

# WALK-ON

ATY

**Lee County Board Of County Commissioners  
Agenda Item Summary**

Blue Sheet No. 20061081

**1. ACTION REQUESTED/PURPOSE:** Consider providing funding for an appeal to the First District Court of Appeals concerning the recent issuance by the Florida Department of Environmental Protection of the construction and operation permit to the Mosaic Company for phosphate mining at the "Ona Mine" in Charlotte County.

**2. WHAT ACTION ACCOMPLISHES:** Provides County funding to the Parties for perfecting an appeal to the First District Court of Appeals concerning the "Ona Mine" permit for phosphate mining.

**3. MANAGEMENT RECOMMENDATION:** Consider providing funding for the appeal taking into account the participation by the other Parties to the administrative challenge (Charlotte County, Sarasota County or both).

<b>4. Departmental Category:</b> <span style="font-size: 2em; font-weight: bold;">WO #1</span>		<b>5. Meeting Date:</b> August 22, 2006
<b>6. Agenda:</b>		<b>7. Requirement/Purpose: (specify)</b>
<input type="checkbox"/> Consent <input type="checkbox"/> Administrative <input type="checkbox"/> Appeals <input type="checkbox"/> Public <input checked="" type="checkbox"/> Walk-On	<input type="checkbox"/> Statute <input type="checkbox"/> Ordinance <input type="checkbox"/> Admin. Code <input type="checkbox"/> Other	<b>8. Request Initiated:</b>
		Commissioner _____ Department <u>County Attorney</u> Division _____ By: <u>David M. Owen</u> County Attorney

**9. Background:**

At the August 15, 2006 Board meeting, an issue was raised with respect to a proposed appeal to the First District Court of Appeals of the permit issued to the Mosaic Company for phosphate mining at the "Ona" site in Charlotte County. The Board of County Commissioners was provided with a memorandum relating to the background of the matter (attached).

Information has been received from the General Counsel on the matter, the de la Parte Law Firm, that the approximate cost for the appeal is \$120,000.00. In the past two years of the case, Lee County has invested approximately \$2 Million.

Informal discussions have been had with the County Attorneys for both Charlotte and Sarasota Counties with respect to their continued action(s) in the case and their financial participation.

A rough analysis from the de la Parte firm as to the theories for a DCA reversal of the granting of the permit is also attached (August 16, 2006 e-mail from David Caldevilla, Esq. to Susan Henderson).

Funds are available in GC5190300100.503120. (Anticipated amount needed should not exceed approximately \$120,000.)

**10. Review for Scheduling:**

Department Director	Purchasing or Contracts	Human Resources	Other	County Attorney	Budget Services				County Manager/P.W. Director
				<i>[Signature]</i>	Analyst	Risk	Grants	Mgr.	
					RK 9/10	vs 8/16	8/16	8/17/06	8-17-06

**11. Commission Action:**

- Approved
- Deferred
- Denied
- Other

*1/10/06*  
*1/10/06*  
*1/10/06*

RECEIVED BY  
COUNTY ADMIN:  
*[Signature]*

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COUNTY ADMIN  
FORWARDED TO:  
*[Signature]*

CO. ATTY  
FORWARDED  
TO CO. ADMIN.  
*[Signature]*

**MEMORANDUM  
FROM THE  
OFFICE OF COUNTY ATTORNEY**

DATE: August 17, 2006

TO: Elizabeth Walker, Director  
Public Resources

FROM: 

David M. Owen  
County Attorney

and

Molly Schweers, Administrative Spec.  
Public Resources

RE: **BLUESHEET NO. 20061081; WALK-ON ITEM FOR BOARD OF  
COUNTY COMMISSIONERS' REGULAR MEETING OF AUGUST 22, 2006**

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Ladies;

As a result of the Board's direction at their meeting on Tuesday (August 15, 2006), I am respectfully requesting that the above referenced item be placed on the recap sheet for the August 22<sup>nd</sup> Board meeting as a "walk-on" item.

Thanks.

DMO/dm

xc: Donald D. Stilwell, County Manager  
John J. Renner, Chief Assistant County Attorney  
Susan M. Henderson, Assistant County Attorney  
Lisa Pierce, Supervisor, Minutes Department

**Owen, David M.**

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**From:** Henderson, Susan  
**Sent:** Wednesday, August 16, 2006 11:53 AM  
**To:** Owen, David M.  
**Subject:** FW: Ona Mine - Projected Appellate Attorneys' Fees and Costs

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**From:** David Caldevilla [mailto:dcaldevilla@dgfirm.com]  
**Sent:** Tuesday, August 15, 2006 4:40 PM  
**To:** Henderson, Susan  
**Cc:** Edward de la Parte Jr.  
**Subject:** RE: Ona Mine - Projected Appellate Attorneys' Fees and Costs

Susan -

Although the Final Order is very complex, our preliminary analysis is that DEP committed several reversible errors. Among other things, we believe that the Final Order is based upon an unauthorized remand procedure, that IMC was erroneously relieved its financial responsibility obligations, that DEP unlawfully relied upon non-rule policies, and that the Final Order erroneously failed to adopt the ALJ's recommendation on remand. In addition, there were also numerous individual errors which cumulatively prejudiced the petitioners. For example, the Final Order was not issued by DEP Secretary Colleen Castille herself, but was instead issued by one of her Deputy Secretaries, Michael Sole. The Final Order contains no explanation why Secretary Castille did not issue the Final Order herself and no description of Mr. Sole's legal authority, if any, to issue the Final Order. In addition, the Final Order contains numerous supplemental fact findings, which an agency has no authority to make. All in all, we strongly believe that reversible errors were made, and that the project should be rejected as a matter of law. However, we are unable to guarantee a particular result, or identify a particular probability of reversal.

- Dave Caldevilla

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**From:** Henderson, Susan [mailto:SHenderson@leegov.com]  
**Sent:** Tuesday, August 15, 2006 4:14 PM  
**To:** David Caldevilla  
**Subject:** RE: Ona Mine - Projected Appellate Attorneys' Fees and Costs

David.

David Owen (County Attorney) would like some sort of prognosis of the probability of the success of the appeal. Maybe you've got something that you're going to use in your pitch to Charlotte County next week?

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**From:** David Caldevilla [mailto:dcaldevilla@dgfirm.com]  
**Sent:** Monday, August 14, 2006 1:52 PM  
**To:** Henderson, Susan  
**Cc:** Edward de la Parte Jr.; Linda K. Foy; Charles R. Fletcher  
**Subject:** Ona Mine - Projected Appellate Attorneys' Fees and Costs

Susan -

It was a pleasure talking with you this morning. At this time, our best estimate of projected appellate attorneys' fees and costs for the Ona Mine case is approximately \$120,000. As you will recall, this case involved an 8-week trial, plus an additional 1-week supplemental remand hearing, and the recommended and final orders exceed 600

8/16/2006

pages. We appreciate Lee County's interest and look forward to hearing back from you.

- David Caldevilla  
de la Parte & Gilbert, P.A.  
(813)229-2775


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MEMORANDUM  
FROM THE  
OFFICE OF COUNTY ATTORNEY

DATE: August 14, 2006

TO: Board of County Commissioners

FROM:   
David M. Owen  
County Attorney

RE: MOSAIC CORPORATION (FORMERLY IMC PHOSPHATE, INC.) PERMIT  
FOR PHOSPHATE MINING IN CHARLOTTE COUNTY ["ONA MINE"]

Commissioners;

I am providing the attached as a general summary for the above matter which may be brought up at tomorrow's meeting.

The essence of questions that may be raised are these:

1. Is the issuance of the Permit by the DEP final? No. The issuance of the Permit may be challenged (Notice of Appeal filed within thirty (30) days from issuance) by any of the Parties to the original challenge.
2. Is Lee County able to participate in such an appeal? Yes, if the Board is desirous of doing so based on prior participation and the findings of the State Administrative Law Judge, Robert Meale.
3. Is Charlotte County pursuing an appeal of the decision? The Charlotte County Board will be meeting in Executive Session next week (Tuesday, August 22, 2006) to make that decision.
4. Can Lee County appeal without Charlotte County's participation? Yes. However, Lee County is an Intervenor in this case. The best appellate posture will be if all original parties participate in the appeal of the Permit with a sharing of the expenses as done previously.

\* Blue sheets on 8/22

\$120,000. Estimate

Board of County Commissioners  
August 14, 2006  
Page 2

**RE: MOSAIC CORPORATION (FORMERLY IMC PHOSPHATE, INC.) PERMIT  
FOR PHOSPHATE MINING IN CHARLOTTE COUNTY ["ONA MINE"]**

If the Board is desirous of proceeding with an appeal of the Permit issuance, I am suggesting that a bluesheet be walked on to the August 22, 2006 meeting for Board action and authorizations for staff activities and funding in the alternative (all or proportional). In the interim, those costs to the County can be established and related in the bluesheet.

I have been in contact with Ed de la Parte, Esq., with respect to the appeal. He has advised that he is prepared to proceed when given direction by the Parties.

We can discuss this further at your meeting tomorrow when the issue is raised.

DMO/dm  
Attachment

xc: Donald D. Stilwell, County Manager  
Holly Schwartz, Assistant County Manager  
John J. Renner, Chief Assistant County Attorney  
Susan M. Henderson, Assistant County Attorney

**Owen, David M.**

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**From:** Dist1, Janes  
**Sent:** Wednesday, August 02, 2006 11:04 AM  
**To:** Schwartz, Holly A.; Owen, David M.  
**Subject:** FW: Florida Department of Environmental Protection to Allow Expansion of Strip Mining in the Peace River Basin

fyi

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**From:** Paola Burgess [mailto:paola@eprgroup.com]  
**Sent:** Wednesday, August 02, 2006 10:44 AM  
**To:** Paola Burgess  
**Subject:** Florida Department of Environmental Protection to Allow Expansion of Strip Mining in the Peace River Basin

## **FOR IMMEDIATE RELEASE**

### **Media information only:**

**Honey Rand, APR 813.948.6400**

**August 1, 2006**

#### **Florida Department of Environmental Protection to Allow Expansion of Strip Mining in the Peace River Basin**

On Monday, July 31, Department of Environmental Protection (FDEP) Secretary Colleen Castille issued a Final Order allowing Mosaic to proceed with the expansion of strip mining in the Peace River Basin. The Order was issued despite a recommended denial from Hearing Officer Robert Meale.

"We are very disappointed," said Charlotte County Commissioner Adam Cummings. "When Judge Meale recommended denying the permits to strip mine, we'd hoped that FDEP would follow his lead."

In a lengthy and unusual administrative process, Judge Meale originally recommended issuing the permits with many additional controls and restrictions. FDEP returned the Order to Judge Meale for additional review. On June 16, 2006, Judge Meale issued his review but said that he "declines to recommend the issuance of the ERP and approval of the CRP, both as amended above."

Charlotte County believes that the judge declined to issue the permits because the Department of Environmental Protection removed essential controls that he had included in the permit. Those controls included effective management of sand tailings which are critical to support successful reclamation and the financial guarantees that the sand tailings would be properly handled.

Charlotte, Lee and Sarasota Counties along with the Peace River Manasota/Regional Water Supply Authority and Hardee Citizens Against Pollution all argued that phosphate reclamation has failed. The result of failed reclamation, according to environmental scientists, is a negative impact to fishing, water quality, wildlife and ultimately, Charlotte Harbor. The area to be strip

mined—Horse Creek—provides 15 percent of water flows to the Peace River. It's the freshwater from the Peace that keeps Charlotte Harbor healthy. Impacts to Horse Creek affect the Peace River and therefore the ongoing health of Charlotte Harbor.

"If the phosphate industry can't properly reclaim the land, they shouldn't be allowed to destroy it," says Cummings.

"The judge has left us a sound basis to appeal this Final Order," said Ed de la Parte, who handles phosphate matters for Charlotte County. "He made it very clear that he didn't think this permit would protect the environment."

Doug Manson, General Counsel for the Peace River Manasota Regional Water Supply Authority said that his board would have to reassess the threat to the Peace River and customers' interests before deciding whether to appeal.

Since the original order, Mosaic has filed applications for additional strip mining in the Peace River Basin. They have also closed one mine site—a source of sand tailings for reclamation—and informed the U.S. Army Corps of Engineers of their intent to sell sand tailings.

"We absolutely do not understand the Secretary's position on this," said Commissioner Cummings. "It's a shame that her legacy as Secretary will be the failure to protect the Peace River Basin and all the people who depend on it for a living. The value of our environmental resources far outweighs the dividends to Mosaic's shareholders."

###

## Background

The proposed Ona strip mine site is located near the tiny town of Ona in Hardee County. The permit proposed by the Department of Environmental Protection will allow Mosaic (the mining company) to strip mine a significant portion of the tiny water body, Horse Creek.

Horse Creek provides 15 percent of the freshwater flow to the Peace River—drinking water source to residents in Charlotte, Sarasota, and Desoto Counties and the City of North Port. Likewise, the freshwater flow from the Peace River helps keep Charlotte Harbor's estuary healthy. That estuary provides economic vitality for Charlotte and Lee Counties, local municipalities and countless businesses large and small. The National Estuary program estimates that the economic value of the entire Peace River basin approaches \$5 billion—far more than the \$500 million that phosphate strip mining provided Florida.

Horse Creek provides critical habitat for the smaller fishes that eventually make it downstream into the Peace River. The population of fish in Horse Creek has been relatively stable since 1976—despite the changes in surrounding land use. The public impact of strip mining the headwaters of Horse Creek can be measured in two clear ways: a reduction in fish species and reduction in freshwater flow to the Peace River.

The Peace River Manasota Water Supply Authority says that the cost of water is already higher because of the need for additional water storage. During an accident or disaster when clay silt from upstream strip mining clouds the river, drinking water cannot be collected. As river flows are reduced, the number of days that the Authority cannot take water from the river increases. As a consequence, more storage capacity is needed.

These are among the reasons why Charlotte, Lee and Sarasota Counties along with the Desoto Citizens Against Pollution and the Peace River Manasota Water Supply Authority challenged the Ona strip mining permit, issued by the Florida Department of Environmental Protection in 2003.

### June 16, 2006

Administrative Law Judge Robert Meale issued a Recommended Order on Remand with respect to Ona strip mining permit. The bottom line is found on page 48 of the Judge's Order:

"The proposed Recommended Orders of DEP and IMC contain recommendations that



DEP issue the ERP and approve the CRP as amended above. The Administrative Law Judge declines to recommend the issuance of the ERP and approval of the CRP, both as recommended above.”

**Remand:** A Remand sends a Recommended Order back to the issuing Judge for additional review, findings or action. It is very unusual in these kinds of permit challenges for an issuing agency to send the Recommended Order back to the Judge.

### What it means

Of greatest significance, Judge Meale’s denial of the permit represents substantial validation of concerns shared by Charlotte County and its allies. Two major strip mining permits (Altman, 2003) and Ona have been denied by two different Administrative Law Judges. That the Ona permit is denied based on the lack of adequate financial security underscores what Charlotte County has said all along, “If the mining companies cannot afford to do it right, then Florida cannot afford phosphate mining.”

In his original Recommended Order issued May 2005, Judge Meale advised DEP to issue the permit with the addition of 24 new or revised conditions. Specifically, Meale found in his original order that (Mosaic’s) proposed mitigation was substantially deficient because the financial security amount was insufficient. He believed that (Mosaic) should have included in this amount the cost of acquiring, transporting and placing sand tailings on all 3,500 mined acres (including wetlands and uplands) so that the post-mining topography was restored to pre-mining conditions.

#### **FDEP removed those significant conditions in its Remand.**

Mosaic announced the closing of the Fort Green Mine earlier this year (a source of sand tailings for the restoration of Ona, they claimed) and most recently revealed a plan to sell sand tailings from the Ona Mine. Without the financial controls and the sand tailings, there is no way to provide for successful and acceptable restoration of the environment. With DEP’s removal of his cornerstone conditions, Judge Meale may have decided Mosaic was no longer capable of providing reasonable assurance that the pre-mining conditions would be restored—Whatever his reason, his recommendation is quite clear: deny the permit and do not accept the reclamation plan. No matter his thinking, **the judge concluded that the applicant (Mosaic) failed to meet the conditions set by law.**

#### **Flashback**

When Administrative Law Judge Johnston recommended denial of the Altman strip mining permit, then Secretary David Struhs accepted the decision and denied the permit his own agency had written. Current DEP Secretary Colleen Castille may not consider herself bound by Judge Meale’s recommendation to deny the permit. She could issue the permit—even without the financial guarantees and sandtailings management the Judge recommended. If she does, Charlotte and its allies are positioned to prevail on appeal.

#### **Into the Future**

Even now, FDEP is holding a series of meeting to explain and introduce their new management plan for Peace River watershed. DEP and phosphate strip mining are both at a crossroads. Two Administrative Law Judge’s have said that the current regulation of phosphate strip mining is inadequate. Business as usual won’t work in a Florida economy driven by environmental sustainability. Will this new management plan account for the recommendations made by two different hearing officers in two different cases? Will this FDEP Secretary make a choice for business as usual or better business?

### Legal

DATE	ACTION	PARTICIPANTS	OUTCOME
January 2003	FDEP issues proposed		Challenged by local

	strip mining permit for Ona		governments, water supply authority and environmentalists.
February 2003	Strip mining permit challenged	Charlotte County, Lee County, Sarasota County, Peace River Manasota Water Supply Authority, Desoto Citizens Against Pollution	Administrative Law Judge is assigned and a hearing scheduled.
April-June, 2004	Judge Robert Meale hears evidence	Charlotte County, Lee County, Sarasota County, Peace River Manasota Water Supply Authority, Desoto Citizens Against Pollution, FDEP (supporting their permit), IMC phosphates	Judge Meale issues Recommended Order.
May 2005	Judge Meale issues Recommended Order		Judge recommends issuing the permit, but adds conditions including financial constraints and controls and the management of sand tailings and water.
August 2005	FDEP Remands Order to Judge Meale		FDEP removed several conditions to the permit including financial controls and the management of sand tailings.
October 2005	Remand Hearing	Charlotte County, Lee County, Sarasota County, Peace River Manasota Water Supply Authority, Desoto Citizens Against Pollution, FDEP (supporting their permit), IMC phosphates (now Mosaic)	
June 16, 2006	Judge Meale issues Recommended Order on Remand		With FDEP's removal of his recommended management of sand tailings and necessary financial surety, Judge Meale recommends AGAINST strip mining.
15 Days	Exceptions must be filed	Charlotte County, Lee County, Sarasota County, Peace River Manasota Water Supply Authority, Desoto Citizens Against Pollution, FDEP (supporting their permit), IMC phosphates (now Mosaic)	
45 days from Exceptions	FDEP must act		FDEP claims that they issued the order per Judge Meale's recommendations. This is incorrect. The JUDGE recommended AGAINST issuing the permits.

## BACKGROUND

In 2003, Charlotte County continued its successful efforts to protect Charlotte Harbor from the deleterious impacts of expanded phosphate mining in the Peace River Basin. As phosphate mining expands and moves south in the Peace River Basin, the impacts of changes in the quality, timing, and quantity of water flowing into Charlotte Harbor will increase. Mining closer to Charlotte Harbor will also increase the threat to the lower Peace River and Charlotte Harbor fisheries from accidental releases of mining wastes.

In order to avert the potential loss of the economic and natural resource value of the lower Peace River and Charlotte Harbor fisheries, the Charlotte County Commission has aggressively opposed the expansion of phosphate mining in the Peace River Basin through administrative litigation, state rulemaking, and the federal environmental impact statement process.

**MEMORANDUM  
FROM THE  
OFFICE OF COUNTY ATTORNEY**

**DATE:** August 18, 2006

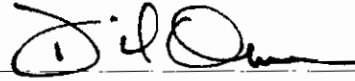
**TO:** Elizabeth Walker, Director

Public Resources

and

Molly Schweers, Administrative Spec.  
Public Resources

**FROM:**



David M. Owen  
County Attorney

**RE: CORRECTION TO BLUESHEET NO. 20061081; WALK-ON ITEM FOR BOARD  
OF COUNTY COMMISSIONERS' REGULAR MEETING OF AUGUST 22, 2006**

Ladies;

All of the references to the First District Court of Appeals in the above bluesheet should be corrected to read "Second District Court of Appeals".

Thanks.

DMO/dm

xc: Donald D. Stilwell, County Manager  
John J. Renner, Chief Assistant County Attorney  
Susan M. Henderson, Assistant County Attorney  
Lisa Pierce, Supervisor, Minutes Department