STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN SALVATORE AND
DESIREE RABUSE,

Petitioners,

v.

OGC CASE NO.: 25-1060
DOAH CASE NO.: 25-4785

TMV PROPERTIES, INC. AND
STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

FINAL ORDER

On January 5, 2026, an administrative law judge (ALJ) with the Division of Administrative Hearings (DOAH) issued a Recommended Order in these proceedings. Petitioners had challenged a Notice of Intent (NOI) to issue Environmental Resource Permit No. MMR_452990-001 (ERP) to TMV Properties, Inc. (TMV). The ERP would authorize a proposed sand mining and reclamation project covering 281.25 acres of a 293.31-acre property in Charlotte County.

Background and Procedural History

The ALJ conducted a two-day formal hearing. During the hearing, the applicant proposed modifications to the project, namely (1) to substitute clean fill or clean debris, as opposed to vegetative debris, for backfill material; and (2) to add two wells to a monitoring plan. Those modifications are reflected in the record as Joint Exhibits P and HH.[1] In the Recommended Order, the ALJ recommended that the Department issue the ERP with the permit modifications

[1] Exhibit P is a redlined version of changes to the NOI, reflecting the substitution of clean fill. Exhibit HH is a map depicting the proposed location of two monitoring wells.

reflected in those two exhibits. Petitioners have filed timely exceptions to the Recommended Order, and TMV filed a timely response to those exceptions.

The Recommended Order fully describes the proceedings before DOAH. A transcript of the proceedings is in the record, and was available to the ALJ when he prepared the Recommended Order. References to Florida Statutes are to Florida Statutes (2025).

Petitioner's exceptions are addressed below.

Exceptions 1 and 2

In the first and second exceptions to the Recommended Order, Petitioners contend that the ALJ misinterpreted volume I, section 10.2.2.2 of the Environmental Resource Permit Applicant's Handbook, incorporated in rule 62-330.010(4), Florida Administrative Code (the Handbook). This specific part of the Handbook makes an exception to several of the "Environmental Criteria" in the Handbook. Among other things, section 10.2.2.2 creates an exception to the requirement that the applicant provide reasonable assurances regarding "Cumulative Impacts" under section 10.2.8 of the Handbook. Under section 10.2.2.2, this exception applies to two types of surface features: (1) "wholly-owned ponds that were entirely constructed in uplands and that are less than one acre in area" and (2) "alterations in drainage ditches that were constructed in uplands." That section also provides that the exception would not apply if the pond or ditch provided significant habitat for endangered or threatened species.

Petitioners argue that the ALJ erred by not requiring a review of cumulative impacts as described in the Handbook, specifically based on impacts to an upland-cut ditch. First, Petitioners contend that the ALJ decided that cumulative impact analysis did not apply because the project would not impact any wetlands, as opposed to surface waters (the ditch). Here, Petitioners mischaracterize the ALJ's findings and conclusions. The ALJ did not say that

cumulative impact review would not apply to surface waters. In paragraph 68 of the Recommended Order, the ALJ described and accepted expert testimony regarding the upland-cut ditch. As he found, the exception in 10.2.2.2 applied to that ditch.[2]

Next, Petitioners argue that the ALJ misinterpreted rule 10.2.2.2. Specifically, Petitioners argue that 10.2.2.2 applies only to "minor upland-ditch works." However, while section 10.2.2.2 sets an areal limit on the application of the exemption to ponds, there is no such limit for upland-cut ditches. "[W]hat a text does not provide is unprovided." *Cornelius v. Haywood*, 423 So. 3d 32, 37 (Fla. 4th DCA 2025), citing *State v. Demons*, 351 So. 3d 10, 15 (Fla. 4th DCA 2022). Petitioners' proposed interpretation is less reasonable than the interpretation reflected in the Recommended Order. For these reasons, the first and second exceptions must be rejected. *See* § 120.57(1)(l), Fla. Stat. ("When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.")

Exception 3

Petitioners take exception to 12 paragraphs of the Recommended Order, arguing that the ALJ misinterpreted the reasonable assurances standard by placing undue weight on the testimony of TMV's experts. The cited paragraphs do not support the exception. They show only that TMV's expert testimony persuaded the ALJ, but Petitioners' testimony did not. The ALJ has exclusive authority to make findings on the credibility of witnesses and other evidence. *E.g.,*

[2] The testimony and the finding appear to assume the upland ditch is a surface water.

Castro v. Dep't of Health, 424 So. 3d 526, 532 (Fla. 1st DCA 2025). For that reason, the exception is rejected.

Exception 4

Petitioners take exception to several paragraphs in the Recommended Order, objecting to the consideration of amendments offered during the formal hearing. Petitioners cite section 120.60(3), Florida Statues, with a parenthetical quotation regarding amendments to permit applications. However, the quotation does not appear in the statute itself, and does not paraphrase any part of the statute.[3] Petitioners appear to argue that because TMV amended its application during the hearing, and because those changes were substantial, DEP should have required "new notice" of the application. The opinion in *Hopwood v. Department of Environmental Regulation*, 402 So. 2d 1296, 1299 (Fla. 1st DCA 1981), discussed and applied in the Recommended Order, addresses this issue squarely. Succinctly, "major or substantial amendments to or modification of a permit application in midproceeding may well constitute a due process problem of notice to the agency [or other parties]." *Hopwood* at 1299; *see Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009) (applying *Hopwood* to address objections by third-party challengers in permitting hearing). However, where the parties are not surprised or unfairly prejudiced by a change to the application, and where the change is not significant, parties are permitted to make changes to the proposed permit during the formal hearing. *Id.*; *see also Capeletti Bros., Inc. v. Dep't of Gen. Services*, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983) (discussing functions of a de novo proceeding). To the extent that the materiality of the amendments is a finding of fact, the Department cannot re-weigh the evidence or make

[3] Petitioners did not argue that the modifications were reasonably expected to cause new or substantially greater adverse impacts. *See* Fla. Admin. Code R. 62-110.106(7)(a)4. Given the nature of the modifications, this rule would not apply.

alternative inferences from evidence in the record. *Gross v. Dep't of Health*, 819 So. 2d 997, 1005 (Fla. 5th DCA 2002); *Prysi v. Dep't of Health*, 823 So. 2d 823, 825 (Fla. 1st DCA 2002).

The Department is only authorized to reject conclusions of law over which it has substantive jurisdiction, i.e., issues within the Department's area of expertise. *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001), citing § 120.57(1)(l), Fla. Stat. The Department lacks substantive jurisdiction over decisions on procedural and evidentiary rulings by the ALJ. *Id.*; *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001). A ruling on procedural fairness would appear to be within the ALJ's authority. To the extent the *Hopwood* issue is arguably within the Department's substantive jurisdiction, the ALJ's conclusions on this point are more reasonable than the conclusions offered by Petitioners. This exception is rejected. *See* § 120.57(1)(l), Fla. Stat.

Exception 5

Petitioners allege that the ALJ mischaracterized Petitioners' testimony as "speculative" in three paragraphs of the Recommended Order. In paragraph 96, the ALJ did characterize Petitioners' testimony on one issue as "speculative," which appears to be a commentary on the weight of evidence. Again, the ALJ has exclusive authority to make findings on the credibility of witnesses and other evidence. *Castro*, 424 So. 3d at 532. If this statement is to be read as a ruling on the admissibility or competence of Petitioners' testimony, the exception must be rejected because the Department lacks substantive jurisdiction over evidentiary rulings by the ALJ. *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001). Exception 5 is rejected.

Exception 6

In its sixth and final exception, Petitioner argue that the Department cannot rely upon existing "agricultural irrigation features" to demonstrate reasonable assurances of compliance,

because the permitted project is intended for a mining operation. *See* § 373.414(1), Fla. Stat. (reasonable assurance requirement as applied to a statutory public interest test). The reasonable assurance standard requires a demonstration by the applicant of a "substantial likelihood that the project will be successfully implemented." *Metro. Dade Cnty. v. Coscan Florida, Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Applying common sense, the original purpose of a ditch would not change its effect on the movement of water. The language of the statute does not support Petitioners' argument. Petitioners have identified no other rule, statute, or other authority to support the argument. To the extent that Petitioners present an argument on the interpretation of section 373.414(1), Florida Statutes, their proposed interpretation is less reasonable than the ALJ's interpretation. For that reason, the sixth exception is rejected. *See* § 120.57(1)(l), Fla. Stat.

CONCLUSION

Having considered the applicable law and the Recommended Order, and otherwise being duly advised, it is ORDERED:

A. The Recommended Order (Exhibit A to this Final Order) is adopted and incorporated herein by reference, in its entirety.

B. The ERP is GRANTED with the permit modifications reflected in Joint Exhibits P and HH.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; or by electronic mail to Agency_Clerk@dep.state.fl.us and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 19 day of February, 2026, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

ALEXIS A. LAMBERT
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.

Lea Crandall Digitally signed by Lea Crandall Date: 2026.02.19 12:13:26 -05'00'
Clerk

February 19, 2026
Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent by electronic mail to the following on this 19th day of February, 2026.

John Salvator Desiree Rabuse 36456 Washington Loop Road Punta Gorda, FL 33982 desireerabuse@gmail.com	Susan L. Stephens, Esq. Felicia L. Kitzmiller, Esq. Sterns Weaver Miller Weissler Alhadeff & Sitterson, P.A. 106 E. College Avenue, Suite 700 Tallahassee, FL 32301 sstephens@sternsweaver.com fkitzmiller@stearnsweaver.com kskipper@stearnsweaver.com *Counsel for TMV Properties, Inc.*
Jay Patrick Reynolds Assistant Deputy General Counsel Matthew A. Taylor Assistant General Counsel 3900 Commonwealth Boulevard, MS 35 Tallahassee, FL 32399-3000 Patrick.Reynolds@FloridaDEP.gov Matthew.Taylor@FloridaDEP.gov Lateshee.M.Daniels@FloridaDEP.gov Jacqueline.Gardner@FloridaDEP.gov *Counsel for Department of Environmental Protection*	

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

/s/ Jeffrey Brown
JEFFREY BROWN
Administrative Law Counsel

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard, MS 35
Tallahassee, FL 32399-3000

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN SALVATORE AND DESIREE RABUSE,

Petitioners,

vs. Case No. 25-4785

TMV PROPERTY, INC, AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in these cases on November 10 and 12, 2025, via Zoom teleconference, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioners John Salvatore and Desiree Rabuse:

John Salvatore and Desiree Rabuse, pro se
36456 Washington Loop Road
Punta Gorda, Florida 33982

For Respondent TMV Properties, Inc. ("TMV"):

Susan Lynne Stephens, Esquire
Felicia L. Kitzmiller, Esquire
Stearns Weaver Miller, P.A.
106 East College Avenue, Suite 700
Tallahassee, Florida 32303

For Respondent Department of Environmental Protection ("DEP"):

Jay Patrick Reynolds, Esquire
Florida Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3900

STATEMENT OF THE ISSUE

The issue is whether the mining, associated disturbance, and reclamation of 281.25 acres on a 293.31-acre property in Charlotte County proposed by Respondent TMV meets the requirements for an Environmental Resource Permit to be issued by DEP.

PRELIMINARY STATEMENT

On May 30, 2025, DEP issued a Notice of Intent ("NOI") to issue Environmental Resource Permit No. MMR_452990-001 (the "ERP") to TMV, giving preliminary approval to a proposed sand mining and reclamation project covering 281.25 acres of a 293.31-acre property in Charlotte County.

Petitioners, John Salvatore and Desiree Rabuse, whose property abuts the Project, timely filed a petition with DEP challenging issuance of the ERP. Petitioners' Second Amended Petition (the "Petition") was filed with DEP on August 12, 2025.

On September 3, 2025, DEP referred the case to DOAH for the assignment of an ALJ and the conduct of a formal hearing. By Order dated September 12, 2025, the case was set for hearing on November 10 and 12, 2025, on which dates the hearing was convened and completed.

On September 18, 2025, TMV filed a Motion to Relinquish Jurisdiction, arguing that Petitioners could not establish that the proposed agency action

would affect their substantial interests and therefore lacked standing to bring a challenge to the proposed ERP. Petitioners filed a response to the motion on September 24, 2025. By Order dated September 26, 2025, the undersigned denied the motion without prejudice to TMV's ability to request that specific issues be stricken as beyond the scope of an ERP hearing under chapter 373, part IV, Florida Statutes, or to renew its objection as to Petitioners' standing at the close of the evidentiary portion of this case.

On October 1, 2025, TMV filed a Motion to Strike and Motion in Limine. This motion sought to exclude issues raised by the Petition that TMV claimed were beyond the allowable scope of an ERP proceeding, such as references to dust, airborne particulates, air pollution, odor, noise, vibration, decreased property value and other financial losses, fire hazards, productivity losses and compromised future plans, cumulative effects of water withdrawal, comprehensive plan and zoning regulations, and lack of community engagement by TMV during the application process. On October 6, 2025, Petitioners filed a written response in opposition. By Order dated October 23, 2025, the undersigned granted the Motion in Limine, with the proviso that Petitioners would be allowed to present evidence regarding TMV's permitting presentations to Charlotte County for the limited purpose of impeaching the credibility of TMV. At the outset of the final hearing, the undersigned orally granted a follow-up motion by TMV to exclude traffic concerns from the issues to be considered.[1]

On October 30, 2025, DEP filed a Notice of Intended Revisions to the NOI and Accompanying Draft Environmental Resource Permit, correcting scrivener's errors and incorporating TMV's revised reclamation plans providing that clean fill or clean debris would be used as backfill material

[1] On November 13, 2025, a written Order was entered memorializing this and several other rulings made orally at the start of the hearing.

rather than the yard trash specified in the initially approved application. On October 31, 2025, Petitioners filed a Motion to Strike the Notice of Intended Revisions. At the outset of the final hearing, the undersigned denied the Motion to Strike without prejudice and the hearing went forward based on the revised NOI and draft ERP.

At the hearing, TMV presented the testimony of Gary Bayne, President and Senior Project Engineer at Southwest Engineering and Design ("SED"), who was accepted as an expert in civil engineering and stormwater design; and David Brown, National Practice Lead in Hydrogeology at RESPEC Company, LLC, who was accepted as an expert in hydrogeology, groundwater flow modeling, and groundwater quality. Mr. Bayne and Mr. Brown also testified as rebuttal witnesses.

DEP presented the testimony of Marisa Rhian, Administrator of the Mining and Mitigation Program ("MMP") within the Water Resource Management Division of DEP; and the rebuttal testimony of Zachariah Shely, another MMP Administrator.

Respondents' Joint Exhibits A, C through E, G, I through P, and HH were admitted into evidence. TMV's Exhibits Q, R, U through Y, BB, DD, GG, II, JJ, and LL through NN were admitted into evidence. DEP's Exhibits 1 and 4 were admitted into evidence.

Petitioners each testified on their own behalf. Petitioners' Exhibits C, 2, 3, 5, 10, 15, and 16 were admitted into evidence. Without objection, Petitioners offered TMV's Exhibit FF into evidence, which was admitted.

The four-volume Transcript of the hearing was filed on November 25, 2025. Revised versions of Volumes 2 and 3 of the Transcript were filed on

December 2, 2025. The parties' joint motion for an extension of the time for filing proposed recommended orders was granted by Order dated December 5, 2025. In accordance with the Order granting the extension, the parties timely filed their Proposed Recommended Orders on December 12, 2025.

The law in effect at the time DEP takes final agency action on the application being operative, references to statutes are to their current versions, unless otherwise noted. *Lavernia v. Dep't of Pro. Regul.*, 616 So. 2d 53 (Fla. 1st DCA 1993).

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

The Parties

1. DEP is the state agency charged with regulating specified activities in or affecting state jurisdictional surface waters, including stormwater management, pursuant to chapter 373, part IV, and the implementing rules in Florida Administrative Code Title 62. In this case, DEP is responsible for reviewing TMV's application for mining activities and issuing the ERP that has been challenged in these proceedings.

2. TMV Properties, Inc., is the name under which TMV, Inc., a Delaware corporation, is registered to do business in the state of Florida. TMV owns a 293.31-acre property located at 32990 Bermont Road, Punta Gorda, Florida 33982, further identified by Charlotte County Property Appraiser Parcel IDs 402433200001, 402434100001, and 402434300001 ("Project Site"), and is the applicant for the ERP at issue in this proceeding.

3. TMV established its ownership of the parcels composing the Project Site by way of two warranty deeds executed on February 12, 2019, one for a 20 percent interest conveyed by Highway 17, LLC, and the other for an

80 percent interest conveyed by Charlotte Florida Partnership.[2] TMV also submitted Charlotte County Property Appraiser reports dated December 21, 2022, showing TMV's ownership of all parcels relevant to its ERP application.

4. Mr. Salvatore and Ms. Rabuse own a neighboring property directly to the north of the Project Site, at 36456 Washington Loop Road, Punta Gorda, Florida. A portion of the northern property line of the Project Site is the southern property line of Petitioners' property. Petitioners have resided at this location since 2021.

Background

5. The Project Site is a former citrus grove with an existing agricultural stormwater management system that includes a water treatment reservoir in the northwest corner, pumps, perimeter ditches around the old grove, furrows running north-south to drain water from around the now-removed trees, and a large central east-west ditch. Stormwater gathered in the ditches is pumped into a large stormwater reservoir in the northwest corner of the Project Site. This stormwater management system is authorized by Permit No. 43010748.003 from the Southwest Florida Water Management District ("SWFWMD"), which has been modified over time.

6. TMV also owns adjacent property west of the Project Site on which it operates permitted yard trash recycling and disposal facilities. In March 2021, DEP issued Permit No. 328814-003-SO/E26, which modified the yard trash permit to include the Project Site. An Operation Plan approved by DEP states that only uncontaminated yard trash may be recycled and disposed of at the facility.[3] Piles of composted and mulched vegetative debris are stored

[2] The warranty deed conveying 80 percent ownership was inadvertently omitted from the permit application file. At the final hearing, the record was supplemented with the second deed, which had been provided to Petitioners during discovery.

[3] "Yard trash means vegetative matter resulting from landscaping maintenance or land clearing operations and includes materials such as tree and shrub trimmings, grass clippings, palm fronds, trees and tree stumps, and associated rocks and soils." Fla. Admin.

in the southwest corner of the Project Site, with ultimate disposal authorized in and under berms surrounding the Project Site. DEP's South District office has inspected the yard trash recycling and disposal facilities, including the portions of the facilities on the Project Site, and determined that TMV, is and has been, operating in compliance with its permits.

7. After it completes its mining activities and reclamation of the property, TMV plans to develop the Project Site as a mixed-use development with a nature preserve in the center of the property. Landscaped berms made partly of compost and mulch produced by TMV will surround the perimeter of the Project Site.

8. TMV intends to grow sod and trees on the western portion of the Project Site for use in reclamation. TMV applied for a modification of its existing SWFWMD Water Use Permit[4] for the old citrus grove to account for the increased water usage caused by the change in crop plan from citrus to 41 acres of tree farm nursery and 78 acres of sod. SWFWMD approved the modification on June 17, 2022.

9. In 2022, in mistaken reliance on the citrus grove's existing stormwater management system permit, and after receiving the modified water use permit, TMV began constructing large, segmented perimeter ditches to be used as a water source for the tree and sod irrigation. These ditches will be modified to create a hydraulic barrier between activities on the interior of the Project Site and surrounding properties. These modified ditches are referred to as hydraulic barrier ditches ("HBDs") to distinguish them from the existing agricultural ditches surrounding the property. HBDs are an industry standard in mining.

Code R. 62-701.200(135). TMV accepted a great deal of yard trash from local governments following Hurricane Ian in 2022.

[4] This is a separate permit from SWFWMD Permit No. 43010748.003 referenced in Finding of Fact 5 above.

Petitioners' Complaints Regarding HBD Construction

10. In the spring of 2023, Petitioners complained to regulatory agencies about TMV's activities near their shared property line. As a result, TMV abandoned the portion of the HBD being constructed adjacent to Petitioners' Property and backfilled the area with mulched and composted yard debris to create a privacy berm pursuant to its yard trash recycling permit.

11. On May 16, 2023, DEP conducted a site inspection and issued a warning letter[5] related to, among other things, TMV's construction of the HBDs. SWFWMD also conducted a site inspection and issued a Notice of Permit Condition Violation letter. At issue was TMV's mistaken belief that construction of the HBDs was authorized under its SWFWMD permits. TMV immediately ceased work on the HBDs when it received these letters.

12. To resolve the issues raised in the SWFWMD and DEP letters, TMV applied for and received "after-the-fact" SWFWMD ERP No. 4310748.003 on December 13, 2023 ("SWFWMD ERP"), which modified the grove's existing agricultural stormwater permit to authorize construction of the HBDs and the tree farm. The SWFWMD ERP permit satisfied DEP that the issue raised by its warning letter had been resolved.

13. After receiving the SWFWMD ERP, TMV resumed construction of the HBDs and has remained in compliance with the terms of that permit.
Mr. Shely testified that DEP determined that construction of the HBDs did not constitute "mining" requiring an MMP-issued ERP. Mr. Shely stated that all of the concerns raised in DEP's warning letter have been addressed by TMV and that, if the ERP at issue in this proceeding is issued, DEP will issue a letter closing its file on the warning letter.

14. Pursuant to the SWFWMD ERP, most of the HBDs proposed in TMV's ERP application have been constructed and are operational for their

[5] Petitioners overstated the import of a DEP warning letter, believing it to establish that the listed violations have been determined by DEP. Two Administrators from DEP's MMP office, Marisa Rhian and Zachariah Shely, testified that such letters merely advise landowners of potential violations that must be addressed in coordination with the relevant agencies.

permitted agricultural irrigation purposes. The only remaining HBD to be constructed is an angled barrier near Petitioners' property.

The ERP Application

15. At the same time as the above-described activities, TMV was engaged in pre-application discussions with DEP regarding the excavation on the center portion of the Project Site. On or about September 3, 2024, TMV converted its DEP pre-application submittals into a formal application for an ERP to authorize mining for sand and shell in that area. The application also sought authorization for associated disturbances on the remainder of the 281.25-acre Project Site including a stormwater management system, hydraulic barriers, material storage, and haul roads, as well as reclamation. These activities will henceforth be referred to collectively as the "Project."

16. TMV plans to excavate three cells consisting of about 56.4 total acres to a depth of about 13 feet below existing grade. The nearest cell is about 520 feet from Petitioners' property line. The cells will be excavated one at a time over the ten-year life of the Project.

17. After excavation, each cell will be backfilled in sequence to meet the reclamation design elevations. The reclaimed excavation area will consist of pine flatwoods, xeric oaks, and mixed conifer forest to create the nature preserve. The HBDs will be reclaimed as landscape berms. The remainder of the Project Site will be replanted as meadow. The vegetation used during this reclamation phase will come from the tree and sod farm on the western portion of the Project Site.

18. TMV's application included the following components produced by, or under the supervision of, Gary Bayne, President and Senior Project Engineer at Southwest Engineering and Design ("SED"), or by third-party consultants retained by Mr. Bayne: (a) statutorily required informational forms sections A, C, and H; (b) Development Plan Set; (c) Project Narrative; (d) Drainage Narrative and Engineering and Design Report; (e) Operation and Maintenance Agreement; (f) Monitoring Plan; (g) Haul Road Narrative;

(h) Restoration Narrative; (i) Environmental Impact Statement; (j) Traffic Impact Statement Report; (k) Survey; (l) Hydraulic Modeling Report; (m) Protected Species Assessment Report; (n) Well Inventory Map; (o) FEMA flood zone maps; (p) reclamation and fill cross sections; (q) property ownership and corporate name data; (r) aerial maps; (s) pre- and post-basin mapping; (t) Water Sample Analyses Reports; (u) Operation Schedule; (v) USGS Soils Map; (w) letter of authorization; (x) Native GIS Files; (y) quadrangle map; (z) existing SWFWMD Water Use Permit; (aa) cultural resources assessment information; (bb) FDEP Yard Waste General Permit: and (cc) additional composite information. Components of the application were supplemented, and at times superseded, by TMV's responses to DEP's requests for additional information ("RAIs").

19. Pursuant to DEP rules, TMV published a Notice of Application in a local newspaper on September 15, 2024.

20. As part of its review, DEP requested a state land title determination and determined there were no state lands involved in the Project Site. DEP also referred TMV's application to the Engineering, Hydrology, and Geology Program ("EHG") with the Division of Water Resource Management for review.

21. On October 24, 2024, DEP issued an RAI that asked for a revised drainage narrative and revised engineering plans, to which TMV responded on January 22, 2025. TMV's response was also reviewed by the EHG, resulting in a second RAI on February 21, 2025. TMV responded to the second RAI on March 7, 2025.

22. On May 30, 2025, DEP issued its NOI, having determined that TMV provided reasonable assurances that the conditions for issuance of the ERP had been met and that the Project would not adversely affect water quality or water quantity.

23. TMV published DEP's NOI and draft ERP in the local newspaper on June 4, 2025. Petitioners had requested direct notice of agency actions

related to the Project Site, but were not initially copied on the NOI and draft ERP due to a clerical error. Nonetheless, Petitioners obtained actual notice and were able to timely file their initial petition challenging the proposed action. Petitioners have amended the petition twice, and the Second Amended Petition is now pending before this tribunal. Petitioners were not prejudiced in any significant way by the initial and unintentional failure to copy them on the NOI and draft ERP.

Amendments to the ERP Application During This Proceeding

24. In the plans preliminarily approved by DEP in the May 30, 2025, NOI and draft ERP, TMV proposed to use yard debris/vegetative waste to backfill excavated areas to two feet below reclamation grade, with the top two feet covered with dirt to the reclamation design elevations. Petitioners raised concerns that the use of yard debris as backfill material would constitute disposal of solid waste in an unlined dewatered pit prohibited by Florida Administrative Code Rule 62-701.300(2)(c).

25. DEP and TMV began discussions on how to address Petitioners' objection, which resulted in TMV's October 23, 2025, submission of amended ERP application materials and a request that the NOI and draft ERP be modified. The revised application materials provided that clean fill or clean debris would be used to backfill excavated areas to two feet below reclamation grade and that material classified as solid waste would not be used in dewatered areas without express authorization from DEP's Solid Waste section.

26. On October 30, 2025, DEP filed a Notice of Intended Revisions to the NOI and Accompanying Draft ERP, incorporating TMV's proposed revisions.

27. "Clean debris" is defined by rule 62-701.200(15):

> Clean debris" means any solid waste that is virtually inert, is not a pollution threat to ground water or surface waters, is not a fire hazard, and is likely to retain its physical and chemical structure under expected conditions of disposal or use. The term

> includes brick, glass, ceramics, and uncontaminated concrete including embedded pipe or steel.

28. "Clean fill" is an industry term inclusive only of uncontaminated earthen materials such as sand, dirt, and "overburden," which means generally the soil and rock above a mineral deposit that must be removed in order to reach the deposit.

29. At the hearing, Petitioners raised new concerns about the proposed water quality monitoring plan. A scrivener's error resulted in the proposed ERP text calling for monitoring from three wells while only one monitoring well was shown in the approved monitoring plans. Mr. Shely testified that ERP rules do not require three monitoring wells and the single well in the monitoring plan was the basis for DEP's finding of reasonable assurances. Mr. Bayne testified that TMV could comply with the draft ERP permit even with this error by monitoring the two proposed piezometers for water quality in addition to their intended use for measuring water levels.

30. Nonetheless, DEP and TMV proposed at hearing to revise the monitoring plan to add two additional monitoring wells: one on the northern boundary of the Project Site immediately south of Petitioners' property, and one near the southern boundary of the Project Site.[6] During cross examination, Mr. Shely offered to work directly with Petitioners to locate these wells where they will best protect Petitioners' drinking water well from any possible pollutant intrusion caused by the Project.

31. Ms. Rhian and Mr. Shely testified that the addition of two monitoring wells was consistent with DEP's previous determination that the Project meets applicable conditions for ERP issuance and would not adversely affect water quality or water quantity. The new monitoring wells provided additional assurances to supplement the reasonable assurances already

[6] The flow of surface water and groundwater is generally to the northwest, away from the Project Site and toward Petitioners' property.

provided. TMV agreed to DEP's request to add the two wells, which will be subject to the monitoring conditions of the ERP.

Reasonable Assurances

a. Wetlands and Other Surface Waters

32. TMV has eliminated and reduced impacts to wetlands or other surface waters as required by section 10.2.1 of the Applicant's Handbook (the "Handbook"). No wetlands are proposed to be impacted by the Project, including secondary impacts, and the one on-site wetland is proposed to be avoided and buffered by a 25-foot buffer meeting the requirements of section 10.2.7 of the Handbook.

33. Petitioners pointed to DEP's June 27, 2023, warning letter as raising the issue of unauthorized impacts to wetlands within the Project boundary. Evidence at the hearing established that the referenced "wetland" consisted of vegetation that established itself in the north-south furrows of the old citrus grove after the permitted citrus grove stormwater system and associated agricultural pumps were shut off.

34. Mr. Shely testified that once the agricultural activity ceased and the pumps were shut off, the furrows began to inundate slightly at the surface, allowing pioneer wetland species, mostly exotic invasives, to take root in the furrows. He stated that the large east-west ditch running through the center of the Project Site was also displaying wetland characteristics.

35. DEP told TMV that it could continue agricultural activities under its existing permits.[7] Once TMV turned the agricultural pumps back on, the

[7] A 1993 SWFWMD permit, issued to a prior owner and transferred to TMV in 2023, gave TMV the authority to perform routine operations and maintenance for the agricultural ditches and furrows. A 2023 modification to the SWFWMD permit authorized construction of the tree farm in the area where the pioneer wetlands had been located. MMP staff, including Mr. Shely, inspected the Project Site in January 2025 and concluded there were no wetlands in the areas proposed for impact by the Project, resolving the question posed in its October 24, 2024 RAI.

Tangentially, Petitioners contended that the 1993 SWFWMD permit expired in 1996 but that TMV continued to operate as if it were still in effect. In this, Petitioners mistakenly conflated

furrows dried out and the wetland vegetation died out. The issue was resolved to DEP's satisfaction, as the furrows could no longer be considered wetlands.

36. There are approximately 0.868 acres of surface water impacts proposed for portions of the upland-cut central east-west ditch on the Project Site. However, that ditch does not now contain wetland vegetation and does not provide significant habitat for endangered or threatened species, as documented by the protected species assessment that TMV submitted with the ERP application.

b. Surface Water Quantity and Quality

37. SED conducted extensive modeling to determine the effects of mining and reclamation activities on surface water. The modeling incorporated site specific information such as topographic surveys, geotechnical reports, field notes on soil borings and seasonal high-water tables, and a modeling program called ICPR4 that models storm events and frequencies.

38. The modeling showed the HBDs and existing agricultural ditches were able to passively retain 100 percent of stormwater onsite for rainfall events up to and including a 25-year, 24-hour storm event, i.e., eight inches of rain within a 24-hour period. Thus, TMV proposed a zero discharge system, as required by the ERP rules applying to southwest Florida.

39. Should a storm event greater than the 25-year, 24-hour design required by the ERP rules occur, TMV has mechanical pumps that will allow it to regulate water levels if adjustments are needed. David Brown is the National Practice Lead in Hydrogeology at RESPEC Company, LLC ("RESPEC"), which performed the hydrologic analysis and modeling for this project. Mr. Brown testified that the segmented nature of the HBDs reduces the risk of flooding. Mr. Brown also stated that in the event of a significant

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the construction term of the permit with the operation and maintenance phase of the permit, as explained by Mr. Bayne and confirmed by operation and maintenance reports from 2017 and 2022.

storm event, the dewatering pumps used for sand mining are typically turned off, which causes water to flow from the hydraulic barriers back into the mine pit. During a hurricane, with the pumps switched off, the mine pit will act as a storage reservoir for excess rainfall.

40. After reclamation, stormwater will be routed through a swale in the central nature preserve and water treatment reservoir in the northwest corner of the property before being released through a weir to a creek system. This stormwater system will provide at least one inch of treatment per acre of the Project Site before being discharged at a rate at or below the property's pre-construction discharge rate.

41. Mr. Bayne provided his expert opinion, based on the proposed design and the modeling, that the excavation and associated activities will not cause flooding or other adverse surface water quantity or quality impacts on offsite properties. Mr. Bayne's testimony was credible and was not countered by Petitioners.

42. Petitioners did not provide any evidence or testimony suggesting that the reclamation, as currently proposed using clean fill or clean debris as backfill, would cause violations of surface water quality standards or harmful surface water runoff. They provided no evidence that the Project or the post-reclamation landscape design would cause off-site flooding.

c. Ground Water Quality and Quantity/Hydrology

43. The unconfined groundwater table, also known as the surficial aquifer, is approximately 30 feet thick underneath the Project Site, and groundwater is encountered in a range between one to five feet below land surface. The intermediate and Upper Floridan aquifers underlie the surficial aquifer.

44. Excavation activities such as sand mining have dewatering effects, i.e., lowering the water table, for two reasons: digging the hole causes unconfined groundwater to flow radially from all directions into the excavated hole from the surrounding landscape; and proper removal of sedimentary materials and

stabilization of the excavation require water to be removed from the excavated hole via mechanical dewatering pumps.

45. Dewatering has the potential to cause adverse drawdown on offsite wetland and water features because groundwater continues to flow radially toward the excavation while the dewatering pumps are being operated. Hydrologic modeling is routinely conducted to assess the effects of this dewatering.

46. If the modeling shows an excavation will cause a drawdown, the effects can be mitigated through construction of an HBD, which is maintained to create a "wall of water" below the land surface outside of the dewatering operation. The water used to fill the HBD is obtained from the dewatering operation; pumps remove groundwater from the excavation area and deposit it into the HBD, which extends down into the top of the surficial aquifer. Maintaining the water level in the HBD, consistent with the top of the surficial aquifer, is effective to attenuate drawdown or adverse impacts to offsite land uses.

47. TMV's proposed excavation of sand and shell will occur to a depth of approximately 13 feet, with dewatering to a depth of approximately 15 feet, meaning that all dewatering effects would be confined to the surficial aquifer.

48. Petitioners raised concerns about the effects of the Project activity on their domestic well. However, Mr. Brown testified that potable wells, such as Petitioners', are almost always drilled into the upper part of the intermediate aquifer system, below a confining layer of clay and safely below the excavation to be undertaken by TMV. Mr. Brown noted that a well drilled in the surficial aquifer would be subject to bacterial contamination and therefore not potable. RESPEC reported that 100 percent of the domestic or irrigation wells in the area that had publicly available casing depth information were drilled into the intermediate aquifer, not the surficial aquifer. Petitioners provided no depth information for their well, but there is no reason to think it is shallower than the other wells in the area.

49. Mr. Salvatore argued that a stream, as evidenced by an unverified blue line drawn on a United States Geological Survey ("USGS") aerial photo, intersected the east-west agricultural ditch on the Project Site and passed by his well location. This, he speculated, could expose his well to contamination from the Project. However, at hearing, Mr. Brown examined a series of historical and current aerial photos of the area where the USGS mapping suggested a surface water connection and affirmatively demonstrated there was no connection; rather, an agricultural ditch had been dug that ran parallel to the existing agricultural ditch but did not connect to it. Mr. Brown opined that USGS maps, such as that relied on by Mr. Salvatore, must be ground-truthed for accuracy and that site investigation has shown no connection exists; the USGS map showed an erroneous connection based on the data source used. Mr. Brown's expert opinion is credited over the testimony of Mr. Salvatore.

50. To assess potential impacts of dewatering, RESPEC modeled the proposed dewatering, including attenuating measures and their effectiveness. The modeling was conducted using DWRM, a complex, iterative, calibrated model developed by SWFWMD that considers all surrounding features such as ponds, streams, and excavations and is refined with site-specific data.

51. The model simulated one year of continuous Project operations to achieve "steady state," a condition in which the amount of water coming in equals the amount of water going out to produce the most conservative model of hydrologic conditions. The model was also conservative in that it assumed all three excavation cells would be operated and dewatered simultaneously, when in fact they will be operated sequentially.

52. The hydrologic modeling demonstrated the existing and proposed HBDs are of a sufficient size and design to confine the effects of mine dewatering on the surficial aquifer to the Project Site.

53. Mr. Brown opined that the hydrologic modeling report meets the requirements of the ERP rules and demonstrates that the HBDs, if

constructed, maintained, and monitored as proposed, will be effective throughout the life of the excavation to protect offsite land uses, existing legal users, natural resources, wells, and ponds from adverse dewatering or drawdown effects to the surficial aquifer during mining and reclamation activities.

54. Mr. Brown testified that the modeling showed that the surficial aquifer will rebound once reclamation is complete and there will be no adverse impacts to groundwater levels on adjacent lands.

55. Mr. Brown also opined that the proposed mining activities will not have an adverse effect on groundwater quality because the HBDs hydraulically separate everything interior to them from the surrounding lands, and because the mining pulls water within the HBDs toward the center of the dewatering operation rather than pushing it out.

56. Mr. Brown concluded that no adverse effects on groundwater will occur from reclamation because the excavations are relatively shallow and will be backfilled with clean fill.

57. Mr. Salvatore testified as to his belief that the excavation of the ditch behind Petitioners' property and/or the adjacent HBD to the east caused what he observed to be a reduction in the size of a pond on Petitioners' property. Mr. Salvatore offered photos and aerials that supported his assertion.

58. Mr. Brown examined rainfall and surface and groundwater temperature data for the most recent five years, as well as Google Earth aerial imagery of Petitioners' property dating back to 2005, to show that Petitioners' pond routinely shrinks and expands over time in concert with seasonal hydrologic factors, oscillating with the rainy versus the dry season, and fluctuating in size by as much as 40 percent. This trend was demonstrated well before any activity occurred on the Project Site. Aerial images showed the agricultural ditch surrounding the Project Site retained water despite construction of the immediately adjacent HBD. Mr. Brown

opined that if any hydrologic feature were to show adverse drawdown effects due to construction of the HBDs, it would have been that ditch.

59. Mr. Salvatore testified that he observed fish coming to the surface for air in January 2023, which he attributed to dropping water levels in his pond caused by adjacent construction of the HBD on the Project Site behind Petitioners' property. As noted above, Mr. Brown testified that the drop in pond levels occurs seasonally and is not linked to the adjacent excavation. Mr. Brown further provided his expert opinion, based on extensive experience with water quality in general and on fish farms in particular, that a cold weather snap is the more likely cause of the fish behavior Mr. Salvatore described. Mr. Brown stated that it is a known phenomenon that as the water column inverts during cold periods, sediment-laden water low in dissolved oxygen rises from the bottom of a pond to the surface where the fish are usually located.

60. Mr. Salvatore also testified as to "brown material" he observed in March 2023 that he attributed to the deposit of mulched yard waste in the HBD on the Project Site adjacent to his property. However, Mr. Salvatore also testified that his cows, horses, and a donkey use the pond, and that he has never had the pond water tested.

61. Mr. Bayne provided evidence that the mulch deposition was authorized by the existing yard debris permit and that the mulch was segregated to ensure contaminated or non-organic items were not disposed of on site.

62. Mr. Brown testified that the pond sediments likely contained fecal matter from the livestock using the pond rather than the adjacent mulch deposition and that vegetative material of the type disposed of onsite does not produce contaminants. Mr. Brown also opined that the previous deposition of mulched and composted yard debris in the HBD is highly unlikely to have caused negative effects on the groundwater on Petitioners' property because of the very slight gradient in the area of the Project Site toward Petitioners'

property to the northeast. Mr. Brown also noted that the citrus grove east-west agricultural ditch acts as a small-scale hydrologic barrier.

63. Petitioners offered no additional evidence or expert testimony regarding decreases in groundwater levels associated with the HBD construction. No evidence of potential effects of either TMV's prior activities or the proposed mining and reclamation activities on Petitioners' well or pond was offered to offset Mr. Brown's credible expert testimony and the scientific modeling performed by RESPEC.

Cumulative Impacts

64. Petitioners contended that DEP erred when it did not subject this proposed ERP to a cumulative impact analysis pursuant to rule 62-330.302(1)(b), and section 10.2.8 through 102.8.2 of the Handbook.

65. Rule 62.330.302(1)(b) provides:

> (1) In addition to the conditions in Rule 62-330.301, F.A.C., to obtain an individual or conceptual approval permit under this chapter, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project:
>
> * * *
>
> (b) Will not cause unacceptable cumulative impacts *upon wetlands and other surface waters* as set forth in sections 10.2.8 through 10.2.8.2 of Volume I. (emphasis added).

66. The analyses set forth in the above Findings of Fact seem to substantiate DEP's position that there will be no appreciable impacts on wetlands or other surface waters under the proposed ERP and that the Handbook's cumulative impact analysis was therefore unnecessary.

67. Petitioners counter that TMV's application and modeling did not account for a second proposed mine near the Project Site and thus concealed drawdown and flooding risks that the two mines would pose. However,

Ms. Rhian testified that the plain reading of the rule still applies and that a cumulative impact analysis is not required because no wetlands are being impacted.

68. Mr. Shely confirmed that the Project has no impact on wetlands and went on to state that the only "other surface water" affected is the east-west agricultural ditch. He noted that section 10.2.2.2 of the Handbook states that "alterations in drainage ditches that were constructed in uplands will not be required to comply with the provisions of sections 10.2.2 through 10.2.2.3, 10.2.3 through 10.2.3.7, and 10.2.5 through 10.3.8 below, unless those ponds or ditches provide significant habitat for endangered or threatened species." Mr. Shely testified that the agricultural ditch meets the requirements of section 10.2.2.2 of the Handbook because it is an upland cut and does not provide habitat for endangered or threatened species. Therefore, no cumulative impact analysis was required.

69. As to the issue of drawdown, Mr. Brown testified that the groundwater model includes all surrounding features, including existing mines, and that the hydraulic modeling shows the HBDs will successfully isolate the excavation activities from the surrounding properties to prevent lowering of the groundwater table.

70. Petitioners presented no countervailing evidence that inclusion of the proposed nearby mine in the modeling would have revealed the Project posed a risk of off-site flooding or drawdown.[8]

Credibility Issues

71. Petitioners contend that TMV should not be found to have provided reasonable assurances that it will meet the conditions of the proposed ERP because TMV has a track record of making misleading statements to other government entities when seeking approval for activities related to the Project. Specifically, Petitioners point to a presentation that Mr. Bayne and

[8] In any event, the proposal for the second mine has been abandoned.

an attorney for TMV made before the Charlotte County Board of County Commissioners on May 23, 2023, when TMV was seeking a zoning change from Agriculture ("AG") to Planned Development ("PD") for the Project Site, "to allow for an existing grove to be restored to a preserve with native vegetation."

72. In the Petition, Petitioners complained that TMV attempted to mislead the public and the Commissioners by "claiming it intended to create a nature preserve and expressly denied any intent to mine the property." In light of the evidence presented at hearing, Petitioners softened their claim, stating in their Proposed Recommended Order that TMV "emphasized" the Project as restoration activities to create a nature preserve and downplayed their mining activities. Petitioners specifically claimed that TMV emphasized that excavated material would remain on site when in fact TMV plans the "extraction and sale of 1.1 million cubic yards of material."

73. At the hearing, Petitioners presented portions of the video of TMV's presentation to the Charlotte County Board of County Commissioners. The full record of that proceeding was entered into the record of this case. The undersigned has watched the full meeting and reviewed the application, staff report, and PowerPoint slides of the applicant's presentations to the Commissioners.

74. As noted above, after the sand mining operation is concluded, TMV intends to perform restoration activities on the Project Site that will turn it into a habitat filled with native vegetation and meadow, with the ultimate plan being residential development of the larger parcel that includes another mine that is no longer active. Naturally, TMV's presentation emphasized the final goal of the nature preserve over the interim excavation measures.[9]

[9] There is no need here to detail the nuances of Charlotte County's ordinances regarding "specific" versus "standard" earthmoving permits or how much excavation is allowed under AG zoning. It was clear that TMV would have been allowed to perform some level of excavation even if its request for the change from AG to PD had been denied.

75. However, TMV did not at all downplay its planned excavation activities and did not hide its intentions to sell part of the sand and shell that will be mined. The Application for Planned Development filed by TMV and its partner stated as follows, in relevant part:

> Bermont Road Partnership and TMV, Inc. (together the "Applicant") propose a condition of approval limiting the depth of the excavation to 13 feet. This depth is requested based upon the following analysis. Note that all numbers in the following calculations, except the excavation depth, have been derived from AutoCAD drawings and some deviation is expected during the actual excavation.
>
> The entire [Rural Community Mixed Use, or RCMU] site has been accepting mulched vegetative debris from the firm contracted by Charlotte County to clear vegetative waste. To date, the site has accepted 500,000 cubic yards ("CY") of mulch with an additional 1,000,000± CY anticipated, for a total of 1,500,000± CY. The 13' excavation must be backfilled with compost an average of 11' with the remaining unfilled depth required for the planting of the restoration area. The necessary backfill material is calculated as follows:
>
> The 13' excavation produces 1,152,569 CY of material comprised of 771,723 CY of sand and 380,846 CY of shell.
>
> Backfilling 13' to 11' will require 966,510 CY of material comprised of the following:
> 1,610,850 CY mulch compacted at a 2:1 ratio = 805,425 CY mulch
> 161,850 CY sand to be mixed with mulch
>
> The proposed 13' depth is necessary for the disposal of the mulched vegetative debris.
>
> Additionally, 83,014 CY of sand will be required to cap the berms which will serve as a buffer around the RCMU site.

> Geotechnical reports indicate that sand extends beneath the surface to a depth of 10'. Beyond the sand, the material becomes shell. The Applicant will require 130,000 cubic yards (CY) of shell to build the roads around the site. The roads are shown on the Concept Plan (pgs. 5 - 6). The roads provide access for the excavation equipment, as well as for the trucks which will haul the sand to be mixed with the mulch to create the compost material and to cover the berms which will be part of the buffer plan for the future RCMU development. Excavating an additional 3' beyond the sand (to accommodate the disposal of the mulch) will produce 380,846 CY of shell, enough to provide the required 130,000 CY. The excess 250,046 CY of shell will be sold.
>
> Sand and shell will be utilized on site and sold off site as follows:
>
> Sand: 771,723 CY excavated
> (161,850 CY mixed with mulch and put back into excavated area)
> (83,014 CY to cap the berms)
> 561,040 CY to be sold
>
> Shell: 380,846 CY excavated
> (130,000 CY to build on-site roads)
> 350,846 CY to be sold
>
> Over 30% of the excavated material will be kept onsite.

76. SED's protected species assessment report provided the following statements as to two of the areas surveyed: "This upland habitat has been cleared for the purpose of creating loading areas for future excavation. No vegetation was observed during the pedestrian transect survey," and "This gravel road-way is proposed to be used as a means of transportation between the active excavation and loading areas."

77. The traffic impact statement submitted by a TMV consultant includes verbal descriptions and graphic representations of the site plan for the excavation.

78. Much of the discussion at the Commission meeting revolved around the mining activity. TMV's attorney flatly stated, "We will be digging a big hole." Mr. Bayne's entire six-minute presentation concerned the excavation. There was no attempt by TMV to disguise what it was planning to do on the Project Site or that it planned to sell some of the excavated sand and shell. There is no reason to question TMV's credibility based on its actions before the Charlotte County Board of County Commissioners.

Conclusion

79. Petitioners' position naturally raises the sympathy of an outside observer. No one wishes to live next door to a mining operation. Petitioners' steadfast advocacy has won significant concessions and compromises by TMV during the course of this proceeding, hence the October 30, 2025 revisions to the NOI and proposed ERP and the additional monitoring wells. Even at the final hearing, DEP stated its intent to work with Petitioners in locating the monitoring wells to maximize the protection of Petitioners' domestic well and property. Petitioners acquitted themselves admirably throughout the course of this proceeding. Nonetheless, it is found, as discussed more fully in the Conclusions of Law below, that TMV has met its burden of providing reasonable assurance of entitlement to the ERP at issue in this case.

CONCLUSIONS OF LAW

Jurisdiction

80. DOAH has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

Standing

81. Section 120.52(13)(b), Florida Statutes, defines a "party," in pertinent part, as a person "whose substantial interests will be affected by proposed

agency action, and who makes an appearance as a party." Section 120.569(1) provides, in pertinent part, that "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency."

82. Standing under chapter 120 is guided by the two-pronged test established in the seminal case of *Agrico Chemical Corporation v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the court held that:

> We believe that before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482; *see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051 (Fla. 5th DCA 2011); *Palm Beach Cnty. Env't. Coal. v. Fla. Dep't of Env't. Prot.*, 14 So. 3d 1076 (Fla. 4th DCA 2009); *Mid-Chattahoochee River Users v. Fla. Dep't of Env't. Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006).

83. As adjacent property owners, Petitioners have established the potential for injury-in-fact which is of sufficient immediacy to establish their standing to a section 120.57 hearing. TMV's assertions notwithstanding, Petitioners raised concerns regarding the impact of the Project on their property that were more than merely speculative.

Nature of the Proceeding

84. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. *Young v. Dep't of Cmty. Aff.*, 625 So. 2d 831, 833 (Fla. 1993); *Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Env't. Regul.*, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991);

McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

85. DOAH hearings are designed to allow affected parties to change the agency's mind. *See Capeletti Bros. v. Dep't of Gen. Servs.*, 432 So. 2d 1359, 1363-64 (Fla. 1st DCA 1983). The *de novo* nature of DOAH proceedings allows parties to make changes to the proposed project and the draft permit after the matter has been referred to DOAH for adjudication. *See Matlacha Civic Ass'n et al v. City of Cape Coral and Dep't of Env't Prot.*, RO Case No. 18-6752 at ¶ 69 (Fla. DOAH Dec. 12, 2019; Fla. DEP Mar. 11, 2020). It does not violate due process for the agency and applicant to make changes mid-proceeding, provided the change is not significant and the complaining party knew or should have known such a change in position was possible. *See Hopwood v. Dep't of Env't Regul.*, 402 So. 2d 1296 (Fla. 1st DCA 1981); *Capeletti Bros. v. Dept. of Gen. Servs.*, 432 So. 2d 1359, 1363-64 (Fla. 1st DCA 1983); *Hamilton Cnty. Comm'rs v. State Dep't of Env't Regul.*, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991).

86. In this instance, the changes made by the agency in the October 30, 2025 Notice of Intended Revisions to the NOI and Accompanying Draft Environmental Resource Permit were concessions to Petitioners' litigation positions, replacing "yard waste" with "clean debris" and "clean fill" as the materials to be used as backfill in excavated areas on the Project Site.

87. Likewise, the change made at the hearing to add two wells to the approved monitoring plans to match the number of wells called for in the proposed text of the application was made in reaction to a scrivener's error found by Petitioners. It is a change that operates to Petitioners' benefit. Petitioners cannot be concluded to have been prejudiced by their own success in changing the agency's mind. *See* Supplements to Prima Facie Case, below.

Standard and Burden of Proof

88. The standard of proof is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

89. Section 120.569(2)(p) provides:

> For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the permit, license, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence.

90. TMV made a prima facie case of entitlement to the ERP by entering into evidence the complete application files and supporting documentation and DEP's NOI. In addition, TMV and DEP presented additional factual and expert opinion testimony and evidence to supplement the prima facie case and support the additional permit conditions proposed during the hearing in response to issues raised by Petitioners.

91. TMV having made a prima facie case, the burden of ultimate persuasion shifts to Petitioners, who, under section 120.569(2)(p), have "the burden of ultimate persuasion and [have] the burden of going forward to prove the case in opposition to the… permit… through the presentation of competent and substantial evidence."

Reasonable Assurance Standard

92. Issuance of the ERP depends on the provision of reasonable assurance that the activities authorized will meet applicable standards.

93. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." *Metro. Dade Cnty. v. Coscan Fla., Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied. Furthermore, speculation or subjective beliefs are not sufficient to carry the burden of presenting contrary evidence or proving a lack of reasonable assurance necessary to demonstrate that a permit should not be issued. *FINR II, Inc. v. CF Indus., Inc.*, Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

Supplements to Prima Facie Case

94. At the hearing, Respondents offered evidence supporting two changes to DEP's draft ERP to supplement TMV's prima facie case by addressing specific concerns raised by Petitioners: (1) evidence and testimony to change the backfill material allowed to be used in reclamation from vegetative/yard debris to clean fill or clean debris and to prohibit the use of solid waste as a backfill material in dewatered areas unless specifically authorized by a solid waste permit and (2) evidence and testimony to add two water quality monitoring wells to TMV's monitoring plan. These changes served to impose additional restrictions on TMV's proposed activities, strengthen reasonable assurances that the Project complies with applicable permitting criteria, and were supported by a preponderance of the competent substantial evidence at hearing.

95. DEP witnesses testified, and the undersigned agrees, that these changes were not necessary to provide reasonable assurances that the applicable permitting criteria would be fulfilled by TMV. The changes strengthen those reasonable assurances to specifically address Petitioners'

concerns. These changes were supported by a preponderance of the competent substantial evidence at hearing.

96. As to the changed backfill material, Petitioners suggested that the use of vegetative debris or yard trash as a backfill material during the reclamation would harm water quality on their property. Petitioners offered only speculation and lay observations as evidence of this assertion, which did not amount to competent substantial evidence sufficient to rebut the presumption that the ERP criteria were satisfied with the existing reclamation plan.

97. DEP nevertheless presented a revised draft ERP with the added condition concerning backfill material, and provided testimony regarding the meaning of the terms "clean fill" and "clean debris" as used in the condition. The proposed change supplements TMV's prima facie case by reducing the potential of the Project to cause the generalized and mostly speculative water quality concerns raised by Petitioners during the hearing.

98. As to the monitoring wells, Mr. Shely testified the ERP rules do not require three monitoring wells and the single well in the monitoring plan was the basis for DEP's finding of reasonable assurances. The reference to three monitoring wells in the body of the draft ERP was a scrivener's error. Mr. Bayne testified that TMV could comply with the draft ERP even with this error by monitoring the two piezometers for water quality as well as water levels. Petitioners did not adequately refute the prima face case of entitlement on this point.

99. Even so, TMV and DEP agreed during the hearing to add two more wells to monitor the quality of groundwater flowing across the Project Site toward Petitioners' property. The general location and purpose of these two wells was established by an exhibit and testimony at hearing, and Mr. Shely offered to work with Petitioners to determine their exact placement. A preponderance of the evidence supports the addition of two new monitoring wells to TMV's monitoring plan.

100. The proposed changes were not significant under the *Hopwood* standard. The changes were made in direct response to Petitioners' complaints and therefore were foreseeable. The changes serve to supplement TMV's prima facie demonstration of reasonable assurances that all applicable permitting criteria have been satisfied. Petitioners had an adequate opportunity to present evidence in opposition to these two changes and failed to do so.

Applicable Permitting Standards

101. Chapter 373, part IV, establishes the statutory framework for issuing environmental resource permits. Chapter 62-330 sets forth the statewide ERP rules implementing those statutes.

102. Rule 62.330.301, titled "Conditions for Issuance of Individual and Conceptual Approval Permits," sets forth the standards and criteria that are generally applicable to ERP projects. The rule provides, in relevant part:

> (1) To obtain an individual or conceptual approval permit, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of the projects regulated under this chapter:
>
> (a) Will not cause adverse water quantity impacts to receiving waters and adjacent lands;
>
> (b) Will not cause adverse flooding to on-site or off-site property;
>
> (c) Will not cause adverse impacts to existing surface water storage and conveyance capabilities;
>
> (d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;
>
> (e) Will not adversely affect the quality of receiving waters such that the state water quality standards set forth in Chapters 62-4, 62-302, 62-520, and 62-550, F.A.C., including the antidegradation

provisions of paragraphs 62-4.242(1)(a) and (b), F.A.C., subsections 62-4.242(2) and (3), F.A.C., and Rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated;

(f) Will not cause adverse secondary impacts to the water resources. In addition to the criteria in this subsection and in subsection 62-330.301(2), F.A.C., in accordance with Section 373.4132, F.S., an applicant proposing the construction, alteration, operation, maintenance, abandonment, or removal of a dry storage facility for 10 or more vessels that is functionally associated with a boat launching area must also provide reasonable assurance that the facility, taking into consideration any secondary impacts, will meet the provisions of paragraph 62-330.302(1)(a), F.A.C., including the potential adverse impacts to manatees;

(g) Will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to Section 373.042, F.S.;

(h) Will not cause adverse impacts to a Work of the District established pursuant to Section 373.086, F.S.;

(i) Will be capable, based on generally accepted engineering and scientific principles, of performing and functioning as proposed;

(j) Will be conducted by a person with the financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued….

* * *

(6) The standards and criteria used to determine whether the reasonable assurances required in this section and Rule 62-330.302, F.A.C., have been provided, including the provisions for elimination or

> reduction of impacts and mitigation to offset adverse impacts, are contained in Volume I, incorporated by reference in subsection 62-330.010(4), F.A.C., and Volume II, incorporated by reference in subsection 62-330.010(4), F.A.C., for the applicable District.

103. Rule 62-330.302 implements section 373.414, and provides that, in addition to the conditions in rule 62-330.301, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project located in, on, or over wetlands or other surface waters will not be contrary to the public interest by balancing seven different criteria as set forth in sections 10.2.3 through 10.2.3.7 of the Handbook. It further provides that an applicant must provide reasonable assurances that the project will not cause unacceptable cumulative impacts on wetlands and other surface waters as set forth in Sections 10.2.8 through 10.2.8.2 of the Handbook.

104. Rule 62-330.302(2) provides that, in considering whether the applicant has provided reasonable assurances that the permitting standards of chapter 62-330 will be met, DEP shall consider the applicant's violation of the ERP rules as well as the efforts taken by the applicant to resolve the violations. The evidence established that, on receipt of letters from DEP and SWFWMD regarding construction of the HBDs, TMV immediately cooperated with these agencies to come into compliance and is currently operating in compliance with its SWFWMD ERP.

105. Section 10.2 of the Handbook provides that compliance with the environmental conditions for issuance contained in rules 62-330.301 and 62-330.302 are determined through compliance with the criteria explained in sections 10.2 through 10.3.8 of the Handbook.

106. Section 10.2.2.2 of the Handbook provides that, where no impacts to wetlands are proposed and alterations are limited to upland-cut ditches, sections 10.2.2 through 10.2.2.3, 10.2.3 through 10.2.3.7, and 10.2.5 through 10.3.8 of the Handbook do not apply, unless those ditches provide significant

habitat for endangered or threatened species. In such cases, the only environmental criteria that apply are those included in sections 10.2.2.4 (water quantity impacts to wetlands and other surface waters) and 10.2.4 through 10.2.4.5 (water quality considerations). The evidence established that no wetland impacts are proposed and any other impacts are limited to upland-cut ditches that do not provide significant habitat for endangered or threatened species. Thus, section 10.2.2.2 of the Handbook limits the applicable portions of sections 10.2 and 10.3 of the Handbook to those pertaining to water quality and water quantity.

107. Under Section 10.2.2.2 of the Handbook, DEP reasonably determined **t**hat the following provisions do not apply to the Project: the public interest test described in rule 62-330.302(1)(a) and sections 10.2.3 through 10.2.3.7 of the Handbook; the prohibition on specific adverse secondary impacts described in rule 62-330.301(1)(f) and implemented through section 10.2.7 of the Handbook; the prohibition on adverse cumulative impacts described in rule 62-330.302(1)(b) and section 10.2.8 of the Handbook; and the mitigation criteria described in section 10.3 of the Handbook. The undersigned concludes that these determinations were correct.

108. Section 10.2.1 of the Handbook provides that design modifications to reduce or eliminate adverse impacts to wetlands and other surface functions caused by a proposed activity must be explored. DEP reasonably determined this criterion was met by TMV's project plans showing proposed avoidance of the only on-site wetland and incorporation of a 25-foot upland buffer between the HBD and the wetland as a minimization measure to prevent secondary impacts, as provided by section 10.2.7 of the Handbook.

109. TMV demonstrated by competent substantial evidence that the application provided reasonable assurance the Project will not cause adverse effects to water quantity in receiving waters or on adjacent lands, surface water storage or conveyance, or flooding impacts, as required by rule 62-330.301(1)(a), (b), and (c), as the stormwater system is designed to meet or

exceed the required stormwater capacity during construction and post-reclamation.

110. TMV demonstrated by competent substantial evidence that the application provided reasonable assurance the Project will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters, as required by rule 62-330.301(1)(d), and section 10.1.1(a) of the Handbook, because no wetlands will be impacted and the upland cut ditches proposed for impact do not provide significant habitat to any listed species.

111. TMV demonstrated by competent substantial evidence that the application provided reasonable assurance the Project will not adversely affect the quality of receiving waters such that the state water quality standards will be violated, as required by rule 62-330.301(1)(e) and section 10.1.1(c) of the Handbook, because during construction no water will be discharged offsite, and the post-reclamation condition will provide enhanced water treatment through the nature preserve to meet or exceed treatment requirements.

112. TMV demonstrated by competent substantial evidence that the application provided reasonable assurance the Project will be capable, based on generally accepted engineering and scientific principles, of performing and functioning as proposed, as required by rule 62-330.301(1)(i), because it was produced and reviewed by professionals with substantial expertise and experience in the fields of engineering, mining, and hydrogeology, supplemented by expert testimony as to the application materials.

113. TMV demonstrated by competent substantial evidence that the application provided reasonable assurance the Project will be conducted by a person with the financial, legal, and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued, as required by rule 62-330.301(1)(j). As provided by section 1.5.1 of the Handbook, compliance with this provision is

demonstrated through rule 62-330.060(3) and (4), which require certification of sufficient real property interest, authorization for agency access to the property, and disclosure of an operation and maintenance entity, all of which were provided by TMV in its application. Aside from noting the absence of one of the warranty deeds in TMV's initial application, Petitioners did not seriously question TMV's financial, legal, and administrative capabilities.

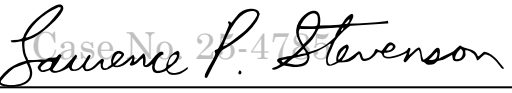
Conclusion

114. Based on the foregoing, it is concluded that the proposed ERP, with the modifications set forth in Joint Exhibits P (the clean fill/clean debris backfill requirement) and HH (describing the general location of the two additional monitoring wells) meets all applicable statutory and rule requirements for issuance of the proposed ERP.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Environmental Protection issue a final order granting TMV's application for the requested ERP with the permit modifications reflected in Joint Exhibits P and HH.

DONE AND ENTERED this 5th day of January, 2026, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
DOAH Tallahassee Office

Division of Administrative Hearings
2001 Drayton Drive
Tallahassee, Florida 32311
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of January, 2026.

COPIES FURNISHED:

Justin G Wolfe, General Counsel
(eServed)

Lea Crandall, Agency Clerk
(eServed)

Alexis Lambert, Secretary
(eServed)

Jay Patrick Reynolds, Esquire
(eServed)

Susan Lynne Stephens, Esquire
(eServed)

Desiree Rabuse
(eServed)

Felicia L. Kitzmiller, Esquire
(eServed)

Matthew Alexander Taylor, Esquire
(eServed)

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.

RECEIVED
January 20, 2026
Dept. of Environmental Protection
Office of General Counsel

STATE OF FLORIDA

DEPARTMENT OF ENVIRONMENTAL PROTECTION

In re: Application of TMV Properties, Inc.

Environmental Resource Permit No. MMR_452990-001

DOAH Case No. 25-4785

DEP OGC Case No. 25-1060

_____/

PETITIONERS' EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to § 120.57(1), Florida Statutes, and Rule 28-106.217, Florida Administrative Code, Petitioners John Salvatore and Desiree Rabuse, proceeding *pro se*, hereby file the following Exceptions to the Recommended Order entered January 5, 2026. These Exceptions identify disputed portions by paragraph, state the legal basis with record citations where applicable, and are filed within the 15-day period required by Rule 28-106.217(1). These Exceptions preserve legal issues for appellate review and address conclusions of law and mixed questions of law and fact that misapply governing statutes and rules.

EXCEPTION NO. 1 – Improper Legal Conclusion That Cumulative Impact Analysis Was Not Required

Disputed Portions: Recommended Order ¶¶ 64–69, 107 (pp. 31–33).

Legal Basis:

The Recommended Order misinterprets *Rule 62-330.302(1)(b), F.A.C.*, and *Sections 10.2.8–10.2.8.2 of the Applicant's Handbook*, by exempting the Project from cumulative impact analysis solely because the ALJ concluded no wetlands were impacted. The rule expressly applies to "wetlands **and other surface waters**." The Recommended Order acknowledges impacts to an upland-cut ditch (¶¶ 36, 68), yet concludes as a matter of law that cumulative impacts analysis is not required.

This interpretation impermissibly narrows the rule and disregards the requirement to evaluate multiple projects affecting hydraulically connected surface-water features. Whether a cumulative impact analysis is required is a legal question reviewed *de novo.*

Record Citations: Tr. vol. 2 at 147–150; Ex. P-5 (Field Photographs); Ex. A-3 (Application Map 7).

EXCEPTION NO. 2 – Erroneous Application of Section 10.2.2.2 of Applicant's Handbook

Disputed Portions: Recommended Order ¶¶ 68, 106–107 (pp. 32–33).

Legal Basis:

The Recommended Order incorrectly relies on *Section 10.2.2.2* to exempt the Project from public-interest balancing and cumulative-impact review. That limited exception applies to minor upland-ditch works, not to a **281.25-acre mining operation** involving multiple dewatering cells

and groundwater manipulation. Treating it as such contradicts *§ 373.414(1), Fla. Stat.*, which requires "reasonable assurance that the activity proposed will not be contrary to the public interest." See also *Applicant's Handbook § 10.2.1.*

Record Citations: Tr. vol. 3 at 214–222; Ex. A-10 (Engineering Plan Sheets 1 of 12, Hydrology Model Figures 2 and 3).

EXCEPTION NO. 3 – Misapplication of the "Reasonable Assurance" Standard

Disputed Portions: Recommended Order ¶¶ 92–99, 109–112 (pp. 29–31, 34).

Legal Basis:

The Recommended Order applies the "reasonable assurance" standard in a manner that effectively nullifies a third party's right to challenge permit issuance under *§ 120.569(2)(p), Fla. Stat.* By requiring Petitioners to "offset" Respondents' expert modeling, the ALJ elevated applicant modeling to near-conclusive status. Florida law requires reasonable assurance—not scientific certainty—but it also requires the agency to meaningfully evaluate credible contrary evidence. Misstating this burden of proof constitutes legal error. See *Heifetz v. Dep't of Bus. Reg., 475 So. 2d 1277, 1280 (Fla. 1st DCA 1985).*

Record Citations: Tr. vol. 4 at 370–375; Ex. P-12 (Groundwater Level Data, Well P-3, April 2024).

EXCEPTION NO. 4 – Reliance on Post-Application Modifications Without Reopening Notice

Disputed Portions: Recommended Order ¶¶ 24–31, 86–100 (pp. 16–19, 27–30).

Legal Basis:

The Recommended Order deems DEP's modifications (e.g., prohibiting yard-waste backfill, adding wells) legally insignificant. Yet such material revisions substantively changed the project and cured prior deficiencies—showing the original Notice of Intent (NOI) lacked reasonable assurance. DEP could not rely on *post-referral* amendments without providing new notice. See *§ 120.60(3), Fla. Stat.* ("An application may not be amended in a manner which substantially modifies the proposed agency action unless the agency provides notice.")

Record Citations: Tr. vol. 1 at 85–94; Ex. A-8 (DEP Memorandum of Dec. 3, 2025 permit revisions).

EXCEPTION NO. 5 – Misclassification of Petitioners' Evidence as "Speculative"

Disputed Portions: Recommended Order ¶¶ 42, 63, 96 (pp. 23–24, 28–29).

Legal Basis:

The Recommended Order repeatedly dismisses Petitioners' sworn testimony as speculative, despite finding standing based on concrete risks (¶¶ 81–83). Lay testimony and circumstantial evidence can constitute "competent substantial evidence" in administrative proceedings. An overly restrictive standard is a legal error reviewed *de novo.* See *Heifetz*, 475 So. 2d at 1280.

Record Citations: Tr. vol. 2 at 198–202; Tr. vol. 3 at 260–265 (John Salvatore testimony); Ex. P-14 (Aerial Photographs of Surface Flow Path).

EXCEPTION NO. 6 – Failure to Determine Whether ERP Relies on Lawfully Authorized Infrastructure

Disputed Portions: Recommended Order ¶¶ 36, 68, 87, 109 (pp. 21, 32, 28, 34).

Legal Basis:

The Recommended Order fails to address whether the ERP lawfully relies on existing agricultural irrigation features as hydraulic barriers for a commercial mining operation. Under *§ 373.414(1), Fla. Stat.*, reasonable assurance must demonstrate the proposed activity "will comply with all applicable laws" when the permit is issued. DEP cannot issue an ERP that depends on infrastructure authorized only for agricultural use. See *Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC, 986 So. 2d 1260, 1265 (Fla. 2008)* (agency action beyond statutory authority is subject to *de novo* review).

Record Citations: Tr. vol. 3 at 200–210; Ex. A-12 (Project Cross-Sections, Irrigation Ditch Alignment); Ex. P-11 (Local Zoning Map with Setback Zones).

CONCLUSION

Petitioners respectfully request that the Department of Environmental Protection reject or modify the conclusions of law identified above, or, in the alternative, expressly address each in the Final Order so as to preserve Petitioners' right to judicial review.

Respectfully submitted this 19th day of January, 2026.

John Salvatore

36456 Washington Loop Road

Punta Gorda, FL 33982

(863) 444-7883

i.r.scientist@gmail.com

Desiree Rabuse

36456 Washington Loop Road

Punta Gorda, FL 33982

(559) 303-1196

desireerabuse@gmail.com

Petitioners, *pro se*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail this 19th day of January, 2026, to:

Jay Patrick Reynolds and Matthew Taylor, Esqs.

Florida Department of Environmental Protection

3900 Commonwealth Blvd., MS #35

Tallahassee, FL 32399-3000

patrick.reynolds@floridadep.gov

matthew.taylor@floridadep.gov

Lea Crandall, Agency Clerk

Office of General Counsel, DEP

Douglas Building, Mail Station 35

3900 Commonwealth Boulevard

Tallahassee, FL 32399-3000

lea.crandall@floridadep.gov

Susan Lynne Stephens and Felicia Lynnelle Kitzmiller, Esqs.

Stearns Weaver Miller Weissler Alhadeff

106 E. College Avenue, Suite 700

Tallahassee, FL 32301-7721

sstephens@stearnsweaver.com

fkitzmiller@stearnsweaver.com

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN SALVATORE and DESIREE RABUSE,

Petitioners,

v.

OGC CASE NO. 25-1060
DOAH Case No. 25-4785

TMV PROPERTIES, INC. and
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.
_____/

RESPONDENT TMV PROPERTIES, INC.'S
RESPONSE TO PETITIONERS' EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to Rule 28-106.217(3), Florida Administrative Code ("F.A.C."), Respondent TMV Properties, Inc. ("TMV"), by and through undersigned counsel, hereby files its response to Petitioners' Exceptions to Recommended Order filed by Petitioners John Salvatore and Desiree Rabuse (collectively, "Petitioners," individually "Salvatore" and "Rabuse") on January 19, 2026.

Introduction

This case involves the Notice of Intent to Issue by the Florida Department of Environmental Protection ("FDEP") for Environmental Resource Permit MMR_452990-001 ("ERP"). The ERP would authorize a sand mining and reclamation project over 281.25 acres of a 293.31-acre property in Charlotte County ("Project"). Petitioners, whose property abuts the Project, timely filed a petition for formal administrative hearing, which was referred to the Department of Administrative Hearings and considered by Administrative Law Judge Lawrence Stevenson ("ALJ") in a two-day hearing on November 10 and 12, 2025.

This is a proceeding arising under Chapter 373, Florida Statutes ("F.S."). Therefore, after submitting a *prima facie* case consisting of the permit application and supporting material and the agency's notice of intent to issue, TMV and FDEP were entitled to a rebuttable presumption that the permit was issued in accordance with law. Petitioners had the "burden of ultimate persuasion" "to prove the case in opposition to the … permit … through the presentation of competent substantial evidence." § 120.569(2)(p), F.S.

All parties submitted proposed recommended orders and the ALJ published a Recommended Order ("RO") on January 5, 2026. The ALJ found, in summary, that Respondents presented competent substantial evidence that the ERP application provided reasonable assurances that the permitted activities would be carried out in compliance with regulatory requirements. The ALJ further found that Petitioners failed to overcome the presumption in favor of permit issuance by rebutting Respondents' case with competent substantial evidence. Petitioners timely filed exceptions to that RO, to which TMV now responds.

Standard of Review

The Administrative Procedures Act, codified in Chapter 120, F.S., mandates an agency accept an ALJ's findings of fact unless that finding of fact is not based on competent substantial evidence or the proceedings giving rise to the finding of fact did not comply with essential requirements of law. § 120.57(1)(l), F.S. "Competent substantial evidence is 'such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred [or] ... such relevant evidence as a reasonable mind would accept to support a conclusion.'" *Duval Utility Co.* v. *Florida Public Service Commission,* 380 So. 2d 1028, 1031 (Fla. 1980) (quoting *De Groot* v. *Sheffield,* 95 So. 2d 912, 916 (Fla. 1957)). An agency may reject a finding of fact only after a

review of the entire record and if it states with particularity in its order the reason the ALJ's finding of fact is rejected. § 120.57(1)(l), F.S.

The agency may reject or modify the ALJ's conclusions of law and interpretations of administrative rules over which it has substantive jurisdiction if it states with particularity in its order the reason for doing so, and the agency's substituted conclusion of law or interpretation of administrative rule is as or more reasonable than the ALJ's. *Id. See also, Pillsbury v. Department of Health and Rehabilitative Services,* 744 So. 2d 1040, 1041-42 (Fla. 2d DCA 1999). Rejecting or modifying a conclusion of law or interpretation of administrative rule may not form the basis for rejecting or modifying a finding of fact. § 120.57(1)(l), F.S.

The Department lacks substantive jurisdiction over decisions on procedural and evidentiary rulings by the ALJ such as the credibility of witnesses or the weight accorded to witness testimony and evidence. *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001), citing§ 120.57(1)(1), Fla. Stat.; *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001). *See also Cracker Creek Canoeing, LLC et al v. Steinhardt and Dep't of Env'tl. Prot.,* OGC Case No. 22-2509 (FDEP Final Order Nov. 21, 2025). Further, FDEP's substantive jurisdiction is limited to matters relating to environmental issues, not procedural matters. *G.E.L. Corp. v. Dep't of Env'tl. Prot.,* 875 So. 2d 1257, 1263 (Fla. 5th DCA 2004).

I. TMV's Response to Petitioners' Exceptions No. 1 and 2 Concerning Interpretation of Section 10.2.2.2, Environmental Resource Permit Applicant's Handbook, Vol. 1 ("Handbook")

The Petitioners' Exceptions No. 1 and 2 attack conclusions of law or interpretation of the rules governing issuance of an ERP over which this agency, the Florida Department of Environmental Protection ("FDEP" or "Department"), has substantive jurisdiction. As such, the conclusions can be rejected only if the Department states with particularity its reasons for rejecting

or modifying the conclusion of law or interpretation of rule and makes a finding that its substituted conclusion of law or regulatory interpretation is as or more reasonable than that which was rejected or modified. § 120.57(1)(l), F.S. Exceptions No. 1 and 2 provide no basis on which the Department can meet the requirements of section 120.57(1)(l).

In Exceptions No. 1 and 2, Petitioners misstate the ALJ's findings and the text of Section 10.2.2.2 of the Handbook. As Petitioners appear to admit in Exception No. 1, Rule 62-330.302(1)(b), F.A.C., requires an applicant to provide reasonable assurances that the proposed project "will not cause unacceptable cumulative impacts upon wetlands and other surface waters *as set forth in sections 10.2.8 through 10.2.8.2* [Handbook]" (emphasis supplied). However, the Petitioners then go on to completely misread the Handbook provision in question.

While Petitioners accurately cite Handbook Section 10.2.8 through 10.2.8.2 as containing the cumulative impacts analysis referenced in their Exception No. 1, they fail to recognize the limiting effect of Handbook Section 10.2.2.2 on the operation of those provisions. Section 10.2.2.2 plainly provides that "alterations in drainage ditches that were constructed in uplands *will not be required to comply"* with, among others, Handbook Sections 10.2.3 through 10.2.3.7 (public interest balancing provisions) and Sections 10.2.8 through 10.2.8.2 (cumulative impact analysis provisions) "*unless* those ditches provide significant habitat for endangered or threatened species." Section 10.2.2.2, Handbook (emphasis supplied). The Petitioners in Exceptions No. 1 and 2 do not dispute that there are no wetland impacts or that the only impacts to "other surface waters" are to upland-cut ditches. The Petitioners also do not challenge the ALJ's finding that the upland-cut ditches do not provide significant habitat for endangered or threatened species. *See* RO, p. 21 ¶ 68 and p. 33 ¶ 106-107. Rather, in Exception No. 1, the Petitioners admit the impacted ditch is upland-cut and cite to two paragraphs in which the ALJ makes the above-referenced finding of fact that

the ditches do not provide significant habitat for imperiled species (RO p. 14 ¶ 36 and p. 21 ¶ 68). The Petitioners simply appear to misunderstand how Section 10.2.2.2 works to limit the portions of the Handbook that apply to a given activity.

Likewise, in Exception No. 2, Petitioners go on to imply limiting words in Section 10.2.2.2, Handbook, that do not exist. They claim Section 10.2.2.2, Handbook, is a "limited" exception applying to "minor" upland ditch works, and therefore, it should not be applied to a mining project. This argument suffers from two fatal flaws: 1) the words "limited" and "minor" do not appear in Section 10.2.2.2, much less serve to restrict its application to the Project; and 2) to the extent there is any quantitative limitation on the exemption, it is in relation to the size of the wetland or surface water to be impacted, not the size of the Project (*see* Section 10.2.2.2, stating that the exception only applies to alterations of upland-cut ponds of less than one acre, and Section 10.2.2.1, limiting that exception to alterations of isolated wetlands of less than one-half acre). In fact, there is no acreage limitation to narrow the exception for alterations to upland-cut ditches. The ALJ found the testimony of the FDEP witnesses on the proper interpretation of Section 10.2.2.2 to be reasonable and correct. *See* RO Finding of Fact ¶ 68, Conclusion of Law ¶ 107.

In summary, to make their case that Section 10.2.8, et seq., of the Handbook applied because there will be impacts to upland-cut ditches, the Petitioners had to ignore Section 10.2.2.2 entirely. To make their case that the exceptions in Section 10.2.2.2, Handbook, do not apply because this is a mining project, Petitioners had to ignore the plain language of Section 10.2.2.2, Handbook. The Petitioners' unfounded belief that the rules and Handbook should be interpreted differently do not provide a legal basis to reject or modify the ALJ's reasonable and correct interpretation of Rules 62-330.201 and 62-330.302, F.A.C., and Section 10.2.2.2, Handbook, which is in accord with the interpretation of the FDEP witnesses of those same provisions. The

Petitioners' contrary interpretation, based as it is on an apparent misreading of the Handbook, is not more reasonable.

II. TMV's Response to Petitioners' Exceptions No. 3 and 5 Concerning Application of Reasonable Assurance Standard and Speculative Nature of Petitioners' Evidence

In Exceptions No. 3 and 5, Petitioners allege the ALJ misstated the burden of proof and applied "an overly restrictive standard," but this is a smoke screen for Petitioners' true objection: that the ALJ did not weigh the evidence in their favor. First, in Exception No. 3, the Petitioners baldly disagree with the weight that the ALJ afforded to the applicant's permit application and supporting materials pursuant to the rebuttable presumption contained in § 120.569(2)(p), F.S. Next, in Exception No. 5, the Petitioners argue that the ALJ unfairly characterized their evidence as "speculative."

The ALJ required the applicant demonstrate "reasonable assurance" and the ALJ defined that term as "a substantial likelihood that the project will be successfully implemented." *Metro. Dade Cnty. v. Coscan Fla., Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992); *see also St. Johns River Water Mgmt. Dist. v. Cece,* 369 So. 3d 730, 735 (Fla. 5th DCA 2023); *Bluefield Ranch Mitigation Bank Tr. v. S. Fla. Water Mgmt. Dist.,* 263 So. 3d 125, 129 (Fla. 4th DCA 2018). Petitioners do not dispute either of these standards. Rather, Petitioners complain the ALJ "elevated applicant modeling to near-conclusive status" and "dismisse[d] Petitioners' sworn testimony as speculative." Both of these complaints go to the weight the ALJ gave the evidence at hearing.

Without providing any detail, in Exception No. 3, they appear to complain that the RO misapplied the "reasonable assurance" standard, apparently because the ALJ found the applicant's hydrologic modeling and the testimony of Mr. Brown, accepted as an expert in hydrogeology, groundwater flow modeling, and groundwater quality, to be more credible than the admittedly non-

expert testimony of the Petitioners as to the effects of the mine. In Exception No. 5, the Petitioners argue similarly, apparently complaining that the lay testimony of the Petitioners as to their fears as to the effects of the mine project were not accorded more weight than the signed and sealed reports in the application materials, the expert testimony of Mr. Brown and Mr. Bayne, or the testimony of the FDEP witnesses on this same subject.

The weighing of evidence is the ALJ's exclusive province, including the weight to afford TMV's prima facie case under section 120.569(2)(p), F.S., as supported by Petitioners' own cited case law:

> It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. *If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other*. The agency may not reject the hearing officer's finding unless there is *no* competent, substantial evidence from which the finding could reasonably be inferred. *The agency is not authorized to weigh the evidence presented*, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.

Heifetz v. Dep't of Bus. Regul., Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (internal citations omitted; emphasis added); see also § 120.57(1)(l), F.S.

The ALJ found Petitioners' alleged potential harm to their substantial interests sufficient to confer standing for a formal hearing under Chapter 120, noting simply that the Petitioners' concerns were "more than *merely* speculative"—i.e., were enough to warrant a formal hearing. Finding of Fact of ¶ 83 (emphasis added). However, at hearing, with both sides able to make their case, the ALJ found the evidence of TMV and FDEP more compelling and determined that, after the Petitioners had a full and fair opportunity to present evidence and testimony to rebut the applicant's case, they failed to do so, finding instead the Petitioners presented evidence of effects that were "generalized and *mostly* speculative." Finding of Fact of ¶ 97 (emphasis added). These

findings are not inconsistent, as implied by Petitioners. While the *potential* for harm due to the Project was not "merely speculative", the ALJ properly determined in light of the evidence and testimony he determined to be credible at hearing, the *likelihood* of those harms coming to pass was not proven, resting as it did on the generalized and "mostly speculative" concerns raised by the Petitioners at hearing. The Petitioners simply did not carry their burden of proving up their "concerns" by a preponderance of the competent substantial evidence.

The Florida Supreme Court described competent substantial evidence as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" or such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla.1957). Contrary to Petitioners' statement, the ALJ did not find that "lay testimony and circumstantial evidence" can never constitute competent substantial evidence in an administrative proceeding, only that in this case, Petitioners' lay testimony and circumstantial evidence did not rise to that level.

III. TMV's Response to Petitioners' Exception No. 4 Regarding Post-Petition Application Amendments

In Exception No. 4, Petitioners again ask the agency to re-weigh the evidence and overturn the ALJ's finding that post-petition changes to TMV's application did not constitute substantial modifications requiring additional notice. As an initial matter, Petitioners cite to § 120.60(3), F.S., as the basis for this exception. The cited statute has no relevance here, but instead provides the minimum due process to be accorded to the *permit applicant* with regard to its own permit or license. Section 120.569, F.S., in contrast, provides the minimum due process to be afforded to third parties challenging agency actions (which in this case also involve a permitting or licensing

decision). Further, Section 120.60(3), F.S., does not contain the language Petitioners pretend to quote.

Setting aside the mis-quoted statute, Exception No. 4 appears to argue that the post-petition amendments to TMV's application were "material" and "substantive" and to challenge the ALJ's determination that the amendments were insignificant. The crux of this exception appears to be that, procedurally, TMV should have been required to "start over" with a new notice of intent to issue, rather than proceed to hearing on what the Petitioners have characterized as an application with "deficiencies."

However, as expressly provided by Section 120.57(1)(k), F.S., proceedings before an ALJ are *de novo,* such that the permit application is not static, as Petitioners appear to assert, but may be explained, supplemented or corrected during the course of the hearing. As stated in the ALJ's RO and well-recognized by the courts, it does not violate due process for the agency and applicant to make changes mid-proceeding without issuing a revised notice if the change is not significant and the complaining party knew or should have known such a change in position was possible. *See, Hopwood v. Dep't of Env't Regul.*, 402 So. 2d 1296 (Fla. 1st DCA 1981); *Capeletti Bros. v. Dept. of Gen. Servs*., 432 So. 2d 1359, 1363-64 (Fla. 1st DCA 1983); *Hamilton Cnty. Comm'rs v. Dep't of Env't Regul*., 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991).

In this case, TMV and FDEP responded to environmental concerns raised by the Petitioners during the proceedings by revising the material to be used as backfill and adding two monitoring wells. The ALJ found these changes were not necessary to satisfy TMV's burden to demonstrate reasonable assurances (RO ¶ 95), were not significant, and were foreseeable (RO ¶ 100). In addition, the ALJ found that Petitioners had sufficient notice of the proposed changes to present evidence in opposition at hearing and failed to do so. *Id.* The ALJ further found that the Petitioners

were not prejudiced by the changes in the project; as the ALJ noted, Petitioners cannot claim to have been prejudiced by their own success in changing the FDEP's mind (RO ¶ 87).

The substance of this exception appears to be that the Petitioners disagree with these findings, but they fail to explain why, merely asserting that the modifications were "material" and "substantively changed" the Project. As to the challenges to the ALJ's findings of fact on this point–that the post-permit modifications were not significant–the Department cannot overturn the ALJ's findings without a review of the entire record and stating, with particularity in the order, that the findings of fact were not based upon competent substantial evidence, as required by section 120.57(1)(l), F.S. As to the challenges on the ALJ's conclusions of law that stem from those findings–that the post-permit modifications did not require reissuing notice–the Department cannot overturn the ALJ's findings of "ultimate fact" or "mixed question of law and fact" unless a thorough review of the record reveals they are unsupported by any competent substantial evidence.

> As explained in *Tedder v. Florida Unemployment Appeals Commission,* 697 So.2d 900, 902 (Fla. 2d DCA 1997) (Danahy, A.C.J., specially concurring), ultimate facts are those "necessary to determine issues in [a] case" or the "final facts" derived from the "evidentiary facts supporting them." *Id.* (citing *Black's Law Dictionary* 1522 (6th ed. 1990)). Ultimate facts are also regularly described as "mixed questions" of law and fact, and must generally be made by the fact finder in an administrative proceeding because they are "necessary for proper review of administrative orders." *Tedder,* 697 So.2d at 902; *see also San Roman v. Unemp. App. Comm'n,* 711 So.2d 93 (Fla. 4th DCA 1998) (finding that whether "good cause" exists for unemployment compensation claimant to voluntarily leave work frequently involves mixed question of law and fact, and is an ultimate fact best left to the fact-finder); *Heifetz v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco,* 475 So.2d 1277 (Fla. 1st DCA 1985) (finding that "negligent supervision and lack of diligence are essentially ultimate findings of fact clearly within the realm of the hearing officer's fact-finding discretion.")

Costin v. Fla. A & M Univ. Bd. of Trs., 972 So. 2d 1084, 1086–87 (Fla. 5th DCA 2008).

IV. TMV's Response to Petitioners' Exception No. 6 Regarding ERP Reliance on Lawfully Authorized Infrastructure

Petitioners' Exception No. 6 argues that FDEP cannot issue an ERP that "depends on infrastructure authorized only for agricultural use" but cites no legal authority and no evidence for this proposition. The case cited by the Petitioners does not even remotely stand for this proposition. Rather, the *Dep't of Envtl. Prot. v. ContractPoint Fla. Parks* case, 986 So. 2d 1260 (Fla. 2008), involved a petition for writ of mandamus for an award of monetary damages against FDEP for wrongful termination of a contract, and the reference to "de novo" review in that case addressed the standard of review on appeal in matters involving statutory interpretation. The case was not brought under Chapter 120 and did not involve issuance of an ERP or in fact any licensing decision.

Petitioners provide no evidence[1] to support their claim that FDEP exceeded its statutory authority in issuing an ERP that relied on dual purpose infrastructure – a ditch system that works both as an agricultural irrigation reservoir and as a hydraulic barrier protecting adjacent properties from mining impacts. Petitioners cite no rules or statutes that prohibit FDEP from issuing an ERP that relies on or integrates existing features into construction plans provided the required purpose is fulfilled.

Based on the competent substantial evidence adduced at hearing, the ALJ properly found that an oversized perimeter ditch permitted by Southwest Florida Water Management District (with both an ERP and consumptive use permit) to serve as an irrigation source for agricultural activities

[1] The "disputed portions" of the RO cited by Petitioners further confound this issue as ¶¶ 36 and 68 are findings of fact related to a vestigial irrigation system that served a former citrus grove on the property that will be impacted by the Project and do not serve as hydraulic barriers; and ¶ 87 deals with Respondents' addition of two monitoring wells to the Project to address Petitioners' monitoring concerns and has nothing to do with any ditch.

could also be integrated into the Project as a hydraulic barrier for mining. Modeling submitted in the application and presented at hearing shows the existing system will prevent drawdown of groundwater on adjacent properties and will protect groundwater quality. RO ¶¶ 109, 111, and 112. Findings of ultimate fact, or a mixed question of law and fact, cannot be disturbed by the agency unless a thorough review of the record reveals they are unsupported by any competent substantial evidence. *Costin.,* 972 So. 2d at 1086–87.

Respectfully submitted this 28th day of January, 2026.

/s/

Susan L. Stephens, Florida Bar No. 986836
Felicia L. Kitzmiller, Florida Bar No. 1010258
Stearns Weaver Miller, P.A.
106 E. College Ave., Suite 700
Tallahassee, FL 32301
Telephone: (850) 354-7605
Email: sstephens@stearnsweaver.com
fkitzmiller@stearnsweaver.com
kskipper@stearnsweaver.com

Attorneys for Respondent TMV Properties Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was sent via electronic mail on this 28th day of January, 2026, to:

John Salvatore & Desiree Rabuse
36456 Washington Loop Road
Punta Gordan, FL 33982
desireerabuse@gmail.com
i.r.scientist@gmail.com

Jay Patrick Reynolds
Assistant Deputy General Counsel
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, FL 32399-3000
patrick.reynolds@floridadep.gov
lateshee.m.daniels@floridadep.gov

/s/
Attorney