R3222; R3878-85; TR Day 2, pp. 233-34):



There is hydrologic connectivity between the Project Site and the Apalachicola River. (R3216-22; TR Day 2, p. 235). In the event of

flood conditions, the road to the Project Site will be flooded as it runs through a deep water cypress slough that surrounds the Project area. (R32217-23; TR Day 2, p. 235; R2267-70). This was demonstrated by photographs showing the road flooded during a 2-year storm event:

Figure 6 – Site Camera 3 on September 30, 2024

(R3856 and R3858).

Prior to filing the Petition[1] in the case, Riverkeeper's expert Ken Jones conducted an analysis of the stormwater management design of the Project. (R3213-24). Mr. Jones' analysis identified multiple

[1] Apalachicola Riverkeeper's Petition for Formal Administrative Hearing filed on June 6, 2024 (R209-309).

flaws in the design of the Project. (R3213-24). The stormwater management pond for the Project is designed like a stormwater management pond for a Dollar General store, not an oil and gas project within a floodplain. (TR Day 2, pp. 243-44). The outfall pipe is placed on the ground in the floodplain:

(TR Day 2, p. 241; Joint Ex. 9[2]). As a result, the interior of the Site

[2] Joint Final Hearing Exhibit 9 was apparently inadvertently omitted from the Record on Appeal. Riverkeeper intends to file a Motion to Supplement the Record pursuant to Rule 9.200(f), Florida Rules of Appellate Procedure.

could completely backflood through the outfall pipe, which would release any pollutants to the Apalachicola River floodplain as the flood waters recede. (R3213-24; TR Day 2, pp. 235, 241-42). There was also no reasonable assurance provided that the design of the berms would be protective in the event of a flood. (R3213-24; TR Day 2, pp. 242-43). The material and design of the berms were not specified in the plans. (R3213-24; TR Day 2; pp. 242-43). If the berms were built with native materials (i.e., locally available such as floodplain sands and soils), they could easily be breached in the event of a flood. (R3215; TR Day 2, pp. 242-43).

At the evidentiary hearing, Clearwater's witness Mr. Messina testified that Clearwater would make the following modifications to the stormwater management plans to attempt to address some of the design flaws identified by Mr. Jones:

> A secondary containment berm around the drilling operation to prevent any operational spills from entering the stormwater pond;
>
> Raising the wet detention pond outlet discharge above the 10-year design storm event elevation;

Installing a flap gate to prevent floodwaters from entering the stormwater basin;

Modeling the pond using a tailwater condition in the 25-year, 24-hour design storm event;

Additional notes for maintenance of the containment berms; and

Constructing the Site in accordance with an approved permit set of design drawings which should incorporate the above recommendations.

(TR Day 2, pp. 41-43; R3213-24).

However, the modifications to the stormwater management system proposed by Clearwater do not address all the design flaws in the Project. (R3213-24; TR Day 2, pp. 242-43, 245-48). The alternative plans proposed by Mr. Messina were merely conceptual plans, lacked adequate detail for construction and operation, and required further permitting that was not initiated or completed at the time of the hearing. (R3739-40; TR Day 2, pp. 43-48, 246). While Clearwater's consultant Kleinfelder recommended notes for maintenance of the containment berms, it failed to actually provide

any notes or details for how to construct and maintain the berms in a way to address the impermeability and failure issues raised by Mr. Jones. (TR Day 2, pp. 51-53, 247). Kleinfelder provided a conceptual plan for a flap gate, but these are not foolproof, and Kleinfelder failed to specify any instructions for proper operation and maintenance of the flap gate. (TR Day 2, pp. 51-54). Kleinfelder failed to model the pond using tailwater conditions associated with the 25-year, 24-hour design storm event, and conceded that they could not implement this recommendation due to constraints at the Site. (TR Day 2, pp. 51, 245-46). DEP's witness Mr. Walker testified that if the Project wasn't constructed in a way to prevent inundation year-round it would violate DEP's oil and gas rules. (TR Day 2, p. 130).

No testing or monitoring of the Project Site is required either before, during or after the oil and gas exploration work authorized under the Proposed Permit ("Proposed Permit") to ascertain whether the Project will result in pollution of land or water in violation of Section 377.371, Florida Statutes, and no such testing or monitoring was offered by Clearwater. (R2372-402; TR Day 2, pp. 132-33). This is despite the fact that the drilling will use additives or produce

material from the ground containing known potential contaminants that can affect the air, land, waters, and creatures of the State, including hydrogen sulfide, barium, and petroleum products. (TR Day 1, pp. 153-54, 159-61; R1838-2221). Clearwater's hydrogen sulfide safety plan failed to consider potential impacts to threatened and endangered species. (TR Day 1, pp. 159-61). The cuttings produced from the ground during the drilling process, which are also a potential source of contamination, are stored onsite in an unlined container that is uncovered and subject to rain, which can create runoff. (TR Day 1, p. 153). The stormwater pond and the ground adjacent to the Site are also unlined. (TR Day 1, pp. 155-56).

There is also the potential for pollution from a blowout as the risk of a blowout exists with any well. (TR Day 1, p. 155). Despite this risk of blowout, flooding, and other potential pollution risks, Clearwater and its drilling company Brammer do not have a contract with any well control companies, do not have insurance in place, and Clearwater has not set aside any money for spill response. (TR Day 1, pp. 158-59, 240-41). Clearwater also would not agree to reduce the risk of pollution by not drilling during hurricane season and

presented a preliminary hurricane response plan that was not approved by DEP or Clearwater. (TR Day 1, pp. 168-69, 240).

The plans submitted by Clearwater were insufficient and were not adequately protective of this sensitive area and environment which the State of Florida and others have spent tens of millions of dollars trying to protect, preserve and restore. (TR Day 2, pp. 155-58, 185-86, 250; R3330-3535; R4259-4444; R4950-94).

The Administrative Law Judge ("ALJ") found that DEP and Clearwater took an exceedingly narrow view of the scope of the Project for purposes of environmental review, limiting it to the immediate location of the drilling pad on the Site. (RO ¶ 117). DEP's analysis of whether the proposed Project was in a "sensitive environment" or "sensitive area" was entirely premised upon limiting its review to the disturbed logging land in the immediate vicinity of the Site. (RO ¶ 117). The ALJ found based on the evidence and argument presented that regardless of the disturbed state of the immediate drilling area, the Site lies in a sensitive environment and a sensitive area. (RO ¶¶ 121, 125). Clearwater failed to make a case that its Project met the requirements of Rule 62C-30.005, and Riverkeeper established that

the Project failed to satisfy the rules. (TR Day 1, pp. 132-33, 155, 158-59, 240-41; TR Day 2, pp. 244-51; RO ¶ 126–28, 132-35).

III. Geologic and Economic Analysis

Section 377.241(3), Florida Statutes, provides that one of the criteria for issuing oil and gas permits is the proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis.

The Proposed Permit would authorize installation and operation of an exploratory oil well known as a "wildcat well." A wildcat well is a well outside of an existing field where no previous well has found oil. (TR Day 2, p. 125; TR Day 3, p. 9). The analog field is located in Alabama, more than 100 miles away from the Project Site. (TR Day 1, p. 81; TR Day 3, p. 22).

No oil has ever been found in any well previously drilled in Calhoun County or the Apalachicola Embayment – the location of the target prospect. Sixty-three wells have been drilled in Calhoun and the surrounding Counties, including 18 in the Smackover formation, and all of them are dry holes that are not producing wells. (R4216-

22; TR Day 1, pp. 78-79). Thus, the success rate for oil and gas wells in the target prospect is 0% and there is no proven reserve of oil in this case. (TR Day 3, pp. 67-68).

Common industry standards are used to reasonably evaluate the probability of a commercially successful well by classifying prospects. (TR Day 3, pp. 11-16; R4042-4083). The bottom line is that Clearwater's prospect is properly categorized as very high risk with a negative expectation of commercial success. (TR Day 3, pp. 11-18, 21-25).

The applicant in this case, Clearwater, did not include an economic analysis or justification for drilling the well with its permit application (TR Day 2, pp. 126-27; R1654-2233; R2248-50), nor did DEP (TR Day 2, pp. 126-27).

Riverkeeper's expert Mr. Moore prepared an economic analysis of the expected present value ("EPV") of the proposed well. (TR Day 3, pp. 11-16; R4042-44).

EPV is the fundamental equation for evaluating exploration opportunities in the oil and gas industry. (TR Day 3, pp. 11-16; R4042-83).

Based on Mr. Moore's analysis of the EPV, using Clearwater's own numbers, the EPV for the proposed well is negative $0.8 million. (TR Day 3, p. 18; R4042-83). A negative EPV indicates that a prudent investor would not drill the well because there is insufficient profit, on a risk-weighted basis, to offset the chance and cost of a dry hole. (TR Day 3, pp. 11-21; R4042-83). Substituting more reasonable numbers suggested by Mr. Moore, the economics of drilling the proposed well are even more negative. (TR Day 3, pp. 23-25).

In this case, Clearwater's own expert at his deposition estimated the likelihood of finding oil and gas is, at most, 30 percent. (TR Day 3, pp. 17, 56-57; TR Day 1, pp. 79-81). That is, it is more than twice as likely that the well will be unsuccessful. Riverkeeper's expert believed that estimate to be too high. Industry standard estimates for finding oil where it has not been found before is more likely in the range of 13 to 25 percent, which would further reduce the already negative economics of the proposed well, and demonstrates the lack of economic justification for the Project. (TR Day 3, p. 9; R4051, Figure 5). Stated differently, the geological risk that Clearwater is not

going to find oil is very high. (R4051, Figure 5; TR Day 3, pp. 14, 21, 43, 55).

Moreover, there is no direct way to see whether there is oil in the area to be drilled based on the seismic data. (TR Day 3, p. 35). Clearwater's expert Mr. Craft explained in fishing terms that they are essentially fishing for oil, and the seismic data is like a fish-finder. (TR Day 1, pp. 68-70). However, Mr. Craft conceded that the seismic data doesn't "see" oil, so it is like a fish-finder that can't see fish. (TR Day 1, pp. 77-78; TR Day 3, p. 9).

The risk of this Project being unsuccessful is also substantially increased because the area underlying the Site is a stratigraphic trap and not a structural trap. (TR Day 3, pp. 32-43). As a result, it can't be determined whether there is an oil trap at all, and the size of the field can't be estimated. (TR Day 3, pp. 42-43).

Further, Mr. Moore discussed that the analog and the prospect are not directly analogous, which also calls into question whether oil will be found with this Project. (TR Day 3, pp. 43-49; R3284 and 3288; R4143). The analog field in this case is more than 100 miles away in Alabama, not in Florida. (TR Day 1, p. 81; TR Day 3, p. 22).

Here, the prospect well is located very close to the former, pre-historic shoreline; in contrast, the analog wells are set back some distance from the former, pre-historic shoreline. (TR Day 3, pp. 43-49; R3284 and 3288; R4143). This difference in configuration of the prospect well location and the analog well location contributes to the risk that oil will not be discovered and may not be located where the well is proposed to be drilled. (TR Day 3, pp. 43-49; R3284 and 3288; R4143).

As explained by Mr. Moore, Clearwater's multiple well economic analysis is flawed because it assumes that if its initial well is successful then there is no further chance of failure in drilling additional wells to develop the field. (TR Day 3, pp. 26-31, 52). Mr. Moore asserted that this is usually true and the EPV would be then based on the chance of finding a field (the chance of success of the wildcat well) and the value of the field as developed. (TR Day 3, pp. 26-31, 52). However, for a stratigraphic trap such as this one, the size of the field cannot be estimated and there remains substantial risk that subsequent wells will fail, even if the first is a success. (TR Day 3, pp. 26-31, 52).

Clearwater's witness Mr. Campbell testified that Clearwater does not know the extent of the field size. (TR Day 1, p. 245). In his testimony, Mr. Craft suggested the area of the field had been delimited using seismic character. (TR Day 1, p. 195-96; TR Day 3, p. 125). Mr. Craft's testimony is not credible because it is inconsistent with Mr. Campbell's testimony. (TR. Day 1, pp. 195-96, 245; TR. Day 3, p. 125). Moreover, Mr. Craft's testimony is inconsistent with his own deposition testimony describing how developing the field would be undertaken. (TR Day 3 pp. 31, 140). When specifically asked about the estimated field size for the prospect during his deposition, Mr. Craft testified that:

> "It's really hard to tell. I mean, you just drill one well at a time and, you know, you hope for it to be bigger. . . ."

(TR Day 3 pp. 31, 140). Moreover, Mr. Craft had previously stated that additional wells would be drilled very close to the initial well to reduce risk. (TR Day 3 pp. 132-33). This prudent approach is precisely because there remains a material risk that subsequent wells will fail as explained by Mr. Moore. (TR Day 3, pp. 26-31, 52). For this reason, the EPV of the prospect cannot ignore the risk and

cost of failure of subsequent wells. (TR Day 3, pp. 26-31, 52). Mr. Moore argued that this approach, evaluating the prospect on a single well basis, is therefore more appropriate. (TR Day 3, pp. 26-31, 52). The preponderance of the evidence established that the field size in this case is unknown, and evaluating the prospect on a single well basis is more appropriate. (TR Day 1, pp. 195-96, 245; TR Day 3, p. 125; TR Day 3, pp. 26-31, 52).

Finally, the USGS estimates that the average field size in the region is 1.9 million barrels, which is not a sufficient size to make it viable for exploration on an economic basis after taking into account the costs and chance of failure of the additional wells required to prove the presence of such an accumulation. (R4090-93; TR Day 3, pp. 50-52). It is much smaller than the field size estimated by Clearwater. (R4090-93; TR Day 3, pp. 50-52; TR Day 1, p. 207).

The totality of the economic analysis evidence demonstrated that a prudent investor would not drill this well, and there is not a proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and

extraction of such products on a commercially profitable basis. (TR Day 3, pp. 5-68; R4042-44).

The ALJ determined that the single well economic analysis is more appropriate and that Mr. Moore's argument against the economic viability of a single well was persuasive and dispositive. (RO ¶¶ 84, 137). Ultimately, Clearwater failed to establish the indicated likelihood of the presence of oil in such quantities as to warrant their exploration and extraction on a commercially profitable basis as provided by section 377.241(3) . (RO ¶ 137).

As the applicant, Clearwater had the burden of showing by a preponderance of the credible and credited evidence that it was entitled to approval of the Proposed Permit. (RO ¶ 147). Weighing the criteria of section 377.241, balancing environmental interests against the right to explore for oil, led the ALJ to the conclusion that the Proposed Permit should be denied. (RO ¶ 161).

SUMMARY OF THE ARGUMENT

Clearwater's appeal attempts to spin a tale of prejudice from a mere footnote that is not a finding of fact and is nothing more than *dicta* in an improper attempt to have this Court reweigh the evidence and substitute the Court's findings of fact for those of the ALJ and DEP below. Further, Clearwater argues legal error on the part of the ALJ and DEP when clearly there was none. The ALJ's well-reasoned Recommended Order was replete with findings of fact weighing the record evidence presented by both parties. Finally, the ALJ correctly cited to and applied the test in *Coastal Petroleum Co. v. Florida Wildlife Fed'n, Inc.*, 766 So. 2d 226, 228 (Fla. 1st DCA 1999) for weighing the statutory criteria in section 377.241, Florida Statutes. Accordingly, this Court should affirm the Final Order on Appeal.

ARGUMENT[3]

Standard of Review on Appeal

This Court reviews final agency action based on the framework established by section 120.68, Florida Statutes. The Court must

[3] Appellant Riverkeeper has structured its brief to respond to the corresponding sections in Appellee Clearwater's Initial Brief.

affirm the agency's action unless it finds "a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief." § 120.68(8), Fla. Stat.; *see also* § 120.68(7), Fla. Stat. (establishing the grounds for relief from agency action). Generally, this Court reviews an agency's findings of facts for competent, substantial evidence while reviewing legal conclusions de novo. *Robinson v. Comm'n on Ethics*, 242 So. 3d 467, 470–71 (Fla. 1st DCA 2018). Further, "[a]n administrative agency abuses its discretion when it disregards an ALJ's factual findings supported by competent, substantial evidence." *Chappell Schs., LLC v. Dep't of Child. & Fams.*, 332 So. 3d 1060, 1063 (Fla. 1st DCA 2021) (citing *Strickland v. Fla. A&M Univ.*, 799 So. 2d 276, 278 (Fla. 1st DCA 2001)). No deference is afforded to the agency's interpretation of statutes. Art. V, § 21, Fla. Const.

I. The Final Order Should Not be Set Aside as Neither the ALJ nor DEP Based any Finding of Fact or Conclusion of Law on Evidence Outside of the Record.

Clearwater hyperbolically argues that a single footnote — footnote 17 — in a 52-page Recommended Order forms the basis for vacating DEP's Final Order on appeal in this case. Clearwater's arguments should be rejected as neither the ALJ nor DEP relied on

the footnote to support a finding of fact or conclusion of law, and the Administrative Law Judge's related findings of fact are supported by competent, substantial evidence.

Footnote 17 to Ultimate Finding of Fact 135, which is the subject of much discussion in the Appellant's Initial Brief, simply states:

> 17. The undersigned **notes** that a bill now pending in the Florida Legislature would amend section 377.24 to provide that "the drilling, exploration, or production of oil, gas, or other petroleum products is prohibited within 10 miles of a national estuarine research reserve." On April 16, 2025, the bill passed the full House of Representatives by a vote of 116-0. See HB 1143 (2025).

(Emphasis added). There are no findings of fact or conclusions of law in the Recommended Order that rely on footnote 17 for support, and there are no other references to HB 1143 in the Recommended Order. The footnote is not itself a finding of fact based on the language used by the ALJ: "[t]he undersigned **notes**. . . ." Nor does it rise even to the level of official recognition,[4] which the ALJ could have taken pursuant to Rule 28-106.213(6), Florida Administrative

[4] Official recognition is the administrative equivalent of judicial notice.

Code and section 90.202(2) and (12), Florida Statutes. Rather, the ALJ's footnote citation to HB 1143 is merely dicta, that is inconsequential to the ALJ's Ultimate Finding of Fact 135 as it was supported by numerous specific findings of fact based on competent, substantial record evidence. (RO ¶¶ 15-17, 19-29, 40-42 and 117-129).

Nor did DEP rely on footnote 17 in its Final Order. DEP's final order states:

> It is not a citation of competent substantial evidence in support of a material finding. Nor is it a declaration of legislative intent. Rather, it is merely one of several editorial remarks that has no substantive effect on the findings of fact, conclusions of law, or ultimate recommendation.

Further, the cases cited by Clearwater in its brief are distinguishable. *Thorn v. Florida Real Estate Commission,* 146 So. 2d 907 (Fla. 2d DCA 1962), involves an administrative disciplinary proceeding against a real estate broker. The agency in *Thorn* charged Mr. Thorn with conspiring with an unlicensed party, Mr. Gainsford. This was an essential element of the charge and the agency had the burden of proving the element. The issue in *Thorn* was that there

was absolutely no proof in the record of the essential element of the charge — that Gaisford was not registered with the Commission as a broker or salesman in good standing. *Id.* at 910. This does not even remotely come close to the facts in this case. Here, there is ample competent, substantial record evidence supporting the ultimate finding that the project is in a sensitive area or environment. (RO ¶¶ 15-17, 19-29, 40-42 and 117-129). Moreover, the burden of proof (i.e, the burden of ultimate persuasion) to entitlement to the permit in this case was on Clearwater, not Riverkeeper. *Dep't. of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 789 (Fla. 1st DCA 1981); *c.f.* § 120.569(2)(p), Fla. Stat. (RO ¶ 147).

Similarly, *Bell Atl. Bus. Sys. Services v. Dep't of Lab. & Emp. Sec.*, 677 So. 2d 989 (Fla. 1st DCA 1996) is also distinguishable from this case. *Bell Atl.* involved a challenge by an unsuccessful bidder for a contract with a state agency. The unsuccessful bidder's protest was deemed untimely and dismissed by the agency. The court reversed, holding that there was "not competent proof" that the unsuccessful bidder received notice of the contract award, and that the burden was on the agency to show the unsuccessful bidder

received notice of the award. *Id.* at 992. This case is inapposite. Again, in this case the burden was on Clearwater, not Riverkeeper, and there is ample competent, substantial evidence to support all findings and ultimate findings in the Recommended Order and Final Order.

Likewise, *Groves–Watkins Constructors v. Dep't of Transp.*, 511 So. 2d 323 (Fla. 1st DCA 1987) is not similar to this case either. In *Groves–Watkins,* the DOT rejected all bids for a road construction project as excessive and directed that the project be rebid. Groves–Watkins protested and an administrative hearing officer assigned to hear the case found that as the original low bidder, Groves–Watkins, was entitled to award of the contract because the DOT's cost estimate was erroneous, and Groves–Watkins proved that it was the low bidder and that its bid was not excessive. DOT in its final order declined to adopt the decision of the hearing officer. The court reversed DOT's decision because it was not based on competent, substantial evidence, and also because the award was based on factual and legal issues raised in the DOT's final order that were not raised during the hearing. *Groves–Watkins* is inapplicable because footnote 17 is not a

finding of fact and was not the basis for the ALJ's Recommended Order or DEP's Final Order, and the record is replete with competent, substantial evidence to support the ALJ's Recommended Order and DEP's Final Order.

Finally, Clearwater's reliance on *Kanter Real Estate, LLC v. Dep't of Envtl. Prot.*, 267 So. 3d 483 (Fla. 1st DCA 2019) is misplaced. In *Kanter*, the Court held that DEP "improperly rejected the ALJ's factual findings." That is not what happened in this case. Here, DEP didn't reject any factual findings. Footnote 17 is not a factual finding and Clearwater's strained attempts to characterize it as one should be rejected.

Clearwater's argument about footnote 17 is a thin reed on which to base Clearwater's claim that the entire proceeding is "prejudicially tainted." The record contains competent, substantial evidence to support the ALJ's Recommended Order that the Site is a "sensitive area or environment" and every other finding as well. Clearwater just simply failed to meet its ultimate burden in this case under *J.W.C. Co., Inc.* The Court should reject Clearwater's invitation to ignore the entire record of the case because of the ALJ's passing reference in

one footnote in a 52-page Recommended Order, and should affirm DEP's Final Order denying the permit.

II. The Final Order Should be Affirmed, not Vacated.

A. Vacatur is not the appropriate remedy

Clearwater's arguments for vacatur reveals its true motivation for this appeal — trying to position itself for a favorable takings claim. The denial of the Proposed Permit, and the Final Order's finding that Clearwater failed to establish the proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis forestalls any future claim that the State of Florida owes compensation to Clearwater under Article X, § 6 of the Florida Constitution or under the Due Process Clause of the U.S. Constitution. (RO ¶ 137). Quite simply, if drilling for oil is not commercially profitable, then there are no damages. As Riverkeeper's expert put it, a prudent investor would not drill the well at issue in this case. (RO ¶ 63).

Riverkeeper agrees with Clearwater's contention that Chapter 25-193, Laws of Florida (codified at 377.24(10), Florida Statutes)

would prohibit issuance of the Permit today. *See* Initial Brief at 1-2. Because the law currently in effect requires Clearwater's application to be denied, this Court is authorized to order such action pursuant to section 120.68(6)(a), Florida Statutes. *See Bayfront HMA Med. Ctr., LLC v. Dep't of Health & Galencare, Inc.,* 290 So. 3d 596, 599 (Fla. 2nd DCA 2020); § 120.68(6)(a), Fla. Stat. (providing that the decision of a court reviewing final agency action "may be mandatory, prohibitory, or declaratory in form" and "shall provide whatever relief is appropriate irrespective of the original form of the petition," including not only the "set[ting] aside [of] agency action" but also the ordering of "agency action required by law"). This outcome is consistent with the general rule in Florida that a change in a licensure statute that occurs during the pendency of an application for licensure is operative as to the application, so that the law as changed, rather than as it existed at the time the application was filed, determines whether the license should be granted. *See, e.g., Lavernia v. Dep't of Prof'l Reg., Bd. of Med.,* 616 So. 2d 53, 53–54 (Fla. 1st DCA 1993)(*citing Ziffrin, Inc. v. United States,* 318 U.S. 73, 78 (1943)("In *Ziffrin,* the United States Supreme Court reasoned that

just as a change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law, so, by like token, a change of law pending an administrative hearing or act must be followed in relation to a permit for the doing of a future act)).

Therefore, the Final Order denying the Permit should be affirmed, not vacated.

B. The Legislature's Enactment of Section 377.24(10), Florida Statutes, Renders this Appeal Moot

"Whether an issue is moot is a question of law subject to de novo review" *Jeda v. Gerasci*, 330 So. 3d 549, 551 (Fla. 4th DCA 2021) (citing *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003)).

The parties agree on the basic timeline of the enactment of Section 377.24(10), Florida Statutes. On April 30, 2025, the Florida Legislature passed HB 1143 and the Governor signed the bill into law on June 26, 2025.[5] *See* Initial Brief at 6, n. 7. Section 1 of HB 1443 created Section 377.24(10) which states:

[5] For reference, the Administrative Law Judge issued the Recommended Order in this case on April 28, 2025, before the Legislature passed HB 1143. And FDEP issued the Final Order on

> (10) Notwithstanding any law or rule to the contrary, the drilling, exploration, or production of oil, gas, or other petroleum products is prohibited in counties designated as rural areas of opportunity under s. 288.0656 if the proposed site is within 10 miles of a national estuarine research reserve.

Section 5 of HB 1143 provided that the act would take effect on July 1, 2025.

Clearwater concedes that Section 377.24(10) operates as a "ban on oil and gas operations in the region of Clearwater's drill site." (Initial Brief at 1-2). Thus, the intervening enactment of Section 377.24(10) operates to prohibit the activities Clearwater seeks to pursue on their Site in Calhoun County, Florida.

In *Kendall Healthcare Grp., Ltd., v. Pub. Health Trust of Miami-Dade Cnty.*, 296 So. 3d 533, 535 (Fla. 1st DCA 2020), the Court explained that "[m]ootness of an argument on appeal will generally destroy appellate jurisdiction . . . ." However, the Court further explained that "jurisdiction to decide the merits of the claim will be preserved if collateral legal consequences that affect the rights of a

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June 16, 2025, before the Governor signed HB 1143 and before the effective date of HB 1143.

party flow from the issue to be determined." *Id.* (quoting *Godwin*, 593 So. 2d at 212).

Clearwater acknowledges that an appeal can be dismissed as moot "where no practical relief may be afforded in light of intervening statutory amendments." Initial Brief at 27 (citing *Bayfront Med. Ctr., Inc., v. Neavins*, 920 So. 2d 185, 186-87 (Fla. 2d DCA 2006)). But Clearwater contends that an exception to the mootness doctrine applies because collateral legal consequences affecting Clearwater's rights "may flow from the issue to be determined." Initial Brief at 27 (citing *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992)). Though it is not entirely clear from the Initial Brief, Clearwater seems to assert that the collateral legal consequences that may flow from the issues in this case are that the state "might" use the Final Order to avoid Clearwater's hypothetical takings claims that allegedly arise from the enactment of section 377.24(10), Florida Statutes.

Clearwater's argument is misplaced. The mere possibility that the state "might" use the Final Order in hypothetical future litigation "is insufficient to be deemed a 'consequence' flowing from a claim." *See Kendall Healthcare Grp., Ltd.*, 296 So. 3d at 535 (citing *Lund v.*

Dep't of Health, 708 So. 2d 645, 647 (Fla. 1st DCA 1998)). Clearwater has failed to establish that the collateral legal consequence exception to the mootness doctrine applies because the supposed collateral legal consequences that Clearwater will be exposed to are hypothetical and tenuous. Accordingly, this Court should dismiss this appeal as moot.

III. The Site of Clearwater's Proposed Wildcat Well is a "Sensitive Area or Environment."

The ALJ in the RO and DEP in the FO correctly applied the law in section 377.241(1), Florida Statutes and Rules 62C-25.002(44), 62C-26.003(10) and 62C-30.005, Florida Administrative Code. Clearwater's wildcat well is in a sensitive area and sensitive environment. The ALJ's findings were supported by competent, substantial evidence and there were no errors of law.

A. The Project Site was in a Sensitive Area and Environment under the Applicable Rules

As discussed in the RO, DEP and Clearwater took an exceedingly narrow view of the scope of the project for purposes of environmental review, limiting it to the immediate location of the drilling pad on the Site, and ignored a comment letter from FWC that

the Project Site "is located near, within, or adjacent to potential habitat" for several federal and state-listed species. (RO ¶¶ 117, 120). This was contrary to the requirements of Rules 62C-25.002(44), 62C-26.003(10) and 62C-30.005, Florida Administrative Code.

As discussed in RO paragraph 118, the definition of "sensitive environments" is found in Rule 62C-25.002(44):

> Unless the context otherwise requires, the words defined shall have the following meaning when found in Chapters 62C-25 through 62C-30, F.A.C.:
>
> * * *
>
> (44) SENSITIVE ENVIRONMENTS shall mean those areas identified by commenting agencies during the Department's external review process as especially susceptible to disturbances peculiar to the proposed activity. Sensitive environments **may** be **related to** species specific habitat or other ecosystems. **Some examples** are aquatic preserves, live bottom areas, water conservation areas, endangered or threatened species habitat, wetlands, etc.

(Emphasis added.). Clearwater in its brief (and in the proceeding below) argued that the Project Site is not a sensitive environment because FWC's comment letter failed to use the alleged magic words needed to invoke the rule (i.e., "sensitive environment"). This is an

incorrect reading of the rule, and the rule has no such "magic word" requirement. Rather the rule uses broad, general language that commenting agencies identify an area "as especially susceptible to disturbances peculiar to the proposed activity." Such sensitive environments "**may** be **related** to species specific **habitat** or other **ecosystems**." The rule goes on to state that, "[**s]ome examples are** aquatic preserves, live bottom areas, water conservation areas, endangered or threatened species habitat, wetlands, **etc.**" As noted by the ALJ, this is exactly what the FWC did. In RO paragraph 40 the ALJ noted that "FWCC's letter stated that the Site 'is located near, within, or adjacent to potential habitat' for several federal and state-listed species: reticulated flatwood salamander, eastern indigo snake, Gulf sturgeon, Barbour's map turtle, purple bankclimber (mussel), fat threeridge (mussel), Chipola slabshell (mussel), oval pigtoe (mussel), and southern elktoe (mussel) . . . " and that the "letter also notes that FWCC has observed 5,652 federally proposed or listed freshwater mussels downstream of the Site." The ALJ made similar findings in RO paragraphs 120 and 153. These statements were sufficient to put the DEP and Clearwater on notice that the area of

the Project Site was especially susceptible to disturbances peculiar to the proposed activity (oil drilling) as it is related to species specific habitat or other ecosystems, and identified several federal and state-listed species. Thus, the Project Site was correctly found to be a "sensitive environment" by the ALJ consistent with Rule 62C-25.002(44), Florida Administrative Code.

Clearwater also argues that the FWC's comments didn't occur during the external review process. This is also incorrect. As the FWC letter clearly states, the FWC's letter was in response to the DEP providing the FWC with a copy of the application for review and comment:

> Florida Fish and Wildlife Conservation Commission (FWC) staff have reviewed the above referenced Florida Department of Environmental Protection (DEP) Oil & Gas Program permit application. FWC staff provides the following comments and recommendations as technical assistance during review of the application in accordance with FWC's authorities under Article IV, Section 9 of the Florida Constitution and Chapter 379, Florida Statutes.

(R3225). There is no specific time limit in Rule 62C-25.002(44) on when the FWC must respond. In any event, the Riverkeeper's petition

challenging the permit rendered the permit proposed agency action. *See Young v. Dep't of Cmty. Aff.*, 625 So. 2d 831, 833 (Fla. 1993); *Hamilton Cnty. Bd. of Cnty. Comm'rs v. State Dep't of Envtl. Reg.*, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); *Dep't. of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 785 (Fla. 1st DCA 1981) . As the ALJ correctly noted, DEP and Clearwater cannot be heard to argue that the FWCC letter was submitted after the Proposed Permit was preliminarily approved and is therefore irrelevant, unless it is also willing to disregard the significant changes Clearwater made to its application after that preliminary approval, which DEP was willing to consider. (RO ¶¶ 120, 153).

Further, the ALJ noted that the Site is in a sensitive environment or area as it is in the floodplain of the Apalachicola River, adjacent to wetlands, and is connected to the Apalachicola River, an OFW and UNESCO designated biosphere region, and downstream waterbodies include the Apalachicola Bay—an OFW and a State Aquatic Preserve—as well as Class I and II waterbodies. (RO ¶ 121). Further, two ponds are within a one-mile radius of the Site. One of the two ponds is known as Brown Lake and is located

approximately 4,950 feet east- southeast of the proposed surface hole location. National Hydrologic Data indicates one intermittent stream and three perennial streams within one mile of the Site. The streams are hydrologically connected to the Apalachicola River. Brown Lake Slough connects Brown Lake to the Apalachicola River, which is approximately 4,820 feet southeast of the surface hole location. An unnamed pond is approximately 2,300 feet southeast of the surface hole location. There are unnamed channels within the one-mile radius of the proposed well location. There are wetlands to the north and south of the Site. If a spill were to occur, it would have catastrophic consequences due to the proximity of the proposed well to the nearby streams, wetlands, and bodies of water, which would compound the difficulty of cleaning up the spill. (RO ¶¶ 16-17, 19-28, 125, 135, 154)

Thus, the ALJ's findings of fact and conclusions of law that the project was in a sensitive environment were supported by competent, substantial evidence, correct and not clearly erroneous.

The ALJ's conclusion that the Project Site was in a sensitive area is also correct and not clearly erroneous. First, "sensitive area"

is not a specifically defined term but it is reasonable to conclude that the term sensitive area is broad enough to also include sensitive environments.

Second, the term sensitive area appears in Rule 62C-26.003(10), Florida Administrative Code, which provides:

> (10) The applicant shall describe the provisions made for locating and constructing roads, pads, utility lines and other facilities needed for drilling operations and shall make every effort to minimize related impacts. Applications for permits in wetlands, submerged lands, and other sensitive areas shall be reviewed in accordance with Rule 62C-30.005, F.A.C.

As the ALJ reasonably noted, the quoted rule requires the applicant to "make every effort to minimize related impacts," presumably including impacts beyond the Site itself. The rule does not require DEP to don blinkers and pretend that the "related impacts" of the Proposed Permit cannot extend beyond the Site (RO ¶ 125). The ALJ's interpretation is consistent with the language of Rule 62C-30.005,[6]

[6] While Rule 62C-30.005, Florida Administrative Code is titled "Applications to Drill in the Big Cypress Watershed," it's incorporation by reference in Rule 62C-26.003(10), Florida Administrative Code makes it applicable to those projects located

which evidences the Department's intent to prevent offsite impacts in the area surrounding the drilling Site: "[t]he Department shall evaluate each application to drill and visit each proposed access route and drilling site . . . to insure that the exploration and production activities will cause no permanent adverse impact on the water resources and sheet flow of **the area**, or on the vegetation or the wildlife of **the area**, with special emphasis on rare and endangered species. . . ." Rule 62C-30.005(1), Florida Administrative Code (emphasis added).

In conclusion, Clearwater essentially argues that a site can be surrounded by the most sensitive environments, but as long as the drilling pad itself is in a previously impacted area or uplands then everything that surrounds it is irrelevant. The ALJ rejected Clearwater's absurd and "exceedingly narrow" argument in his Recommended Order, DEP rejected it in its Final Order, and this Court should reject that argument as well.

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outside of the Big Cypress Watershed that fall within the relevant criteria listed in Rule 62C-26.003(10), Florida Administrative Code. *See* § 120.54(1)(i)1 and 2, Fla. Stat. (providing for incorporation of materials and agency rules by reference).

B. Consideration of Environmental Impacts under Section 377.241, Florida Statutes is Broader than under DEP's Rules[7]

Clearwater argues that section 377.241, Florida Statutes, must be read *in pari materia* with the DEP's rules on sensitive areas or environments. However, Clearwater cites no authority for this proposition, and the undersigned is not aware of any such authority for this proposition.

Rather, as discussed in caselaw, section 377.241, Florida Statutes provides broad authority for DEP to balance environmental interests of an oil and gas project. Section 377.241 creates "a multi-factor balancing test that 'requires the agency to 'weigh' the criteria of Section 377.241, balancing environmental interests against the right to explore for oil.'" *Kanter Real Estate, LLC v. Dep't of Envtl. Prot.*, 267 So. 3d 483, 488 (Fla. 1st DCA 2019); *Coastal Petroleum Co.*

[7] In Clearwater's Initial Brief at pages 31-32, Clearwater cites to alleged errors in paragraphs 117, 119-121, and 125 of the Recommended Order, but Clearwater did not file exceptions specifically identifying those paragraphs. Therefore, Clearwater is deemed to agree with the findings of fact, or at least waived any objection to the findings of fact. *See Envtl. Coal of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003).

v. Fla. Wildlife Fed'n, Inc., 766 So. 2d 226, 228 (Fla. 1st DCA 1999).

In *Coastal Petroleum*, the applicant for the drilling permit argued that the DEP was constrained from reinterpreting its application of section 377.241, Florida Statutes. The court rejected that argument, explaining:

> The appellant asserts that in the past, DEP has issued permits when each criterion of section 377.241 "has been met," but that when DEP announced its intention to issue a drilling permit in this case, a group of environmental organizations challenged the decision, arguing that DEP was wrongly interpreting the statute, which requires the agency to "weigh" the criteria of section 377.241, balancing environmental interests against the right to explore for oil. Following an evidentiary hearing and the issuance of an order in which the hearing officer recommended granting the permit with a multi-million dollar surety, DEP reconsidered its past practice and agreed with the environmental petitioners that "meeting" each criterion was not legally sufficient. It then "balanced" the criteria and determined that issuance of a drilling permit was too dangerous to the coastal environment.
>
> The appellant contends that DEP cannot "change its mind" about how to interpret the law without notice and rulemaking procedures, especially when the result is an unconstitutional taking of its property. We find that the appellant had adequate opportunity to be heard on the issue of the proper

> interpretation of section 377.241. DEP correctly determined that its previous practice was not consistent with the proper interpretation of the permitting statute and adequately explained its determination.

Id. at 228. In *Coastal Petroleum,* DEP balanced the factors in section 377.241, Florida Statutes, including environmental interests, and decided that issuance of a drilling permit was too dangerous to the coastal environment. Here, like in *Coastal Petroleum,* the ALJ balanced the factors in section 377.241, Florida Statutes, including environmental interests, and decided that issuance of the drilling permit was too dangerous to the surrounding and downstream sensitive areas and environment.

And this case is distinguishable from *Kanter Real Estate, LLC v. Dep't of Envtl. Prot.*, 267 So. 3d 483, 488 (Fla. 1st DCA 2019) . In *Kanter,* unlike in this case, the ALJ made an ultimate finding of fact was that the land in question did not have any qualities that would make it vulnerable to pollution of the land, aquifer or surface waters, a finding the ALJ supported with examples and facts introduced as evidence:

> 109. The property upon which the Well Site is to be located has no special

> characteristics that would make it susceptible to pollution. Although the Well Site is in WCA-3, it is located in the Pocket, an area with existing road access that is *hydrologically isolated from both surface and groundwater and is environmentally degraded and overrun with cattails.* The area is far less likely to impact natural resources than other Department-permitted wells, notably those at Raccoon Point which exist in the Big Cypress National Preserve, in a far more ecologically intact area than here.

(Emphasis in original). Here, there was ample competent, substantial evidence in the record to support the ALJ's findings that the Site was hydrologically connected to the Apalachicola River, an OFW and UNESCO designated biosphere region, and downstream waterbodies include the Apalachicola Bay—an OFW and a State Aquatic Preserve—as well as Class I and II waterbodies.

The ALJ's interpretation of section 377.241, Florida Statutes, and DEP's adoption of his interpretation, was consistent with caselaw and should be affirmed.

C. Clearwater failed to satisfy Rule 62C-30.005, Florida Administrative Code

Clearwater impermissibly, and incorrectly, attempts to argue that it complied with Rule 62C-30.005, Florida Administrative Code.

Clearwater's arguments should be rejected for several reasons.

First, Clearwater failed to preserve these issues for appeal. The findings of fact that Clearwater failed to comply with specific portions of Rule 62C-30.005, Florida Administrative Code are found in Recommended Order paragraphs 126 through 129. Clearwater failed to take exception to these paragraphs. Therefore, Clearwater is deemed to agree with the findings of fact, or at least has waived any objection to the findings of fact. *See Envtl. Coal. of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. Ag. for Health Care Admin*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003).

Second, these findings of fact relate to whether Clearwater carried its burden of proof in this case. *Dep't. of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 789 (Fla. 1st DCA 1981 (RO ¶ 147). When the finding of fact under review is that a party did not carry its burden of proof, the finding cannot be reviewed for competent, substantial evidence. *Beckett v. Dep't of Fin. Servs.*, 982 So. 2d 94, 102 (Fla. 1st DCA 2008); *Fitzgerald v. Osceola Cnty Sch. Bd.,* 974 So. 2d 1161,

1164 (Fla. 1st DCA 2008); *Mitchell v. XO Commc'ns,* 966 So. 2d 489, 490 (Fla. 1st DCA 2007).

Third, the findings of fact are supported by competent, substantial evidence and should not be revisited on appeal. The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g.*, *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). This Court may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cnty. Sch. Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there

may also be competent substantial evidence supporting a contrary finding. *See, e.g.*, *Arand Constr. 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).

Here, there is ample competent substantial evidence to support the ALJ's findings that Clearwater failed to meet its burden of proof. This evidence is detailed in Riverkeeper's statement of the facts on pages 9-18, above, under the heading "The Project's Design was Flawed and Lacked Reasonable Assurance." And there was extensive discussion in the Recommended Order of the evidence presented by both sides on the stormwater issues related to Rules 62C-30.005 (2)(b)6 and 7, Florida Administrative Code. (RO ¶¶ 85–106, 125–29, 132-35, 154-56)

To summarize this evidence, the drilling location was in a sensitive area or environment that could flood with up to 4 feet of water surrounding the Site. Clearwater didn't design the Site to meet the more stringent flooding Rules 62C-30.005(2)(b)6 and 7, Florida Administrative Code. Clearwater designed it like someone might design a Dollar General store in a small town, not an oil and gas

project in Florida's most sensitive environmental area. As a result, the design of the project was a failure. Riverkeeper's engineer showed that the original design was subject to flooding, which would release any pollutants to the Apalachicola River floodplain as the flood waters recede. (R3217-23; TR Day 2, pp. 235, 241-42). Clearwater attempted to fix the flaws in the project but its attempts fell short of the rule requirements.[8] Clearwater's modifications didn't have details to show that the berms wouldn't fail in the event of the flood. And Clearwater couldn't prove that it could actually implement its

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[8] Clearwater attempts to argue that the ALJ "penalized" it for trying to fix its project. This is refuted by the ALJ's footnote 18 which states:

> The criticism in the Findings of Fact of the post-approval amendments was not intended to suggest that DEP and Clearwater did anything untoward or not in keeping with the cited authorities. Clearwater was entitled to offer its seven-well economic scenario and its conceptual stormwater plan at the hearing though they were not part of the original application. Riverkeeper did not object to the amendments. The undersigned only intended to suggest that in some situations, DEP might exercise its discretion to slow the process and complete its own review of complex technical amendments rather than leaving it to the ALJ to sort them out *ab initio*.

proposed modifications given the constraints on expanding the project imposed by the surrounding wetlands.[9]

Further, Clearwater does not even attempt to reargue that it could comply with Rule 62C-30.005(2)(a)6, which provides that all roads shall be high enough to assure year round usage. There were multiple lines of evidence, including Clearwater's own photographs, that the access road is constructed through a cypress swamp that is subject to seasonal flooding. (R3217-23; TR Day 2, pp. 87, 202-09, 235; R2263-64, 2267-70; R3856 and 3858)

In conclusion, Clearwater failed to meet its burden of proof, and the ALJ's findings were supported by competent, substantial evidence and should be affirmed. This largely occurred because Clearwater never took the applicable regulatory requirements seriously (and still doesn't based on the argument in the brief). Despite overwhelming evidence to the contrary, Clearwater continues

[9] In engineering speak, Clearwater's consultant failed to model the proposed changes to the project using tailwater conditions associated with the 25-year, 24-hour design storm event, and conceded that Clearwater could not implement this recommendation due to site constraints. (TR Day 2, p. 51, 245-46)

to approach this project with an excessively narrow point of view that fails to see the project in the proper context. As a result, the ALJ, and in the end, DEP, both correctly concluded that this wildcat well is too risky to proceed in this sensitive environment and area.

IV. The Final Order Correctly Applies Section 377.241(3), Florida Statutes, and the Balancing Test in Section 377.241, Florida Statutes Generally and Should be Affirmed.

The Administrative Law Judge and DEP correctly applied section 377.241(3), Florida Statutes, giving meaning to all words in the statute. The balancing test of all of the factors in section 377.241, Florida Statutes was also applied correctly and reasonably consistent with past cases. Clearwater's arguments should be rejected as they are inconsistent with the text of the statute, were not properly preserved on appeal, and improperly ask this court to reweigh the evidence below.

A. Clearwater Failed to Meet the Test in Section 377.241(3), Florida Statutes

First, Clearwater failed to preserve these issues for appeal. Clearwater took exception to paragraphs 158 through 160 of the RO regarding geological and economic analyses related to section

377.241(3) , Florida Statutes. However, Clearwater did not take exception to paragraphs 47 through 84 and 137. These paragraphs omitted by Clearwater contain extensive analysis and findings of fact on the same topic as paragraphs 158 through 160. Therefore, Clearwater is deemed to agree with the findings of fact, or at least waived any objection to the findings of fact. *See Envtl. Coal. of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. Ag. for Health Care Admin*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003).

Second, these findings of fact relate to whether Clearwater carried its burden of proof in this case. *Dep't. of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 789 (Fla. 1st DCA 1981); *c.f.* § 120.569(2)(p), Fla. Stat. (RO ¶ 147). When the finding of fact under review is that a party did not carry its burden of proof, the finding cannot be reviewed for competent, substantial evidence. *Beckett v. Dep't of Fin. Servs.*, 982 So. 2d 94, 102 (Fla. 1st DCA 2008); *Fitzgerald v. Osceola Cnty Sch. Bd.,* 974 So. 2d 1161, 1164 (Fla. 1st DCA 2008); *Mitchell v. XO Commc'ns,* 966 So. 2d 489, 490 (Fla. 1st DCA 2007).

Third, the findings of fact are supported by competent, substantial evidence and should not be revisited on appeal. The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g.*, *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). This Court does not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cnty. Sch. Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g.*, *Arand Constr. 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).

Here, there is ample competent substantial evidence to support the ALJ's findings that Clearwater did not establish the indicated likelihood of the presence of oil in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis pursuant to section 377.241(3), Florida Statutes. This evidence is detailed in Riverkeeper's statement of the facts on pages 19-25, above, under the heading "Geologic and Economic Analysis," and there was extensive discussion in the Recommended Order of the evidence presented by both sides related to section 377.241(3), Florida Statutes. (RO ¶¶ 47-84, 137, 158-60).

To summarize this evidence, no oil has ever been found in the area that Clearwater seeks to drill. Riverkeeper's oil and gas expert Chris Moore prepared an economic analysis of the expected present value ("EPV") of the proposed well using Clearwater's numbers supplied by Mr. Campbell. (TR Day 3, pp. 11-16; R4042-44; R3731-32). EPV is the fundamental equation for evaluating exploration opportunities in the oil and gas industry, and is what Mr. Moore used

to evaluate whether Clearwater was likely to meet its burden of proof pursuant to section 377.241(3), Florida Statutes. (TR Day 3, pp. 11-16; R4042-83). A negative EPV indicates that a prudent investor would not drill the well because there is insufficient profit, on a risk-weighted basis, to offset the chance and cost of not finding oil. (TR Day 3, pp. 11-21; R4042-83). In laymen's terms, if you pursue projects with a positive EPV, it is considered investing and on average you would expect to be successful — the basis of the exploration industry — and if you pursue projects with a negative EPV, it's considered gambling and you would expect to lose your money and go out of business. (TR Day 3, pp. 14-15; R4069).

Mr. Moore's analysis of the EPV used Clearwater's own numbers for the likelihood of finding oil as estimated by Mr. Craft (30%), the expected revenues based on the quantity of oil expected to be recovered from Mr. Campbell, and Mr. Campbell's estimated expenses for drilling the well. The result of the EPV for the proposed well, using Clearwater's numbers, was <u>negative</u> $0.8 million. (TR Day 3, p. 18; R4042-83; R3731-32). However, Mr. Moore thought that Mr. Craft's 30% estimate of finding oil was too high, and that industry

standard estimates for finding oil where it has not been found before is more likely in the range of 13 to 25 percent, which would further reduce the already negative economics of the proposed well, and further demonstrate the lack of commercial profitability for the Project. (TR Day 3, p. 9; R4051, Figure 5). The totality of the economic analysis evidence demonstrated that a prudent investor would not drill this well, and that there is not a proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis. (TR Day 3, pp. 5-68; R4042-44)

Fourth, Clearwater seeks to have this court discard the ALJ's and DEP's findings of fact and conclusions of law on section 377.241(3) based on Mr. Moore's EPV analysis. Instead, Clearwater asks the Court to adopt a "low bar" test whereby the Department would not "act as a financial gatekeeper" pursuant to Section 377.241(3), but instead would "require the decisionmaker to **assume success** in finding oil once an indicated likelihood is established and then test commercial sufficiency of the indicated quantity." (Initial

Brief at p. 39, 43, 45)(emphasis added). Clearwater's interpretation would replace the current burden of proof on permit applicants to satisfy all the statutory criteria section 377.241(3) under *J.W.C. Co., Inc.,* with a presumption of proof in favor of the applicant if it can demonstrate merely that it meets the requirements of half of the statute.

Further, the premise of Clearwater's arguments about EPV are entirely wrong. It's not an unreasonable, clearly erroneous, impossibly "high bar" approach to oil exploration. On the contrary, it's the industry standard approach for evaluating a project's commercial profitability so that you don't go broke in the oil business!

Clearwater's argument that "the statute does not require a showing of positive expected monetary value it requires a showing that there is something worth chasing," rings hollow from an economic and legal perspective. (Initial Brief at p. 43). From an economic perspective, Clearwater's interpretation is akin to a gambler arguing that a trip to the casino in Vegas is justified because they could win money at the casino, never mind whether the odds support that conclusion. From a legal perspective, Clearwater's

argument rewrites section 377.241(3) to emphasize "the proven or indicated likelihood of the presence of oil, gas or related minerals" while effectively eliminating the rest. In a state where supremacy of the text reigns supreme, Clearwater's interpretation fails to give meaning to all of the words in the statute and should be rejected. *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946 (Fla. 2020))(In Florida, courts "follow the 'supremacy of text principle' – namely the principle that '[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."). Further, it transforms the statute from a meaningful criteria to be weighed and balanced by the Department, to a "low bar" check the box criteria contrary to the interpretation of the application of the statute in *Coastal Petroleum.*

The Court should reject Clearwater's arguments to supplant the Department's consideration of the commercial profitability under the statute, with the judgment of the driller as to whether drilling is financially prudent. Clearwater's arguments impermissibly reargue the RO and FO, which are supported by competent, substantial

evidence, and promote an interpretation of the law that does not implement the text of section 377.241(3), Florida Statutes.

B. The Recommended Order and Final Order Properly Balanced the Criteria in Section 377.241, Florida Statutes

The Final Order should be affirmed as the ALJ and DEP followed the law by balancing the criteria in Section 377.241, Florida Statutes.

Clearwater contends that the ALJ failed to properly apply the balancing test, and argues that "the ALJ explicitly stated that factors (1) and (3) were "the two overriding factors" (R: 611–663 (R: 611–663 (RO ¶138))." (Initial Brief at p. 46). At the outset we would note that Clearwater's argument appears to be founded on a mistake. The ALJ does not state this anywhere in the Recommended Order, nor does it appear in the Final Order. Rather, this language appears in Riverkeeper's Proposed Recommended Order that was submitted following the administrative hearing below. (R510, ¶ 138)

In any event, the ALJ and DEP clearly followed the law. Clearwater's arguments are belied by the fact that the ALJ cited the relevant cases and language addressing the balancing test in *Kanter* and *Coastal Petroleum*, as well as the fact that the ALJ quoted the

balancing test issue verbatim from the Parties' Amended Joint Prehearing Stipulation on page 5 of the Recommended Order:

> 1. Whether the matters described in subsections 377.241(1)-(3), Florida Statutes, tend to on balance to weigh in favor of or in opposition to the issuance of the Permit.

(R615, 659). Clearly the ALJ understood the law and acted on the issues identified in the Parties' Prehearing Stipulation.

Clearwater's real contention appears to be that it doesn't like that the ALJ didn't weigh the criterion in its favor, and is asking this Court to reweigh the evidence and rebalance the criteria to fit Clearwater's desired ultimate conclusion (as it asked DEP to do below). However, neither the agency nor this Court is permitted to reweigh the evidence presented, judge the credibility of the witnesses, or otherwise interpret the evidence to fit a desired ultimate conclusion. *See Rogers v. Dep't of Health,* 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Bill Salter Advert., Inc. v. Dep't of Transp.*, 974 So. 2d 548, 551 (Fla. 1st DCA 2008).

As discussed in Findings of Fact 15-17, 19-28, 40-42, 85-106, 117-29, 130-135 and Conclusions of Law 150-156, the criteria

in section 377.241(1) weighed in favor of denial. Riverkeeper did not contest that Clearwater satisfied section 377.241(2) and this weighed in favor of issuance. As discussed in Findings of Fact 47-84 and 137 and Conclusions of Law 158-160, the criteria in section 377.241(3) also weighed in favor of denial. Weighing the criteria of section 377.241, balancing environmental interests against the right to explore for oil, led the ALJ to the conclusion that the Proposed Permit should be denied as discussed in Conclusion of Law 161. These determinations should not be disturbed and the Final Order should be affirmed.

CONCLUSION

Clearwater's appeal attempts to spin a tale of prejudice from a mere footnote that is not a finding of fact and is nothing more than *dicta* in an improper attempt to have this Court reweigh the evidence and substitute the Court's findings of fact for those of the ALJ and DEP below. Further, Clearwater argues legal error on the part of the ALJ and DEP when clearly there was none. The ALJ's well-reasoned Recommended Order was replete with findings of fact weighing the record evidence presented by both parties. Finally, the ALJ correctly

cited to and applied the test in *Coastal Petroleum* for weighing the statutory criteria in section 377.241, Florida Statutes. Accordingly, this Court should affirm the Final Order on Appeal.

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief was prepared in 14-point Bookman Old Style and that it complies with the font and word-count requirements of Florida Rules of Appellate Procedure 9.045 and 9.210. This brief does not exceed 13,000 words (excluding the parts exempted by Rule 9.210(a)(2)(E)).

CERTIFICATE OF SERVICE

I certify that a copy of this filing has been provided via the E-Filing Portal to the following on this ____ day of June 2026:

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