STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

APALACHICOLA BAY AND RIVER KEEPER, INC., D/B/A APALACHICOLA RIVERKEEPER,

Petitioner,

v.

OGC Case No.: 24-1705
DOAH Case No.: 24-2283

CLEARWATER LAND AND MINERALS FLA., LLC AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

FINAL ORDER

This order concludes an administrative proceeding conducted pursuant to sections 120.569 and 120.57, Florida Statutes, to formulate final agency action on Clearwater Land and Minerals Fla., LLC's application for a permit to drill an exploratory oil well. A final hearing was conducted before the Division of Administrative Hearings (DOAH) on December 9-11, 2024. DOAH issued a Recommended Order on April 28, 2025 (Exhibit A). DEP and Clearwater submitted exceptions to the Recommended Order on May 13, 2025. Riverkeeper responded to the exceptions on May 20, 2025. The Department hereby adopts the Recommended Order subject to the following qualifications in its rulings on exceptions.

RULINGS ON EXCEPTIONS

Section 120.57(1)(k), Florida Statutes, requires this order to include an explicit ruling on each exception that clearly identifies: the disputed portion of the recommended order, the legal basis for the exception, and appropriate and specific record citations.

Clearwater's Exceptions

I. Exceptions to Paragraphs 140-145

In the context of an administrative proceeding, "standing has been equated with jurisdiction of the subject matter of litigation and has been held subject to the same rules…." Grand Dunes, Ltd. v. Walton Cnty., 714 So. 2d 473, 475 (Fla. 1st DCA 1998) (quotations omitted). The Recommended Order concludes Riverkeeper satisfied two separate and distinct[1] standing tests: (1) the section 403.412(6), Florida Statutes, test and (2) the "substantial interest" test. Clearwater takes exception to both of these conclusions.

A. Section 403.412 Standing

Section 403.412(6), Florida Statutes, grants standing to Florida non-profit corporations to initiate an administrative proceeding on a permitting decision where the corporation shows, among other things, that it "has at least 25 current members residing within the county where the activity is proposed." In Paragraph 7, the Recommended Order finds that:

> Riverkeeper's Executive Director, Susan Anderson, testified that as of the date the Petition was filed, Riverkeeper's membership list included more than 25 persons who reside in Calhoun County. Clearwater contends there is ambiguity in the document supporting Ms. Anderson's statement, because it reflects individuals who had paid membership dues during the two-year period between July 2022 and July 2024. Ms. Anderson's testimony as the organization's executive director is nonetheless credited as authoritative.

This finding leads to the conclusion that Riverkeeper demonstrated Section 403.412(6) standing. RO ¶ 140.

[1] Without citing authority, Clearwater suggests that in addition to satisfying the criteria under section 403.412(6), Florida Statutes, parties must also meet the "substantial interest" test. Not only would this view render section 403.412(6), Florida Statutes, meaningless, but it would also conflict with the plain language of section 403.412(6) and the historic treatment of this section by the courts. See Conservation All. of St. Lucie Cnty. Inc. v. Florida Dept. of Envtl. Prot., 144 So. 3d 622, 624 (Fla. 4th DCA 2014); see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt., 54 So. 3d 1051, 1055 n.1 (Fla. 5th DCA 2011).

An agency reviewing a recommended order may not reject or modify the findings of fact "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence.[2]" E.g., § 120.57(1)(1), Fla. Stat.; Kanter Real Estate, LLC v. Dep't of Envtl. Prot., 267 So. 3d 483, 488 (Fla. 1st DCA 2019); Charlotte Cnty. v. IMC Phosphates Co., 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009). Moreover, a reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. See, e.g., Rogers v. Dep't of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); Belleau v. Dep 't of Envtl. Prot., 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); Dunham v. Highlands Cnty. School Bd., 652 So. 2d 894, 896 (Fla. 2d DCA 1995). If there is competent substantial evidence to support a Recommended Order's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. See, e.g., Arand Cons tr. Co. v. Dyer, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); Conshor, Inc. v. Roberts, 498 So. 2d 622, 623 (Fla. 1st DCA 1986).

The Recommended Order's finding of fact in paragraph 7 is supported by competent substantial evidence (Ms. Anderson's testimony), which cannot be modified, rejected, or reweighed by the reviewing agency. Tr2. 142-145.[3] By extension, the conclusion of law based on this finding (RO ¶ 140) cannot be disturbed.

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[2] The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); Nunez v. Nunez, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

[3] The transcript is designated herein as "TR1" for the hearing day 1 segment, "TR2" for the hearing day 2 segment, and "TR3" for the hearing day 3 segment.

B. Substantial Interest Standing

To establish "substantial interest" standing,[4] a party must demonstrate that: (1) they will suffer an injury in fact which is of sufficient immediacy to entitle them to an administrative hearing and (2) their substantial injury is of the type or nature the proceeding is designed to protect. Agrico, 406 So.2d at 482. The Recommended Order concludes Riverkeeper satisfies both prongs. RO ¶ 144. Clearwater disputes this conclusion with respect to the first prong because it believes the evidence does not show a reasonable likelihood its proposed stormwater management facilities could harm the Apalachicola River and floodplain. However, the Recommended Order's conclusion is based on the findings in paragraphs 85-106, all of which are supported by the competent substantial evidence cited therein – namely, the testimony of Mr. Smith, Mr. Jones, and Dr. Glad. RO ¶¶ 17, 87-93, 102, and 105; Tr1. 142; Tr2. 241-248; Tr3. 111. The Department cannot reject or reweigh this evidence; nor can it reject or modify the conclusion of law based on this evidence. See, e.g., Charlotte, 18 So. 3d at 1082; Rogers, 920 So. 2d at 30.

For these reasons, this exception is denied.

II. Exception to Paragraphs 148-161

Clearwater takes exception to the Recommended Order's conclusion that "the proposed permit should be denied" after "[w]eighing the criteria of section 377.241" and "balancing environmental interests against the right to explore for oil." RO ¶ 161. In support of this exception, Clearwater argues the Administrative Law Judge (ALJ) improperly applies the balancing test in three regards. First, he treats the balancing criteria as a "matrix of approval" instead of individually evaluating each criterion and then weighing that criterion against the others. Second, when

[4] The "substantial interest" standing test is commonly referred to as the "Agrico test" in reference to its establishment in Agrico Chemical Co. v. Dep't of Envtl. Reg., 406 So.2d 478 (Fla. 2d DCA 1981).

considering the criteria, he improperly ignores the legislative intent. Third, he improperly considers pending legislation that is outside of the record.

A. Improper Application of Balancing Test

The first contention, that the ALJ improperly treats the balancing criteria as a "matrix of approval," is misplaced. Quoting Kanter, the ALJ declares plainly that "section 377.241 stated a multifactor balancing test that requires the agency to weigh the criteria of section 377.241, balancing environmental interests against the right to explore for oil." RO ¶ 149. Nothing in the analysis following this declaration (RO ¶¶ 150-161) suggests the ALJ treats the criteria as a matrix instead of a multifactor balancing test.

Perhaps Clearwater's real contention is that the ALJ assigns improper weight to each criterion and the Department, as the reviewing agency, should perform a re-balance before issuing the final order. While balancing the section 377.241 criteria is indeed within the province of the reviewing agency, weighing the evidence is within the province of the trier of fact. Fla. Wildlife Fed'n, Inc. v. Coastal Petroleum Co., Case Nos. 96-4222, 96-5038 (Fla. DEP May 22, 1998); Kanter, 267 So. 3d 483. Thus, when balancing the section 377.241 criteria, the Department cannot (1) reject the Recommended Order's findings of fact, (2) reweigh the evidence that led to the findings of fact, or (3) make its own supplemental findings of fact. Id.; City of N. Port, Fla. v. Consol. Minerals, Inc., 645 So. 2d 485, 486 (Fla. 2d DCA 1994) ("The agency's scope of review of the facts is limited to ascertaining whether the hearing officer's factual findings are supported by competent substantial evidence. The agency makes no factual findings in reviewing the recommended order.") (citations omitted). Clearwater does not dispute the Recommended Order's findings are supported by competent substantial evidence; rather, it suggests the ALJ should have given more weight to its evidence and made findings that would have been more beneficial to its

case. Be that as it may, the Department is limited to the ALJ's findings when applying the section 377.241 balancing criteria, and none of these findings weigh in favor of issuing Clearwater the drilling permit.

B. Failure to Consider Legislative Intent

Clearwater's second contention is that, in applying the 377.241 criteria, the ALJ improperly ignores the "guiding principles" in Part I of Chapter 377: disordered mineral exploration (i.e., mineral speculation that creates unnecessary clouds on title and prevents the orderly and predicable use of the land's surface), wasted oil, and infringement of correlative rights. However, nothing in the record or Recommended Order indicates the ALJ did not consider these principles along with the "environmental interest" that has been recognized by the First District Court of Appeals. Coastal Petroleum Co. v. Florida Wildlife Fed'n, Inc., 766 So. 2d 226, 228 (Fla. 1st DCA 1999); Kanter, 267 So. 3d at 488 ("In Coastal Petroleum this Court held that the Department correctly determined that section 377.241 stated a multifactor balancing test that requires the agency to weigh the criteria of section 377.241, balancing environmental interests against the right to explore for oil.") (quotations omitted).

C. Consideration of Evidence Outside of the Record

Clearwater's final contention is based on a footnote in the Recommended Order that cites to pending legislation that would effectively prohibit oil drilling in the vicinity Clearwater wishes to drill (i.e., 10 miles of a national estuarine research reserve). Clearwater argues the note "constitutes a reversible error because it injects extra-record material into the fact-finding and legal analysis, violating both the Florida Administrative Procedures Act and fundamental principles of due-process adjudication." Clearwater Exceptions at ¶ 35.

The footnote at issue annotates the ALJ's statement that DEP should have found

Clearwater's proposed well to be in an environmentally sensitive area. The clear purpose of the note is to bolster his point by insinuating the House of Representatives agrees with him. It is not a citation of competent substantial evidence in support of a material finding. Nor is it a declaration of legislative intent. Rather, it is merely one of several editorial remarks that has no substantive effect on the findings of fact, conclusions of law, or ultimate recommendation. *Cf.,* RO p. 9 (opining on the bad quality of the transcript), ¶ 66 (opining on the degree of thoroughness of DEP's review), ¶¶ 96 n.11 & 131 (opining on the difficulty of reviewing newly presented evidence in de novo proceedings), ¶ 125 n.15 (opining on the degree of thought exercised by a witness); and ¶ 146 (encouraging DEP to adopt a different litigation strategy in future cases).

For these reasons, this exception is denied.

III. Exception to Paragraphs 130-131, 134 & 156

Clearwater takes exception to the Recommended Order's finding that Clearwater's conceptual stormwater management plan "lacked detail as to the building specifications for the critical containment berms that would keep toxic materials from escaping the Site during flood conditions." RO ¶ 156. In support of this exception, Clearwater cites to several remarks that evince the ALJ's frustration that the plan was not submitted until after the petition (see RO ¶¶ 130-131 & 134). Clearwater also points to the ALJ's apparent disregard of the unopposed testimony that the plan's enhancements were not offered to supplement the proposed oil and gas permit, but rather to supplement Clearwater's ERP permit for the drilling pad.

Notwithstanding the ALJ's displeasure over the timing of the plan's submittal and omission of factual findings about the plan's relationship to the ERP, he thoughtfully considered the plan and supports his findings of its inadequacy with competent substantial evidence. See RO ¶¶ 85-103, 134; Tr2. 43-48, 51-54, 241-248. An agency reviewing a recommended order may not reject

or modify findings of fact that are based on competent substantial evidence. E.g., § 120.57(1)(1), Fla. Stat.; Charlotte, 18 So. 3d at 1082. Moreover, a reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. E.g., Rogers, 920 So. 2d at 30.

Accordingly, this exception is denied.

IV. Exception to Paragraphs 135 & 151-154

Applications to drill exploratory oil wells in wetlands, submerged lands, and "other sensitive areas" are subject to additional review criteria. See Fla. Admin. Code R. 62C-26.003(10) (imposing the requirement for additional review); 62C-25.002(44) (defining "sensitive environment") & 62C-30.005 (containing the additional review criteria). Whether an area qualifies as "sensitive" is a question of fact. See Fla. Admin. Code R. 62C-25.002(44) (defining sensitive environments as "areas identified by commenting agencies during the Department's external review process as especially susceptible to disturbances peculiar to the proposed activity" or "may [otherwise] be related to species specific habitat or other ecosystems"). Examples might include "aquatic preserves, live bottom areas, water conservation areas, endangered or threatened species habitat, wetlands, etc." Id.

A. The Sensitive Area Finding

The Recommended Order finds the area Clearwater seeks to drill in is "sensitive" based on its proximity to the Apalachicola River basin, the Apalachicola National Estuarine Research Reserve, and habitat for several federal and state-listed species (per the Florida Fish and Wildlife Commission's comment letter). RO ¶¶ 119-121, 125, 135, 140-42 & 151-154; DEP Ex 14. Clearwater takes exception to this finding. In support, Clearwater claims the ALJ erroneously interprets Rule 62C-26.003(10), which provides: "[a]pplications for permits in wetlands,

submerged lands, and other sensitive areas shall be reviewed in accordance with Rule 62C-30.005." Clearwater argues a "floodplain" is excluded as a sensitive area by the *ejusdem generis* canon of statutory construction (i.e., when a general phrase follows a list of specifics, the general phrase must be interpreted to include only items of the same type as those listed). In other words, Clearwater believes floodplains are "not of the same type" as wetlands or submerged lands, and thus do not qualify as "sensitive" under Rule 62C-26.003(10). Not only does this argument wrongly assume ambiguity in the plain language of the rule by turning to a canon of construction, but it also ignores the fact that DEP expressly elaborates on sensitive areas in its definition of "sensitive environments" (Rule 62C-25.002(44)). This definition is certainly broad enough to encompass the floodplain of a river basin in a National Estuarine Research Reserve with habitat for several federal and state-listed species.

B. The Failure to Meet Rule 62C-30.005 Finding

After finding the proposed project is in a sensitive area (and therefore subject to the additional review criteria in Rule 62C-30.005), the Recommended Order finds Clearwater failed to present any evidence that it satisfied the additional review criteria in subparagraphs 62C-30.005(2)(a)6., (b)1., (b)6. and (b)7. (RO ¶¶ 126-129, 135); and, conversely, that Riverkeeper established by a preponderance of the evidence that Clearwater did not satisfy these criteria (RO ¶¶ 126-129 and 154). Clearwater takes exception to this finding.

1. Paragraph 62C-30.005(2)(a)

Subparagraph 62C-30.005(2)(a)6. requires that "[a]ll roads [associated with a proposed project] shall be high enough to assure year around usage." The ALJ accepts Riverkeeper's testimony that "the access road is constructed through a cypress swamp" and photographic evidence "showing that the access road at this location is subject to seasonal flooding" as

competent substantial evidence establishing the roads were not high enough to assure year around usage. RO ¶ 128 and 154; Tr1.142-143, 162; Tr2. 87; Joint Ex. 27, p. 151. Accordingly, the ALJ's ultimate conclusion that Clearwater failed to meet subparagraph 62C-30.005(2)(a)6. is supported by competent substantial evidence and cannot be disturbed. E.g., § 120.57(1)(1), Fla. Stat.; Charlotte, 18 So. 3d at 1082. Clearwater infers this finding directly conflicts with the ALJ's later finding that "[e]xisting private timber roads lead from the public road to the drilling pad and are sufficient to move equipment material on and off the Site, though not at all times due to seasonal flooding. Neither the roads nor drill site were constructed in or through sensitive resources." However, no such conflict exists. The finding expressly caveats that the roads will not be functional "at all times due to seasonal flooding."

2. Paragraph 62C-30.005(2)(b)

Generally speaking, Paragraph 62C-30.005(2)(b) requires proposed drilling sites in sensitive areas to be constructed in a manner that ensures fluids remain on site. See Fla. Admin. Code R. 62C-30.005(2)(b)1 ("Drilling sites shall be located to minimize negative impacts on the vegetation and wildlife, including rare and endangered species, and the surface water resources."); 62C-30.005(2)(b)6 ("Drilling pads shall be constructed to a height to assure year round usage."); and Subparagraph 62C-30.005(2)(b)7 ("A protective levee of sufficient height and impermeability to prevent the escape of pad fluids shall be constructed around the drilling site and storage tank areas."). Based on the: (1) site maps and historic flood data (Joint Ex. 10), (2) aforementioned testimony of Mr. Smith, Mr. Jones, and Dr. Glad (Tr1. 142; Tr2. 241-248; Tr3. 111) and (3) the lacking detail in Clearwater's conceptual stormwater management plan (Joint Ex. 31; Tr2. 48-54), the ALJ concluded subparagraphs (b)1., (b)6., and (b)7. are not satisfied. RO ¶¶ 126-129 and 154. Clearwater alleges multiple weaknesses in the evidence the ALJ relied on to arrive at this

conclusion and, in turn, argues the strengths of the conflicting evidence presented in the final hearing. However, a reviewing agency cannot reweigh the evidence presented in the final hearing. See, e.g., Rogers, 920 So. 2d at 30. Because there is competent substantial evidence to support the Recommended Order's findings of fact, they must be accepted. E.g., § 120.57(1)(1), Fla. Stat. It is irrelevant that there may also be competent substantial evidence supporting a contrary finding. E.g., Arand, 592 So. 2d at 280.

Clearwater also suggests the ALJ's finding based on Mr. Messina's testimony that "the constructed well pad would have no adverse impacts on water surface elevations in the floodplain" (RO ¶ 94; Tr2. 13) is in direct conflict with his finding that no evidence was presented showing compliance with the paragraph 62C-30.005(2)(b) criteria. However, this finding must be read in context with the surrounding findings (RO ¶¶ 94-106). While the ALJ affirms Mr. Messina's testimony that the proposed berm and backflow flap gate would contain waters onsite during a flood event (RO ¶¶ 94 & 98; Tr2. 13), he additionally finds he is not persuaded the berm and backflow flap would be adequately constructed and failsafe (RO ¶ 101; Tr2. 52-54, 247, 260-61). Given this uncertainty, he ultimately concludes Clearwater did not demonstrate compliance with the paragraph 62C-30.005(2)(b) criteria. Again, the Department cannot reweigh this evidence.

For these reasons, this exception is denied.

V. Exception to Paragraphs 155-156

Clearwater again takes exception to the ALJ's to the Recommended Order's finding that Clearwater's conceptual stormwater management plan is inadequate. RO ¶¶ 155-156. Clearwater repackages the same arguments made in Exception IB., Exception III and Exception IV.B.2 above, which improperly ask a reviewing agency to reweigh the evidence and make supplemental findings. For the same reasons stated above, this exception is denied.

VI. Exception to Paragraphs 158-160 (Geological & Profitable Viability)

In its final exception, Clearwater revisits the section 377.241 balancing test (discussed in the Response to Exception II above). Clearwater disputes the Recommended Order's conclusions with respect to the third criterion – i.e., "the proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis." § 377.241(3), Fla. Stat. Ultimately, the ALJ concludes "Clearwater did not establish the indicated likelihood of the presence of oil in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis" and that "one's willingness to spend money does not establish a project's commercial profitability." RO ¶ 158. This conclusion is based on the extensive factual findings made in Recommended Order paragraphs 47-84, and summarized in paragraphs 158-160, which Clearwater does not take exception to.

Clearwater argues the "preponderance of evidence in this case . . . is that there is an indicated likelihood of the presence of oil in commercial quantities at the proposed target location." Clearwater Exceptions ¶ 65. Clearwater then rehashes all of the evidence it presented at hearing and discounts the conflicting evidence presented by Riverkeeper. However, as explained above, the reviewing agency cannot reweigh the evidence or make supplemental findings; it can only review whether the ALJ's findings are supported by competent substantial evidence. E.g., Kanter, 267 So. 3d 483; City of N. Port, 645 So. 2d at 486.

The ALJ's conclusion that "Clearwater did not establish the indicated likelihood of the presence of oil in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis" is based on the testimony of Mr. Craft (estimating a 30% likelihood of striking oil) and Mr. Moore (opining that Clearwater's economic analysis is too

speculative because it is premised upon the hypothetical assumption that seven additional wells will be present). RO ¶ 158-160; Tr.26-29; Joint Ex. 45. Because these findings are supported by competent substantial evidence, they must be accepted. There are no additional findings that balance the criteria in 377.241(3) in favor of issuing the permit.

Accordingly, this exception is denied.

FDEP's Exceptions

FDEP makes four exceptions to the ALJ's aforementioned editorial remarks reflecting the ALJ's frustration in serving as the independent "de novo" fact finder in this administrative proceeding. See Beverly Enterprises-Florida, Inc. v. Dep't of Health & Rehab. Services, 573 So. 2d 19, 23 (Fla. 1st DCA 1990) ("A request for a formal administrative hearing commences a de novo proceeding intended to formulate agency action, and not to review action taken earlier or preliminarily."). The Riverkeeper appropriately compares these remarks to "dicta" in its response to FDEP's exceptions. As stated above in response to Clearwater Exception II (part C), the remarks are mostly anecdotal and have no substantive effect on the findings of fact, conclusions of law, or ultimate recommendation.

Accordingly, the exceptions are denied.

CONCLUSION

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

A. The Recommended Order is adopted in its entirety, subject to the above qualifications,[5] and incorporated by reference herein.

[5] None of which disturb the material findings of fact, conclusions of law, or ultimate recommendation therein.

B. Clearwater Land and Minerals Fla., LLC's Oil and Gas Drilling Permit Application No. 1388 is DENIED.

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 at 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 16th day of June 2025, 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: 2025.06.16 15:05:41 -04'00'

Clerk

June 16, 2025
Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by electronic mail to the following on this 16th day of June, 2025.

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STATE OF FLORIDA DEPARTMENT
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

APALACHICOLA BAY AND RIVER KEEPER, INC., D/B/A APALACHICOLA RIVERKEEPER,

Petitioner,

vs. Case No. 24-2283

CLEARWATER LAND AND MINERALS FLA., LLC AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on December 9 through 11, 2024, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), who presided in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether DEP should issue proposed Oil and Gas Permit No. 1388 for an exploratory oil well (the "Proposed Permit") to the applicant, Clearwater, pursuant to chapter 377, Florida Statutes, and Florida Administrative Code Chapters 62C-25 through 62C-30.

PRELIMINARY STATEMENT

On April 26, 2024, DEP issued the Proposed Permit to Clearwater, authorizing the company "to drill a directional exploratory well in unincorporated Calhoun County Florida to a true vertical depth (TVD) of approximately 13,950 feet (ft) and a measured depth (MD) of approximately 14,095 ft, referenced to the rig Kelly Bushing (KB)."

On May 16, 2024, within 21 days of issuance of the Proposed Permit, Riverkeeper requested an extension of time, pursuant to Florida Administrative Code Rule 62-110.106(4), to determine whether to file a

petition for a formal administrative hearing to contest the issuance of the Proposed Permit. On May 22, 2024, DEP granted Riverkeeper a 15-day extension, until June 6, 2024, to file its petition.

On June 6, 2024, Riverkeeper filed its Petition for Formal Administrative Hearing ("Petition"). The Petition alleged that Riverkeeper has standing to contest the issuance of the Proposed Permit and that Clearwater failed to demonstrate that its application met the criteria for issuance in chapter 377 and chapters 62C-25 through 62C-30.

The specific allegations in the Petition are as follows:

a. Whether the applicant has demonstrated that its application complies with section 377.241(2) regarding the "nature, type and extent of ownership of the applicant, including such matters as the length of time the applicant has owned the rights claimed without having performed any of the exploratory operations so granted or authorized."
b. Whether the applicant has demonstrated that its application complies with section 377.241(3) regarding the "proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis."
c. Whether the project is in a sensitive environment or sensitive area as those terms are used in chapters 62C-25 through 62C-30.
d. Whether the applicant has made every effort to minimize impacts associated with facilities needed for drilling operations pursuant to rule 62C-26.003(10).
e. Whether the project is located to ensure that the exploration and production activities will cause no permanent adverse impact on the water resources and sheet flow of the area, or on the vegetation or the

wildlife of the area, with special emphasis on rare and endangered species pursuant to rules 62C-26.003(10) and 62C-30.005(1).

f. Whether the project access corridors and drilling pads would be constructed into or through sensitive resources in violation of the prohibitions in rules 62C-26.003(10) and 62C30.005(2)(a)11.

g. Whether the project drilling site is located to minimize negative impacts on the vegetation and wildlife, including rare and endangered species, and the surface water resources consistent with rules 62C-26.003(10) and 62C-30.005(2)(b)1.

h. Whether the project drilling pad or associated berms will be constructed to a sufficient height to assure year-round usage without site inundation consistent with rules 62C-26.003(10) and 62C-30.005(2)(b)6.

i. Whether the project includes a protective berm or levee to be constructed around the drilling site and storage tank areas, said berm or levee to be of sufficient height and impermeability to prevent the escape of pad fluids, consistent with rules 62C-26.003(10) and 62C-30.005(2)(b)7.

j. Whether it is foreseeable that the project could be flooded, resulting in pollution in violation of section 377.371.

k. Whether the project will pollute land or water; damage aquatic or marine life, wildlife, birds, or public or private property; or allow any extraneous matter to enter or damage any mineral or freshwater-bearing formation inconsistent with section 377.371.

l. Whether the applicant has demonstrated that, in the event of a blowout or other emergency, it will be able to bring the situation under control as rapidly as possible consistent with section 377.40 and rule 62C-28.005(2).

m. Whether the drilling site is located to cause the least surface disturbance and not result in drainage or other environmental problems consistent with rule 62C-26.004(4).
n. Whether the applicant has demonstrated the need for a nonroutine well location consistent with rule 62C-26.004.
o. Whether the applicant has demonstrated the proposed project will not violate the antidegradation provisions in rules 62-4.242 and 62-302.300.

On June 17, 2024, DEP referred the case to DOAH for the assignment of an ALJ and the conduct of a formal hearing. Because of the complexity of the case, the parties jointly requested that the final hearing be set for dates beyond the usual 30-70 days after the issuance of the Initial Order. In keeping with the parties' request, the case was set for hearing on December 9 through 13, 2024. The hearing was convened on December 9, 2024, and completed on December 11, 2024.

On August 2, 2024, a Protective Order Regarding Confidential Information was entered pursuant to the unopposed motion of Riverkeeper. Exhibits marked with the letter "C" after their number have been treated as confidential under the Protective Order.

On December 4, 2024, the parties submitted an Amended Joint Pre-hearing Stipulation that has been used in the preparation of this Recommended Order. The Amended Joint Pre-hearing Stipulation set forth the parties' agreement as to the issues of fact remaining to be litigated, quoted as follows without revision:

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

2. To the extent applicable, whether the Project is in a "sensitive environment" or "sensitive area" as those terms are used in Chapter 62C-25 through 62C-30, Florida Administrative Code.

3. Whether the Applicant has satisfied the documentation requirements to minimize impacts for siting roads, pads, utility lines and other facilities needed for drilling operations pursuant to Rule 62C-26.003(10), Florida Administrative Code, and whether the site is located in a "sensitive area" such that the applicable provisions of Rule 62C-30.005, Florida Administrative Code, should apply.

4. Whether Rule 62C-30.005, Florida Administrative Code, applies. And if it does, whether the Applicant has satisfied the requirements under Rule 62C-30.005, Florida Administrative Code, if applicable, including:

a. Whether the Project is located to ensure that the exploration and production activities will cause no permanent adverse impact on the water resources and sheet flow of the area, or on the vegetation or the wildlife of the area, with special emphasis on rare and endangered species pursuant to Rules 62C-26.003(10) and 62C-30.005(1), Florida Administrative Code.

b. Whether the Project access corridors and drilling pads would be constructed into or through sensitive resources inconsistent with 62C-30.005(2)(a)11, Florida Administrative Code.

c. Whether the Project drilling site is located to minimize negative impacts on the vegetation and wildlife, including rare and endangered species, and the surface water resources inconsistent with Rule 62C-30.005(2)(b)1, Florida Administrative Code.

d. Whether the Project drilling pad or associated berms will be constructed to a sufficient height to assure year-round usage without site inundation

consistent with Rule 62C-30.005(2)(b)6, Florida Administrative Code.

e. Whether the Project includes a protective berm or levee of sufficient height and impermeability to prevent the escape of pad fluids to be constructed around the drilling site and storage tank areas consistent with Rule 62C-30.005(2)(b)7, Florida Administrative Code.

5. Whether the Project will pollute land or water; damage aquatic or marine life, wildlife, birds, or public or private property; or allow any extraneous matter to enter or damage any mineral or freshwater-bearing formation inconsistent with Section 377.371, Florida Statutes, if applicable.

6. Whether the Applicant has demonstrated that, in the event of a blowout or other emergency, it will be able to bring the situation under control as rapidly as possible consistent with Rule 62C-28.005(2), Florida Administrative Code and Section 377.40, Florida Statutes, if applicable.

7. Whether the drilling site is located to cause the least surface disturbance and not result in drainage or other environmental problems consistent with Rule 62C-26.004(4), Florida Administrative Code.

8. Whether the Applicant has demonstrated the need for a nonroutine well location consistent with Rule 62C-26.004, Florida Administrative Code.

9. Whether the Applicant has demonstrated the proposed Project will not violate the antidegradation provisions in Rules 62-4.242 and 62-302.300, Florida Administrative Code, if applicable.

10. Whether the Applicant has demonstrated that its application meets all applicable criteria for issuance of the Proposed Permit under Chapter 377, Florida Statutes, and Chapters 62C-25 through 30, Florida Administrative Code.

At the outset of the hearing, the parties stipulated to the admission of Deposition Exhibits 1 through 74 and 76 through 95 as Joint Exhibits 1 through 74 and 76 through 95. The parties also stipulated to the admission of DEP's Exhibits 1 through 15.

At the hearing, Clearwater presented the testimony of: Steven Craft, Manager of Craft Operating Company and accepted without objection as an expert in the field of geology; Andrew Smith, Drilling and Consulting Engineer at Brammer Engineering, Inc., and accepted without objection as an expert in the field of petroleum engineering; Edward Campbell, Manager of Clearwater and accepted without objection as an expert in petroleum engineering as it relates to oil and gas valuations; Erik Messina, Design Service Line Lead for Kleinfelder, Inc., and accepted without objection as an expert in the field of civil engineering; and Edward Murawski, Program Manager for Kleinfelder and accepted without objection as an expert in the field of biology. Clearwater's Exhibits 1, 2, 6, 9, 11, and 13 were admitted into evidence.

DEP presented the testimony of Gerald Walker, Environmental Administrator for its Oil and Gas Program. DEP offered no exhibits aside from those admitted by stipulation at the outset of the hearing.

Riverkeeper presented the testimony of: Susan Anderson, its Executive Director; Daniel Tonsmeire, former coordinator of the Northwest Florida Water Management District's Apalachicola River Bay Surface Water Improvement and Management (SWIM) program, former Apalachicola Riverkeeper, and accepted as expert on the sensitivity of the Apalachicola Bay and River in general terms; William K. Jones, sole proprietor and Principal Engineer with Rhumbline Consultants, PLLC, and accepted without objection as an expert in the field of civil engineering and hydrology;

Christopher Moore, Principal at Moore Energy Consulting and accepted as an expert geologist and an expert in the technical, financial, and economic issues in the oil and gas industry; and Dr. Edward Glab, Co-Director of the Global Energy Security Forum at Florida International University and accepted as an expert in the oil and gas industry, specifically oil spills, oil spill prevention, and oil spill response. Riverkeeper offered no exhibits aside from the those stipulated to at the outset of the hearing.

The three-volume Transcript of the final hearing was filed with DOAH on January 6, 2025. Two joint requests for extension in the time for filing proposed recommended orders were granted, by Orders dated January 6, 2025, and January 21, 2025. In accordance with the Second Order Granting Extension, the parties timely filed their Proposed Recommended Orders on February 5, 2025. The Proposed Recommended Orders have been duly considered in the writing of this Recommended Order.

The undersigned is compelled to note the distressing number of typographical and substantive errors in the Transcript. The "spill prevention control and countermeasure plan" proposed by Clearwater was transcribed as "bill prevention, control, encounter, manage plan." Even a simple, and in this case, ubiquitous word such as "berm" was consistently transcribed as "barn." Having closely attended to the testimony, the undersigned was able to make sense of the Transcript, but fears that a reviewing body may do so only with difficulty. On April 10, 2025, Riverkeeper filed an eleven-page Amended Proposed Errata Sheet that will prove helpful to such reviewers and is hereby adopted as an appendix to the Transcript.

Except where otherwise indicated, all references to the Florida Statutes in this Recommended Order are to the 2024 edition.

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 with the authority under chapter 377, part I, to issue permits to drill for, explore for, or produce oil, gas, or other petroleum products which are to be extracted from below the surface of the land.

2. Clearwater is a Florida limited liability company formed in 2023, and is in good standing and authorized to do business in the State of Florida. Clearwater applied for the Proposed Permit to drill for oil and gas and associated activities in Calhoun County, Florida.

3. Riverkeeper is a not-for-profit Florida corporation established in 1998, and formally incorporated in 1999. Riverkeeper was formed for the purpose of protecting the environment, fish and wildlife resources, and the air and water quality of the Apalachicola River, its tributaries, watershed, and the adjacent inland coastal waters of St. Vincent Sound, Apalachicola Bay, St. George Sound, and Alligator Harbor.

4. Riverkeeper is a member of Waterkeeper Alliance, an international environmental organization uniting 160 Waterkeeper groups in 42 states and 307 Waterkeeper affiliates globally to achieve similar resource protection objectives.

5. Riverkeeper is a membership-based organization. Riverkeeper counts a person who makes a financial contribution to the organization as a "member." Members receive a quarterly invoice and renew their membership on an annual basis. Riverkeeper holds regular membership meetings.

6. Riverkeeper has approximately 1,300 members and another 7,000 persons it counts as "supporters," i.e., persons who have expressed an interest in the organization's activities but have not made a financial contribution. A substantial number of its members actively and frequently use and enjoy the Apalachicola River.

7. Riverkeeper's Executive Director, Susan Anderson, testified that as of the date the Petition was filed, Riverkeeper's membership list included more than 25 persons who reside in Calhoun County. Clearwater contends there is ambiguity in the document supporting Ms. Anderson's statement, because it reflects individuals who had paid membership dues during the two-year period between July 2022 and July 2024. Ms. Anderson's testimony as the organization's executive director is nonetheless credited as authoritative.

History of the Proposed Permit Site

8. The Proposed Permit is based on previously approved Oil & Gas Drilling Permit No. 1374 for the same location (the "Prior Permit"). The Prior Permit was issued to Cholla Petroleum, Inc., on December 4, 2019, for one year. DEP granted an extension that validated the Prior Permit through December 3, 2021. The drilling site contemplated in both the Prior Permit and Proposed Permit is located in Section 10, Township 3, South 9 West on private property owned by Teal Timber, LLC, in Calhoun County (the "Site"). The Site is approximately 9.3 miles northeast of Wewahitchka, 5 miles east of State Road 71, and approximately 2.3 miles north of Porter Landing Road.

9. Environmental Resource Permit 367570-001 (the "ERP") was issued on December 10, 2019, for the construction of the drill pad, perimeter berm, and stormwater containment pond on the Site. The drill pad and stormwater pond were built. The existing drill pad is the surface hole location of the Proposed Permit.

10. The ERP requires the permittee to "construct berms of sufficient size and strength to prevent rain water from washing onto and inundating pads and to contain any spills that may occur during drilling operations around well [s]ites," citing rule 62C-27.001(4)(c) as authority.

11. The ERP states that "[t]he storage capacity of the retention system and perimeter berm shall be designed and constructed to contain site run-off from a 24-hour duration, 100-year storm event."

12. Ultimately, Cholla Petroleum did not drill an exploratory, or "wildcat," well on the Site. With the Proposed Permit, Clearwater seeks essentially a re-authorization of the Prior Permit, i.e., permission to drill the Site at the same proposed well location.

13. The Site is not ready for immediate drilling. Andrew Smith, Clearwater's expert petroleum engineer, estimated that it will cost around $320,000 to upgrade the drilling pad. Outer berm erosion will need repair and the inner secondary berm will have to be built. The stormwater pond will need to be dug out.

14. By a separate application, Clearwater requested that the ERP be transferred from Cholla Petroleum to Clearwater. DEP granted that transfer on December 20, 2023.

Conditions in the Immediate Vicinity of the Site

15. The Site is within the 100-year floodplain of the Apalachicola River basin, located along an unnamed silviculture road in a FEMA-designated Special Flood Hazard Area "AE" Flood Zone. The AE zone has a base flood elevation ("BFE") of approximately 38-feet (NAVD88)[1] in the vicinity of the Site.

16. Two ponds are within a one-mile radius of the Site. One of the two ponds is known as Brown Lake and is located approximately 4,950 feet east-southeast of the proposed surface hole location. National Hydrologic Data indicates one intermittent stream and three perennial streams within one mile of the Site. The streams are hydrologically connected to the Apalachicola River. Brown Lake Slough connects Brown Lake to the Apalachicola River, which is approximately 4,820 feet southeast of the surface hole location. An unnamed pond is approximately 2,300 feet southeast of the surface hole location. There are unnamed channels within the one-mile radius of the proposed well location. There are wetlands to the north and south of the Site.

[1] The North American Vertical Datum of 1988, or NAVD88, is the official vertical datum for the continental United States.

The Site is surrounded by swampland, though none directly abuts the Site. The Site is not within one mile of a bay or river.

17. Riverkeeper points out that if a spill were to occur, it would have catastrophic consequences due to the proximity of the proposed well to the nearby streams, wetlands, and bodies of water, which would compound the difficulty of cleaning up the spill.

18. The immediate area of the Site is within disturbed silvicultural uplands without environmentally significant resources. There are no protected species on the Site. Existing private timber roads lead from the public road to the drilling pad. The timber roads are sufficient without improvement to move equipment and material on and off the Site during construction and drilling. There is one culvert in a timber road about 1,000 feet north of the Site. Neither the roads nor drill site were constructed in or through sensitive resources.

The Wider Area Surrounding the Site

19. Riverkeeper contends that the Site, located within the greater floodplain of the Apalachicola River, is in a state, nationally, and globally designated "sensitive area" and "sensitive environment."

20. The Apalachicola River flows from the confluence of the Flint and Chattahoochee rivers at the Georgia-Florida border, where those rivers join to form Lake Seminole behind the Jim Woodruff Dam. The river travels 107 miles from the dam through the high bluffs of Grand Ridge and Cody Scarp to the Gulf coastal lowlands, finally reaching Apalachicola Bay, where it creates a rich estuary.

21. The habitats within the river and bay system provide essential feeding and nesting grounds for a diverse assemblage of upland, coastal, and estuarine wildlife, including more than 300 species of birds, 1,300 species of plants, 40 species amphibians, 80 species of reptiles, 50 species of mammals, and 180 species of fishes. Several of the native species are threatened or

endangered. Clearwater did not conduct an endangered species survey or assessment of the Site or the surrounding area.

22. In 1983, the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") designated the area as the "Apalachicola Biosphere Region."

23. The Apalachicola River is designated as an Outstanding Florida Water ("OFW") under rules 62-302.700(9)(i)1. and (9)(m)1.

24. The Apalachicola River flows directly into Apalachicola Bay, which is also designated as an OFW under rule 62-302.700(9)(f)2. and a State Aquatic Preserve under rule 62-302.700(9)(h)2.

25. The Apalachicola National Estuarine Research Reserve is an OFW pursuant to rule 62-302.700(9)(m)1. It includes the Apalachicola River, Apalachicola Bay, East Bay, St. Vincent Sound, and St. George Sound.

26. All or portions of Apalachicola Bay, East Bay and its tributaries, St. George Sound, and St. Vincent Sound are designated Class II – Shellfish Propagation or Harvesting Waters pursuant to rule 62-302.400(17)(b)19.

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

28. The Apalachicola River Basin, including the Site, is ranked as the number one priority area for acquisition, conservation, restoration, and management by DEP's Florida Forever Program.

The Application Process

29. Kleinfelder, Inc., is an engineering, construction management, design, and environmental professional services firm retained by Clearwater for this project. On December 4, 2023, Kleinfelder, on behalf of Clearwater, submitted Clearwater's application for the Proposed Permit to DEP, including a check payable to DEP for the $2,000.00 processing and regulatory fee pursuant to

rule 62C-26.003(8), and a check of $11,798.00 payable to DEP for the DEP Petroleum Trust Account, as required by rule 62C-26.002(5)(a).

30. The application included: drawings and plans for the drill pad and location of the drilling rig and related temporary equipment; a hydrogen sulfide ("H2S") safety plan; a casing and cementing program under rule 62C-26.003(5); a location plat surveyed and prepared by a registered land surveyor licensed in Florida under rule 62C-26.003(7); a casing plan that conforms to the requirements under rule 62C-27.005; and proposed blowout prevention equipment to be employed during drilling.

31. On January 5, 2024, DEP issued Kleinfelder a Request for Additional Information ("RAI") that addressed a number of omissions, discrepancies, and documentation issues in the application. The nine-part RAI requested clarification of the identity of the surface owner of the Site; correction of the drilling permit number on the well location plat; additional information as to the ownership of the mineral rights to the Site; and submission of more legible copies of some documents.

32. Two items, numbers six and eight, were of special significance:

> 6. Page 52; Attachment 9, Spill Prevention Control & Countermeasure Plan (SPCC). The SPCC included in Attachment 9 is dated and certified in February 2019 and was prepared for RAPAD Drilling Company LLC (RAPAD). Appendix I of the SPCC Plan indicates the Plan has not been updated since February 2019, please indicate if the plan has been updated and if so, please provide a copy of the update plan. Please indicate whether or not RAPAD will still be completing the project, if not, who will be completing the project. In addition, the plan references 9 individual drill rig models, please indicate the specific rig projected for this project, or provide an explanation of why the multiple rig references are needed.

* * *

> 8. Page 576; Attachment 23; Permitted Site Plan for NLT Royalty Partners 10-4 well at Pad 1. The attachment provides the pad plan that was submitted and reviewed as part of the Permit #1374 application in 2019. Based on the Department's site inspection conducted on Dec. 27, 2023, the pad and associated stormwater structures appear to have substantially deteriorated. Please complete all necessary repairs required to return the pad to the permitted condition. Upon completion submit an as-built survey certified by a qualified professional to the Department verifying the site conforms to the original certified design and required standard.

33. Kleinfelder submitted its response to the RAI on January 12, 2024.[2] Its responses to items six and eight were as follow:

> [Response to item 6:] This document has not been updated by the Drilling Contractor since 2019, and the version submitted is the most recent one. The Drilling Contractor typically will not update the SPCC unless they add or drop a rig to their inventory. This SPCC plan is generated by a third party for them and is designed to encompass all their rigs, which is the reason why multiple rigs are referenced within the document. We felt it best not to redact pages or portions of the official document generated by a third party. For the NLT Royalty Partners 10-4 proposed under this application, RAPAD will still be completing the project and it is anticipated that either Rig #33 or #36 will be used. The two rigs are identical to each other and are the same in size, components, layout, and footprint. While it is not always easy to forecast exactly which rig will be used in advance, we are confident it will be one of these two.
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> * * *
>
> [Response to item 8:] [Clearwater] is still in the construction phase of completing the well pad. Pursuant to FDEP File No. 0367570-002-EM/07,

[2] The response was erroneously dated January 12, 2023.

> which authorizes transfer of FDEP Permit No. 0367570-001-EM/07 to CLM, and General Conditions for Individual Permits No. 6, [Clearwater] will prepare "As-Built Verification and Request for Conversion to operational Phase [Form 62-330.310(1)] within 30 days of completion of the entire project, and prior to commencing drilling operations. In addition, it is our belief that the project is not substantially deteriorated, the stormwater pond has appropriate volume, and all deterioration are [sic] all within confines of the berm that surrounds the perimeter of the project footprint.

34. DEP considered the application complete following Kleinfelder's submission of the response to the RAI, apparently favoring Kleinfelder's assertion that the pad and stormwater pond had not substantially deteriorated over the findings of its own site inspector, and apparently being satisfied with the spill prevention control and countermeasure plan as submitted, though it had not been updated since 2019.

35. On December 8, 2023, DEP distributed the application for comment to agencies and local governments, including the Florida Fish and Wildlife Conservation Commission ("FWCC").

36. On December 8, 2023, the Northwest Florida Water Management District ("NWFWMD") notified DEP that it declined to comment on the Proposed Permit as beyond its jurisdiction, deferring to DEP pursuant to the agencies' Operating Agreement for Florida Administrative Code Chapter 62-330 governing ERPs.

37. On December 11, 2023, the Calhoun County Board of County Commissioners responded in favor of the Proposed Permit.

38. Riverkeeper submitted comments to DEP in opposition to the Proposed Permit on December 22, 2023, and April 29, 2024.

39. On April 26, 2024, DEP issued its Notice of Intent to Issue Drilling Permit ("NOI") that would authorize installation and testing of an exploratory oil well. On May 1, 2024, DEP published notice of the NOI in the

Calhoun County Record, a weekly newspaper published in Blountstown. DEP received no objections to the Proposed Permit from state agencies or local governments prior to issuance of the NOI.

40. On July 3, 2024, after the NOI was issued and this case had been forwarded to DOAH, FWCC submitted its comments to DEP. FWCC's letter stated that the Site "is located near, within, or adjacent to potential habitat" for several federal and state-listed species: reticulated flatwood salamander, eastern indigo snake, Gulf sturgeon, Barbour's map turtle, purple bankclimber (mussel), fat threeridge (mussel), Chipola slabshell (mussel), oval pigtoe (mussel), and southern elktoe (mussel). The letter also notes that FWCC has observed 5,652 federally proposed or listed freshwater mussels downstream of the Site.

41. The FWCC letter noted that the application materials submitted by Kleinfelder did not include a wildlife assessment or wildlife survey report, but did include a statement of stream protection, stating that the project would provide adequate protection of surface waters. The letter listed, with apparent approval, Kleinfelder's plans to include an outer berm designed to contain surface fluids and a secondary containment stormwater management system. The letter also noted that the drill pad was designed in accordance with NWFWMD stormwater requirements.

42. Finally, FWCC recommended that Clearwater coordinate with the U.S. Fish and Wildlife Service's Panama City Field Office regarding the documented populations of federally listed and proposed freshwater mussel species downstream of the Site. No party directed the undersigned to any indication in the record that either Clearwater or DEP contacted FWCC or the U.S. Fish and Wildlife Service to follow up on the issues raised by the FWCC letter.

Mineral and Surface Rights

43. The Site is on land for which Clearwater has an Oil, Gas and Mineral Option Agreement (the "Option Agreement") with the mineral owner, NLT

Royalty, LLC. The Option Agreement covers roughly 27,000 acres and allows Clearwater to execute predetermined leases in increments of 1,280 acres for mineral exploration.

44. Teal Timber, LLC, owns the surface property and is bound by an executed Surface Use Agreement with the mineral owner that addresses the use of the surface for oil and gas exploration.

45. Edward Campbell, Clearwater's Manager, testified that the Site's mineral owner, NLT Royalty, LLC, and the surface owner, Teal Timber, LLC, agree with Clearwater's right to drill the Site if permitted.

46. Clearwater has agreed to repair the drill pad and stormwater structures to the conditions permitted under the Prior Permit. The final drilling pad will be approximately 440 feet by 425 feet. An outer berm will circumscribe the perimeter of the Site and is intended to capture all rainfall on the Site and route it to a stormwater basin for controlled entry. A lined secondary containment berm will surround the drilling rig and is intended to capture and prevent the escape of pad fluids and rainwater from the Site. Clearwater will locate the drilling rig, generators, drilling fluids and chemicals, and all other drilling equipment on the Pad within the secondary containment berm during drilling operations.

Potential Presence of Oil in Commercially Profitable Amounts

47. The Smackover Formation, a carbonate depositional system deposited in the oceans during the Jurassic Period, is the primary geologic target for the exploratory oil well. The Apalachicola Embayment, which is the portion of the Smackover that Clearwater is targeting, has varying depositions of nearshore environments. In the Apalachicola Embayment, the Smackover is underlain by the Norphlet, Pre-Jurassic Gravel, and/or Palezoic Basement formations.

48. The application contemplates drilling a directional exploratory well to a total vertical depth of approximately 14,000 feet. The objective is to find oil in the Smackover Formation or in the Norphlet Formation.

49. Steven Craft is the principal and manager of Craft Operating Company, an independent oil and gas company based in Mississippi. Mr. Craft has been a practicing geologist for 37 years, mostly in the petroleum industry. Mr. Craft stated that he is not licensed in any state, testifying that "I was a geologist before they even had licenses." When the state of Mississippi instituted licensing, Mr. Craft thought about applying but decided it was not necessary for the kind of work he does. Mr. Craft was accepted without challenge as an expert in the field of geology.

50. Mr. Craft has spent much of his career prospecting in the Smackover in south Alabama and the northern panhandle of Florida. In the last 20 years, his company has drilled 91 wells in the Smackover, 47 of which produced oil, for a success rate of 51%. Mr. Craft believes that this project is part of the Smackover Formation, though it is farther east than any of his previous projects.

51. Mr. Craft testified that all the oil he finds in the Smackover is associated with the near shore of the ocean as it existed in the Jurassic period. Therefore, he looks for near shoreline beaches, bars, and reefs that were deposited in that period. The best way to find such formations is to create a map of what the Smackover looked like in the Jurassic period. He studies present day reefs and oolite bars along shorelines, then uses those as bounding parameters to interpret what the Smackover looks like.

52. Mr. Craft offered detailed testimony as to his methods for zeroing in on a prospective well. He reviews data regarding prior wells drilled. He combs through commercial libraries to find existing seismic surveys and subsurface maps. He conducts his own proprietary seismic surveys. Mr. Craft likened seismic data to a fish finder, creating a vertical profile of the layers of earth below, though in this area oil cannot be seen directly on seismic data. Previously drilled wells provide constant data points which are connected with the seismic data to provide something like a map of the subsurface rock formations.

53. Mr. Craft testified that his company began investigating the Site in 2014 and estimated that he spent between two and three thousand hours in research. When his company completed the process for the Site, a geophysicist working with him stated, "I don't know how these guys did it, but they got it in exactly the right place." In other words, the existing drill pad on the Site was the precise drilling location suggested by their research and surveying.

54. Based on his work, Mr. Craft concluded that the Apalachicola Embayment is a direct analog to a known producing Jurassic oil field lying approximately 125 miles northwest of the Site, at the Little Cedar Creek and Brooklyn Oil Fields in Conecuh County, Alabama. These wells have produced in excess of 50 million barrels of oil. Mr. Craft stated that using analogous fields is common practice in oil prospecting and one of the best ways to increase the likelihood of discovering oil.

55. Mr. Craft's testimony as to the likelihood of finding oil at the Site was based in part on his interpretation of proprietary 2D geological seismic surveys specifically commissioned for Clearwater's option area, which data indicated many similar features as found in the analogous Alabama Smackover fields.

56. Mr. Craft studied 13 prior wells drilled within the Apalachicola Embayment, none of which produced oil but the data from which helped him locate what he believes is the prehistoric shoreline, which would increase the likelihood of discovering commercially viable amounts of oil. Mr. Craft's extrapolation of data from the 13 wells left him feeling that there is a likelihood of "good well control," i.e., minimal chances of a blowout, on the Site.

57. Mr. Craft conceded that 63 total wells have been drilled in Calhoun and surrounding counties since 1945, 18 of which were drilled deep enough to reach the Smackover, and that all of them were dry holes. He acknowledged that the proposed well is in a frontier area with no proven reserves. He also

acknowledged that in the Smackover, the presence of oil is not proven until drilling finds it.

58. Mr. Craft detailed the results of the seismic data that his company took, providing maps showing the thickness and setting the approximate limits of the Smackover oil field under the Site. Mr. Craft testified that the thickness of the Smackover indicates the presence of oil, and that the desired thickening shown in his data is directly below the drilling pad location at the Site.

59. Mr. Craft also explained extensively his comparative data modeling indicating a likelihood of oil at the prospect, including 2D seismic signatures that he stated provide assurance of desirable thick bars in the Smackover. He explained that oil, being lighter than water, will migrate upward until it is trapped by some rock formation. Mr. Craft believed that his data showed the spill-point level and the final updip termination of the oil in this formation, which he called the "big final trap." He also showed maps indicating the location of what he termed the "hard cutoff" to locate oil reserves, and the "best thickness to create the oil traps."[3]

60. Christopher Moore testified on behalf of Riverkeeper as an expert in geology and on technical, financial, and economic issues in the oil industry. Mr. Moore has 50 years in the oil and gas industry, moving from working as a geologist on oil rigs in the North Sea to working as a review geologist, putting together prospects of his own and reviewing the work of others. He is currently a guest lecturer at the University of Texas in Dallas and is an adjunct professor at the University of Texas School of Law.

61. Mr. Moore's analysis concluded that the proposed well at issue in this case is not an economically viable prospect. Mr. Moore explained the formula he employs to make such assessments, which is standard in the oil and gas

[3] Mr. Craft explained that if a company drills too far updip, it will find no Smackover at all. If it drills too far down the updip, the drill will hit only water because the oil has migrated further updip.

industry: the chance weighted value of success should outweigh the chance weighted cost of failure. To arrive at the expected value of the prospect, one multiplies the chance of success[4] times some measure of the value of success, and then subtracts the likelihood of failure multiplied by the cost of failure. This calculation results in what Mr. Moore called "Expected Present Value" ("EPV"), which should be greater than zero.

62. Mr. Moore explained that if a prudent operator only invests in projects with an EPV greater than zero, some will fail and some will succeed, but on average the results should be positive. He went on to state:

> [T]he converse is that if you continue to invest in… opportunities with a negative expected value, you will lose your money…. [S]ome people say that when you do projects that have a positive expected value, it is investing. If you do projects with a negative expected value, it's gambling. [C]asinos wouldn't exist if the customers were facing a positive expected value. They'd go out of business. So there's a negative expected value associated with playing in the casino, or buying a lottery ticket for that matter.

63. Mr. Moore calculated the EPV for this project at -$0.8 million. He arrived at this negative valuation even after accepting Mr. Craft's statement that there was a high likelihood of success, which Mr. Craft put at 30%. Mr. Moore believed this number to be high for a wildcat well, but accepted it for purposes of his calculation. Mr. Moore concluded that a prudent investor would not drill this well.

64. Mr. Moore referenced a 1997 paper written by two of the people who ran Chevron's exploration portfolio at that time.[5] The paper provided a "rule of thumb" for categorizing the risk associated with a given play, starting with

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[4] Mr. Moore noted the "very high risk" associated with drilling wildcat wells. The calculation of the probability of commercial success in these situations is "basically a subjective judgment of the geologists."

[5] Otis and Schneidermann, "A Process for Evaluating Exploration Prospects," AAPG Bulletin, v. 81, no. 7 (July 1997), pp. 1087-1109. The AAPG Bulletin is the official, peer-reviewed journal of the American Association of Petroleum Geologists.

the very low risk of a new well in a proven play to the very high risk of a new play in a new basin or a new play with negative data. The wildcat well at issue in this proceeding would be a new trend in a play that has been proven elsewhere, i.e., the Conecuh County, Alabama fields. The authors assessed the success range for such a prospect at about 13% to 25%. Mr. Moore pointed out that the analog wells being 120 miles away from the Site add to the uncertainty. Mr. Moore could see no positive case for drilling the well proposed at the Site.

65. Gerald Walker, the Environmental Administrator for DEP's Oil and Gas Program, testified that DEP does not require an applicant to provide a financial projection demonstrating that oil exists in such quantities "on a commercially profitable basis" pursuant to section 377.241(3). Mr. Walker offered no alternative means for an applicant to objectively show the financial feasibility of a project. He testified that Clearwater did not provide a financial or cost analysis in its application. Mr. Walker stated that DEP makes no independent calculation of the likelihood the project will be commercially profitable.

66. Mr. Walker testified that he was not a technical expert in the oil and gas industry. He stated that the statutory criterion was satisfied by Mr. Craft's research and Clearwater's willingness to risk a large amount of money in the project. Mr. Walker stated: "[I]f they were willing to put, you know, money and effort behind the completion of the geophysical and were willing to take the risk, we thought that, you know, that they were convinced that it would be financially profitable." This statement was typical of DEP's very deferential review of Clearwater's application. If Clearwater thought the project would be profitable, that was good enough for DEP. No further analysis was required.

67. In a similar vein, Mr. Moore noted that DEP's "analysis" of Mr. Craft's report was performed by a geologist with no expertise in calculating prospective resources or in seismic interpretation. Mr. Walker himself

testified that this was the first oil and gas drilling permit application that he had ever reviewed. Mr. Moore accurately described the DEP analysis as "effectively just parroting" the work done by Mr. Craft.[6]

68. Despite Mr. Walker's sanguine view of the project's economics, Clearwater felt that it should provide some economic justification beyond Mr. Craft's report once Mr. Moore and Riverkeeper challenged its assumptions. Implicitly conceding Mr. Moore's point that the single well proposed in the application could not be economically justified, Mr. Campbell prepared an economic analysis based on the drilling of seven wells.[7] Mr. Campbell was accepted as an expert in petroleum engineering as it relates to oil and gas valuations.

69. Mr. Campbell contended that projecting the EPV using a single-well analysis was incorrect because it did not reflect the probable size of the accumulations or the development probability of subsequent offset wells, which he estimated at 95% based on the analog field data. Mr. Campbell considered his seven-well analysis to be very conservative given the potential recoverable reserves of 13 to 17 million barrels in the target area. He pointed out that the analog field in Alabama supported roughly 180 wells. He believed this field has the potential for 36 wells in the nine-section area (one section being 640 acres or one square mile) used in his analysis, with a potential of 30 to 40 million barrels of recoverable oil.[8]

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[6] This is not to diminish Mr. Craft's work product or expertise, which Mr. Moore duly acknowledged. The point is that DEP appears to have brought very little critical intelligence or independent expert analysis to bear on this application.

[7] This analysis was produced for the hearing; it was not part of the application as initially approved by DEP.

[8] All parties seemed to agree that four wells per section would be the limit, though no party cited a statute or rule in this regard. The undersigned notes that rule 62C-26.004(2) provides that exploratory wells drilled to a depth of greater than 7,000 feet, as is contemplated for this project, "shall be located on 160 acre units." There are four 160 acre units in a 640-acre section. Mr. Campbell made repeated references to "governmental 160s."

70. Mr. Campbell testified as to the expected decrease of incremental costs as additional wells are added. Mr. Campbell's analysis included a waterflood injection scenario which he stated would further improve the economics of the project. He did not include tax incentives which he believed could even further improve the economics of the project.

71. Mr. Campbell conceded that his seven-well scenario assumed a 100% success rate on the wells. Assuming the success of the first well, there would be little risk to drilling subsequent wells. Mr. Campbell also conceded that Clearwater does not know the extent of the field in this project, which is why he used the conservative number of seven wells.

72. Mr. Craft believed his seismic data had suggested the basic contours of the field. On his map, the area touched on ten sections of land around the Site. Mr. Craft testified that subsequent wells would be drilled as close as possible to the first (presumably successful) well to reduce risk, with the first seven wells constituting an "inner circle" as the exploration worked its way out to the edges of the field.

73. Mr. Campbell testified that his analysis did not include the possible cost of dealing with the presence of H2S in the drilling because Clearwater does not expect to encounter H2S. H2S is highly toxic and a hazard in oil and gas drilling operations. It has been encountered in the Jay Field in Escambia and Santa Rosa counties. Mr. Craft believed it unlikely there would be H2S, assuming he was correct that the Site is part of an updip flight along a prehistoric shoreline, where in his experience H2S has not been found.

74. Andrew Smith, the petroleum engineer who would actually run the drilling operation, testified that there will be an H2S contingency plan for the Site. Mr. Smith testified that the primary concern is with the drill operators, who may be exposed to the H2S before it has dissipated. He noted there is a hunting camp and logging operations in the area that would also be accounted for in the contingency plan. Mr. Smith stated that Clearwater did

not look at the possible effects of H2S concentrations on threatened or endangered species.

75. Mr. Moore argued that Mr. Campbell's seven-well analysis essentially assumes that which is to be proven, i.e., the probable size of the oil accumulation in the field. Mr. Moore testified that the size of the field cannot be seen seismically or on any kind of map. There is no way of knowing where the next six wells will be drilled, or if they will be drilled at all. For this reason, the economic case should initially be based on a single well.

76. Mr. Moore also criticized Mr. Campbell's assumption that the success of one well automatically means the others will be successful. Even after an initial success, locating the next productive well is a matter of educated guesswork, not an absolute certainty. Mr. Moore faulted Mr. Campbell's analysis for ignoring the risk and cost of failure in subsequent wells.

77. Mr. Moore explained at length the differences between a structural trap and a stratigraphic trap. In the former, as the name suggests, there is a structural configuration in the rock that traps the oil. The key practical feature of a structural trap is that it can be mapped before drilling. A stratigraphic trap is one caused by the changing nature of the underground rock, as explained by Mr. Craft in his discussion of the underground migration of oil. Mr. Moore stated that in a stratigraphic trap, one cannot see the boundaries of the different kinds of rock on seismic, and therefore one has no real idea where the boundaries are. Mr. Moore opined that this uncertainty is why one well is not sufficient to delineate an entire field.

78. Mr. Moore was convinced that Mr. Craft's data suggested a stratigraphic trap. Mr. Craft believed that it is more a combination of a structural and stratigraphic trap. Mr. Moore doubted Mr. Craft's conclusion because none of information provided indicated any component that is structural in nature. Mr. Craft countered that Mr. Moore's conclusion that the boundary cannot be determined because of the stratigraphic trap might be true as a global statement but did not apply to this project because his

work had located the updip limit and found the seismic anomalies that pinpoint the drilling location.

79. Mr. Moore pointed to a United States Geological Survey ("USGS") publication titled "Assessment of Undiscovered, Technically Recoverable Conventional Oil and Gas Resources in the Upper Jurassic Smackover Formation, U.S. Gulf Coast, 2022." The article found that there was a minimum of 1 and a maximum of 70 oil fields remaining to be found in the Smackover Eastern Updip and Peripheral Fault Zone where the Site is located. The median number of oil fields expected is 40.

80. Mr. Moore testified that the most significant number derived from the article was the USGS estimate of the size of the fields in millions of barrels. The range was from 0.5 to 40 million barrels, with a median number of 1 million and a calculated mean of 1.9 million. Mr. Moore opined that a 1.9-million-barrel oil field onshore in the United States "is a nice thing to have," but the problem is that if 1.9 million is the average size of the field one expects to find, it would not be viable to go look for it once the costs and chances of failure of additional wells is considered. He believed that even the 1.9-million-barrel field would require at least three wells because a stratigraphic type of trap cannot be located with a single well.

81. Mr. Moore concluded by stating that he would have no problem with Mr. Campbell's seven-well analysis if there were a seven-well field. However, the seven-well analysis should not be used as justification to drill the first well "because you've got no idea that you're going to find anything as large as seven wells… [T]he appropriate way to go for a trap like this is to decide whether or not to drill on the basis of the economics of … one well…."

82. A conceptual problem with the seven-well analysis is that it does not match up with the environmental analysis proffered by Kleinfelder and accepted by DEP. Clearwater and DEP are insistent that the scope of the environmental review should be limited to the footprint of the single well on

the Site, but want to base their economic case on a seven-well scenario that would impact no fewer than two sections,[9] or two square miles, of the 100-year floodplain of the Apalachicola River basin.

83. Fairness and consistency dictate that Respondents cannot have it both ways. If the environmental case is confined to the footprint of the Site, then the economic case should be confined to the single well that this permit will allow. If DEP accepts the seven-well scenario to establish the commercial profitability of the project, despite Clearwater's present inability to state where or even whether six subsequent wells will be placed, then DEP should also have accepted Riverkeeper's more expansive view of the potential environmental impacts to the Apalachicola River basin.[10]

84. The undersigned finds that the single well economic analysis is more appropriate and that Mr. Moore's argument against the economic viability of a single well was persuasive and dispositive, in spite of Mr. Craft's well-reasoned case for the presence of oil in the area of the Site. The speculative nature of the seven-well analysis, as highlighted by Mr. Moore, renders it an unrealistic basis for assessing the economic viability of the Proposed Permit.

Stormwater Management

85. The stormwater management plan proposed by Clearwater had been prepared in 2019 by Rowe Engineering and Surveying ("Rowe") for the ERP, and was later amended by Kleinfelder in response to criticisms by William K. Jones, Riverkeeper's engineering expert. The plan for the Site contemplates lining the entire operational area with an impermeable synthetic liner to contain and collect any spills. The plan also proposes a wet detention pond lined with clay or with some other impermeable synthetic liner to retain stormwater runoff within the perimeter of the Site. The pond would hold

[9] Two sections because of the four-wells-per-section limit discussed at footnote 8 above.

[10] The undersigned hastens to note that DEP should in any event have looked beyond the footprint of the Site as to potential environmental impacts. This discussion is intended to highlight again the unusual degree of deference to Clearwater as it considered this application.

water at a 33.6 foot elevation. Stormwater would stay in the wet retention pond long enough to allow solids to settle, then would be discharged through an outfall pipe.

86. Riverkeeper presented the testimony of Mr. Jones, an expert in the fields of civil engineering and hydrology. Mr. Jones was critical of the Rowe stormwater management design proposed by Clearwater, describing it as adequate for "a Dollar General in Blountstown," but not designed in anticipation of the toxic materials involved in the oil drilling process.

87. Mr. Jones, noting that the Site is in a flood zone, created a graphic representation of flooding at various heights in the vicinity of the Site based on recorded data as to the flow of the Apalachicola River and its slope into the floodplain area. Mr. Jones graphics showed that a 100-year flood could inundate the Site, including the drilling pad itself, with as much as four feet of water.

88. Mr. Jones's written report, dated June 4, 2024, stated that the wet detention pond was designed to restrict discharges up to a 25-year, 24-hour storm event. In events greater than the 25-year, 24-hour event, the pond would discharge the overflow through a weir and eventually over the top of the pond and through a concrete pipe sitting in the floodplain at an elevation of 32.5 feet. Mr. Jones stated that this design was consistent with a general land development project but was inadequate for a drilling operation in the vicinity of sensitive environmental features.

89. Mr. Jones's report stated that the berm proposed to protect the site from floodwaters would not prevent the site from being completely inundated. The berm would allow floodwaters to discharge in an uncontrolled manner through the weir and over the top of the outfall structure.

90. Mr. Jones further noted that the application did not describe the proposed berm in engineering terms adequate to protect the drill pad area from inundation. His report stated:

> I would have expected a description of the material that the berm is to be constructed from, a cross section with components of the berm and a compaction schedule and compliance criteria for each lift deposited by the contractor. The permittee includes strong sodding criteria which indicates that there is concern for erosion which would lead to encroachment and potential overtopping through weak parts of the berm. These erosion factors may be a function of local rainfall and erosion of the top of the berm making sections potentially vulnerable if a flood occurs.

91. Mr. Jones testified that when building a berm in a floodplain, it is essential to maintain its stability and be assured it will stand up to whatever conditions occur. The failure of the designers to specify how they intended to build the berm was critical:

> [I]f you built it with native material, sands and things like that and you had any kind of event and any kind of major event or even if there was a little bit of poor management of it, you could get erosion of those berms and they could be [an] easily breached structure in the floodplain…. It's like building a dike in Louisiana. You have to build it in such a way that you're not going to flood what is on the inside by some sort of breach.

92. Mr. Jones commented that the secondary containment area proposed by Clearwater likewise lacked design details and was purported to contain only a 2-year, 24-hour storm event. Mr. Jones noted that "there is no discussion on actions or activities for mitigation of stormwater within this secondary containment under greater storm events."

93. Mr. Jones testified that Rowe looked at the project as if it were in the uplands, a situation in which the calculation of volume in a pond and through an outfall pipe are relatively straightforward. The designers did not consider the likely conditions on the Site when the stormwater pond would need to be used. Their chief flaw was placing the outfall pipe on the ground. If the

stormwater was high enough in the floodplain, it would backwater from the outfall pipe into the drilling structure and flood the drilling pad itself.

94. Erik Peter Messina is an engineer for Kleinfelder who testified as an expert in civil engineering. Mr. Messina testified as to his work on confirming the 38-foot BFE and analysis of 10-year, 25-year, and 50-year storm events. Mr. Messina noted that the perimeter berm would have a 40-foot top elevation, leaving two feet of freeboard from the top of the berm to the 38-foot BFE. Mr. Messina noted that industry and Florida standards require only one foot of freeboard. Kleinfelder's analysis confirmed that the constructed well pad would have no adverse impacts on water surface elevations in the floodplain.

95. Kleinfelder examined USGS historic rainfall data and found that the flow rate in the Apalachicola River exceeded a 2-year design storm event on only 54 days over a roughly 30-year period. It exceeded a 10-year design storm event on six days and never exceeded a 25-year storm event. Mr. Messina pointed out that the river levels are regulated by an Army Corps of Engineers ("Army Corps") dam upstream of the USGS Blountstown gage. He concluded that there is a low risk of flood at the Site.

96. Kleinfelder reviewed the originally approved and permitted plans developed by Rowe as well as the June 4, 2024 written report of Mr. Jones. On November 6, 2024, Kleinfelder produced separate memoranda providing its recommendations in reaction to both documents. The memoranda contained the same relevant recommendations: a secondary containment berm around the drilling operations to prevent operational spills from entering the stormwater pond; raising the wet detention pond outlet discharge above the 10-year design storm event elevation; installing a flap gate on the 15-inch outlet pipe to prevent floodwaters entering the

stormwater basin; and modeling the pond using a tailwater condition in the 25-year, 24-hour storm event.[11]

97. Kleinfelder developed a conceptual stormwater plan to address the issues raised by Mr. Jones. Mr. Messina testified that the secondary containment berm proposed in the conceptual plan would be 18 inches high, with a one-foot deep interior ditch and an impermeable liner, throughout the operational area. The secondary berm would contain any potential contaminants that could spill during operations. Mr. Messina stated that Kleinfelder modeled the secondary berm to contain a 100-year flood event. Kleinfelder did not consider the potential for blowouts or kickouts[12] from the well when calculating the volume of the secondary berm.

98. Mr. Messina accepted Mr. Jones's analysis of the possible tailwater condition on the Site, i.e., the potential during flood events for water to submerge the discharge location and flood the operational area through the outlet pipe. To remedy this situation, the conceptual plan included a backflow flap gate with a manual lock on the outlet pipe to stop floodwaters from entering the Site through the pipe. The flap gate would allow water out of the pipe but not allow it back in.

99. Kleinfelder also recommended raising the outfall by 1.6 feet to 34.1 feet elevation, thus preventing 10-year storm events from reaching the outfall elevation. Mr. Messina believed that these improvements would allow the Site to be locked down to contain contaminants during a flood. He noted that

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[11] It is noted, again, that this activity came *after* DEP's preliminary approval of the Proposed Permit on April 26, 2024. As will be discussed below, the undersigned finds it unsettling that this hearing is the first real level of review as to the many revised aspects of the Proposed Permit. Opponents of the Proposed Permit must also feel frustrated at being presented with a constantly moving target. Whatever DEP's statutory authority to allow these amendments at this stage of the process, it seems that at some point it would have been prudent for DEP to withdraw its preliminary approval and undertake a thorough agency-level review of the many changes the project has undergone since April 26, 2024.

[12] Drilling operator Andrew Smith described a "kick" as any undesired flow of formation fluids into the wellbore, caused by the pressure of the drilling fluids in the wellbore being less than that of the formation fluids. The blowout preventer is activated to control the kick before it becomes a blowout.

Hurricane Helene made land about 75 miles east of the Site in September 2024 and that the unimproved Site held up as designed without any improvements during what turned out to be a 10-year storm event.

100. Mr. Messina testified that Kleinfelder's conceptual plan has not been submitted for DEP approval but that Clearwater has agreed to adopt it. He stated that the conceptual plans offered at the hearing are not building plans and could not be used legally as such.

101. Mr. Messina testified that the conceptual plan does not include building specifications for the berms. The conceptual plan also includes no notes for the maintenance of the containment berms. Mr. Messina stressed that the purpose of the conceptual plan was to show possible improvements to the original plans for the Site, not to bring the project to a permitted state. He conceded that if there was a flood and the berm failed, the inside of the facility would flood and whatever was on the Site would then flow into the floodplain.[13]

102. Mr. Messina conceded that the flap gate could fail for various reasons: if a piece became dislodged or was not attached correctly; if debris interfered with its function; or if the gate were poorly maintained. He also acknowledged that the flap gate would be of no use in containing contaminants on the Site in the event of a berm failure.

103. Mr. Jones testified in response to the Kleinfelder conceptual plan and Mr. Messina's description of it. As to Mr. Messina's assertion that the river is regulated by an Army Corps dam, Mr. Jones pointed out that there are "huge, huge restrictions" on what the Army Corps can do on the Apalachicola River. Over 40% of the upper basin is non-regulated. The Flint River, which runs from Atlanta, Georgia, all the way to the Jim Woodruff Dam that impounds Lake Seminole on the Georgia-Florida border, is not regulated at all. As Mr. Jones put it, "if it rains, it's coming." The Jim Woodruff Dam itself is a

[13] Mr. Walker of DEP testified that he would be concerned if the berm were not designed at a sufficient height and impermeability to prevent the escape of fluids.

hydroelectric dam with no storage capacity. Mr. Jones stated that the Army Corps' storage capacity is very limited and controls nothing once flood waters reach a certain height.

104. Mr. Jones noted that the application included a plan of action for shutting down operations when a hurricane is approaching the area of the Site, but no general flooding plan. Mr. Jones stated that there are many non-hurricane events that can create floods and require planning. The undersigned notes that Clearwater presented a detailed contingency plan for closing down and evacuating the Site and removing all equipment and toxic substances from the Site when a hurricane is pending, but this plan was premised on having four days' notice of the storm's approach. In the event of a flash flood or other event that provides Clearwater with less lead time to shut down the Site, the plan of operation does not provide for removal of all drilling fluid additives, some of which would be stored in the "mud house," a metal building about eight feet above the ground on the pad site, and some of which would be placed on top of a two-foot high catwalk.

105. Mr. Jones remained concerned with the lack of detail on the design of the berms. He acknowledged that the ERP rules do not dictate the precise requirements for berm design, but observed that there should be documentation that the materials and design will ensure stable construction. Mr. Jones testified that he has seen "many, many, many berm failures" due to poor design and construction.

106. Clearwater's company representative, Edward Campbell, testified that Clearwater does not intend to operate the Site during hurricane season. However, neither Clearwater nor DEP pointed to any provision in the ERP or the Proposed Permit that sets such a temporal limit on Clearwater's operations. Also unexplained was the inclusion of a plan for shutting down operations when a hurricane is approaching if there is no intention to operate the well during hurricane season.

Potential Fluid Spills

107. Brammer Engineering, Inc., is the contract operator for the Proposed Permit. Mr. Smith's company, APC Consulting, LLC, would be performing the actual drilling operations, with Mr. Smith in a managerial capacity. Mr. Smith prepared and reviewed the drilling plan for the Site.

108. Mr. Smith testified that he will be using a closed loop system, with zero discharge. He stated that most operations include a reserve pit, which is an earthen pond into which cuttings from the drilling operation fall. Used drilling fluids will be removed from the site as needed, on a daily basis early in the drilling process, then slowing to every three or four days. The used drilling fluids will be hauled to Mississippi, which allows "land farming," i.e., the spreading of these fluids on fields as fertilizer. The drill cuttings will go to a local landfill.

109. Mr. Smith stated that steel tanks in the closed loop system eliminate the need for a reserve pit, offering an environmental benefit by generating less liquid and not burying the cuttings. He stated that the risks of fluid spilling out of a closed loop system are low; most of the fluids fall into the tanks.

110. Mr. Smith testified that the rig tanks holding the liquid will be enclosed, with two persons monitoring them 24 hours per day. The tanks will be inside the secondary containment berm of the well pad. Mr. Smith stated that the secondary berm's volume capacity will be 4,000 barrels,[14] and that the combined capacity of every liquid tank inside the berm is 3,000 barrels. In the unlikely event that every tank inside the berm should empty its contents at once, the secondary berm would have more than enough volume to contain the spill, assuming the berm itself did not fail. Mr. Smith conceded that his calculations about the capacity of the secondary berm did not factor

[14] It is general knowledge in the oil industry that one barrel equals 42 U.S. liquid gallons.

in potential rainfall, but believed the capacity would still be adequate because the tanks would rarely be kept more than 75% full.

111. Mr. Smith testified that drilling fluid (or drilling mud) is composed of 90% to 95% water, the rest being "native gel," which are polymer gels that assist in plugging and circulation control. Mr. Smith verified that all materials to be used and their safety and chemical properties were provided to DEP as part of the application. Fuel and chemicals will be kept inside the secondary containment berm and stored in the mud house, where the derrick operator mixes the chemicals and puts them into the drilling system.

112. Fifteen to 20 pallets of bulk chemicals will be stored on the Site. Barite (barium sulfate), which is a compound of the heavy metal barium, is used to add weight to drilling fluid and will be stored in a silo. Mr. Smith stated that because this is a "low weight" well, not much barite will be used. Fuel for the drilling rig, which can hold 14,000 gallons, will be stored in double-walled fuel tanks. Oil will be stored in vertical tanks and will be emptied daily. All of these items will be inside the secondary containment berm.

113. Mr. Smith testified that the spill prevention control and countermeasure plan for the Proposed Permit is the same plan he has used for wells on federal lands and in national forests. He acknowledged that any fluid that escapes the inner containment berm would flow onto the ground on the Site, which will be unlined.

114. Mr. Smith testified that he has never seen a drill pad with the level of protection that will be employed on the Site. He has never drilled a well with a stormwater retention pond, or an outer containment berm, or a lined inner containment berm.

115. Mr. Smith stated that drilling operations will be 24 hours a day, seven days a week. Mr. Smith testified that the drill pipe will have a surface casing to protect underground sources of drinking water as the operator drills through the aquifer.

116. Mr. Smith testified in depth about the blowout prevention equipment that will be used on this rig. He stated that blowouts are not common in onshore conventional drilling in the eastern United States because there is not the "crazy over-pressurized zones" that drillers encounter offshore. Mr. Smith consulted operators in the analog Alabama fields, who reported they had never had so much as a kick in drilling. He stated:

> [I]t's not complex geology they're drilling. [T]hey're not drilling around massive salt domes or places with really high temperature gradients. It's not the rapid depositional environments that typically create overpressure…. I've drilled, I think, 18 wells for the Smackover and Norphlet…. I'm going to say this is the least risky Smackover well I've ever drilled.

Environmentally Sensitive Area

117. As noted above, DEP and Clearwater took an exceedingly narrow view of the scope of the project for purposes of environmental review, limiting it to the immediate location of the drilling pad on the Site. DEP's analysis of whether the proposed project is in a "sensitive environment" or "sensitive area" is entirely premised upon limiting its review to the disturbed logging land in the immediate vicinity of the Site.

118. DEP relies on the definition of "sensitive environments" found in rule 62C-25.002(44):

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

> live bottom areas, water conservation areas, endangered or threatened species habitat, wetlands, etc.

119. DEP states that because no commenting agency identified it as such, the proposed location by definition cannot be a "sensitive environment." DEP's argument is disingenuous, for two reasons. First, DEP is abdicating its own duty to identify and protect sensitive environments by relying on what were, for the most part, very cursory reviews by the commenting agencies. The more reasonable way to read the rule is that it allows commenting agencies to supplement DEP's analysis, not replace it or absolve DEP from examining environmental issues. If DEP has previously found that an area contains a sensitive environment, it makes no sense that the rule would allow the Calhoun County Board of County Commissioners to negate DEP's finding.

120. Second, while the FWCC's letter may not have used the term "sensitive environment," it did state that the Site "is located near, within, or adjacent to potential habitat" for several federal and state-listed species, and that FWCC itself has observed 5,652 federally proposed or listed freshwater mussels downstream of the Site. DEP cannot be heard to argue that the FWCC letter was submitted after the Proposed Permit was preliminarily approved and is therefore irrelevant, unless it is also willing to disregard the significant changes Clearwater made to its application after that preliminary approval.

121. Riverkeeper notes that the Site is in the floodplain of the Apalachicola River, adjacent to wetlands, and is connected to the Apalachicola River, an OFW and UNESCO designated biosphere region, and downstream waterbodies include the Apalachicola Bay—an OFW and a State Aquatic Preserve—as well as Class I and II waterbodies. The Site is clearly within a sensitive environment.

122. There is also the question whether the Site is in a "sensitive area" for purposes of rule 62C-26.003(10), which provides:

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

123. Rule 62C-30.005(1) applies where an application for a drilling permit is made in "sensitive areas," and provides that DEP will evaluate the application "to insure that the exploration and production activities will cause no permanent adverse impact on the water resources and sheet flow of the area, or on the vegetation or the wildlife of the area, with special emphasis on rare and endangered species."

124. The rule does not define "sensitive area" but names two of them as examples: wetlands and submerged lands. While the Site's footprint is in disturbed uplands, its potential impact extends into the adjacent wetlands.

125. Mr. Walker testified that the Site is not in a sensitive area or environment, but stated that his opinion was limited to the specific location of the drilling pad and its immediate surroundings.[15] DEP's focus on the footprint of the Site is understandable in the sense that the Site is where the drilling will occur and is the only area over which Clearwater has control. However, the quoted rule requires the applicant to "make every effort to minimize related impacts," presumably including impacts beyond the Site itself. The rule does not require DEP to don blinkers and pretend that the "related impacts" of the Proposed Permit cannot extend beyond the Site.

[15] Mr. Walker's testimony made clear that he gave very little thought to environmental concerns in preliminarily granting the Proposed Permit. He did not know whether Clearwater submitted a wildlife protection plan. He also did not know whether Clearwater proposed any testing or monitoring of the soil, groundwater, or surface water in the area.

Regardless of the disturbed state of the immediate drilling area, the Site lies in a sensitive area.

126. Rule 62C-30.005(2)(b)6. provides that drilling pads shall be constructed to a sufficient height to assure year-round usage. Rule 62C-30.005(2)(b)7. requires a protective levee of sufficient height and impermeability to prevent the escape of pad fluids to be constructed around the drilling site and storage tank areas. As noted in the Stormwater Management section above, Clearwater submitted only a conceptual plan for the construction of the protective berms, with no detail as to their design, construction materials, or maintenance. This conceptual plan was not part of the original application and was drawn up by Kleinfelder in response to Mr. Jones's criticisms. It does not provide reasonable assurances that the cited rule provisions will be met.

127. Riverkeeper contends that Clearwater has also failed to satisfy rule 62C-30.005(2)(b)1., which provides that drilling sites must be located "to minimize negative impacts on the vegetation and wildlife, including rare and endangered species, and the surface water resources." Riverkeeper notes that the Site is in a sensitive area with threatened and endangered species in the vicinity. The Site is surrounded by a cypress slough, a pond is about 2,300 feet southeast of the drill pad, and unnamed riverine and floodplain channels run within a one-mile radius of the drill pad. Riverkeeper reasonably states that a spill of oil and/or other toxic fluids would have catastrophic consequences to these resources.

128. Rule 62C-30.005(2)(a)6. provides that all roads shall be high enough to assure year round usage. Riverkeeper states that the access road is constructed through a cypress swamp, and points to photographic evidence in the record showing that the access road at this location is subject to seasonal flooding.

129. Clearwater was not made to demonstrate its compliance with rule 62C-30.005 because DEP erroneously decided to limit any environmental

concerns to the footprint of the Site rather than examining the possible impacts of oil drilling on the adjacent sensitive areas. Clearwater may well be able to demonstrate that its activities will have no impact on these sensitive areas, but it did not do so in this case.

Ultimate Findings

130. Beginning with procedural issues, the review process in this case leaves the undersigned perplexed as to what exactly DEP has preliminarily approved and what would be the final form of the project. DEP issued the NOI on April 26, 2024. Riverkeeper filed the Petition on June 6, 2024. Major items, such as the conceptual stormwater plan (including, critically, the secondary berm) and the seven-well scenario for judging the economic viability of the Proposed Permit, were not part of the original application approved by DEP and were concededly created in direct response to Riverkeeper's Petition. Mr. Messina testified that the conceptual stormwater plan was not even submitted to DEP for approval.

131. The undersigned appreciates that this is a *de novo* proceeding, but notes that it is less than ideal for a DOAH ALJ to be the first level of review for matters of this scientific and technical complexity. As suggested above, it appears to the undersigned that once Riverkeeper's critique forced Clearwater to make significant changes to the Proposed Permit, the time had come for DEP to exercise its discretion to rescind the proposed approval long enough to subject those changes to expert scrutiny at least equal to that applied to Clearwater's original application. Established precedent allows permit amendments even up to the final hearing, but in this case, the better practice would have been another round of agency review that forced Clearwater to specify the design and construction of the stormwater control system.

132. In any event, the undersigned was left to consider what was presented at the hearing. Based on the evidence, it is found that the conceptual stormwater control plan offered by Clearwater at the final hearing

was inadequate to ensure that the toxic materials involved in the oil drilling process are confined to the Site.

133. Substantively, DEP's review failed to adequately consider the nature, character, and location of the lands involved in the Proposed Permit as required by section 377.241(1). DEP persisted in its view that the environmental analysis need concern itself only with the footprint of the drilling Site, not the greater area of the Apalachicola River basin potentially affected by the Proposed Permit. DEP maintained this position even while apparently accepting the seven-well economic analysis offered by Mr. Campbell at the final hearing,[16] which would create a much larger drilling footprint over as much as two square miles of the 100-year floodplain of the Apalachicola River basin. Given the newly-introduced uncertainty as to the Proposed Permit's footprint, DEP should have expanded the scope of its environmental review beyond the single drilling platform at the Site.

134. As convincingly argued by Mr. Jones, the berms to be constructed on the Site are of critical importance in keeping toxic materials from escaping the Site, yet DEP appears satisfied with a conceptual plan for those berms that includes no specifics as to their materials and design. Mr. Jones is correct that Clearwater should be required to provide building plans for the construction of the stormwater system, and that those plans receive objective scrutiny, before the Proposed Permit ever receives final approval. Also, as noted above, the conceptual stormwater plan was never submitted to, or approved by, DEP as an initial matter and this tribunal therefore was denied the analytical assistance of an independent agency review of this critical portion of the Proposed Permit.

135. DEP's constricted view of its environmental responsibilities as to the Proposed Permit further led it to the unreasonable conclusion that the project was not in a sensitive area or environment in spite of its proximity to the

[16] Counsel for DEP asked Mr. Campbell exactly one question on cross-examination.

Apalachicola River basin and the Apalachicola National Estuarine Research Reserve.[17] DEP's failure to review the project pursuant to rule 62C-30.005 led to Clearwater's failure to make a case that its project met the rule's requirements. In the vacuum created by the Respondents' failure to address rule 62C-30.005, Riverkeeper established that the Proposed Permit failed to satisfy the rule.

136. Clearwater satisfied the requirement of section 377.241(2) by establishing its property rights to engage in the drilling activities that the Proposed Permit would allow.

137. Clearwater failed to establish the indicated likelihood of the presence of oil in such quantities as to warrant their exploration and extraction on a commercially profitable basis as provided by section 377.241(3). Mr. Craft persuasively argued the scientific case for the presence of oil in some quantity in the vicinity of the Site, but Mr. Campbell failed to make the economic case for the drilling of the single exploratory well that the Proposed Permit would allow, in light of Mr. Moore's more persuasive analysis. Mr. Moore persuasively established that Mr. Campbell's seven-well scenario assumed the success of the first well and the granting of permits for subsequent wells (also assumed to be successful) and as such was too speculative to form the basis of a solid economic proposal. It is also noted that DEP abdicated any duty it had to perform an independent assessment of the commercial prospects of the Proposed Permit during the permitting review, despite the plain language of the statute directing it to "give consideration to and be guided by" that criterion.

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

CONCLUSIONS OF LAW

Jurisdiction

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

Standing

139. Section 403.412(6), Florida Statutes, provides:

> Any Florida corporation not for profit which has at least 25 current members residing within the county where the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, may initiate a hearing pursuant to s. 120.569 or s. 120.57, provided that the Florida corporation not for profit was formed at least 1 year prior to the date of the filing of the application for a permit, license, or authorization that is the subject of the notice of proposed agency action.

140. The evidence presented at the hearing established that: Riverkeeper is a Florida not-for-profit corporation; Riverkeeper has 25 or more members who reside in Calhoun County; Riverkeeper was formed for the purpose of protecting the environment, fish and wildlife resources, and the air and water quality of the Apalachicola River, its tributaries, watershed, and the adjacent inland coastal waters; and Riverkeeper was incorporated in 1999. Riverkeeper has established its standing pursuant to section 403.412(6).

141. Even if Riverkeeper did not meet the standing requirements under section 403.412(6), Riverkeeper has established associational standing pursuant to *Agrico Chemical Corporation v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981), and *Florida Home Builders Association v. Department of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982).

142. In *Agrico*, 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.

Agrico, 406 So. 2d 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).

143. *Florida Home Builders* established the criteria by which a trade or professional association may initiate an administrative proceeding solely as a representative of its members. The court set forth a three step test: the association must show that a substantial number of its members, though not necessarily a majority, are affected by the challenged agency action; the subject matter of the case must be within the association's general scope of interest and activity; and the relief requested must be of a type appropriate for an association to receive on behalf of its members. *Fla. Home Builders*, 412 So. 2d at 353-54.

144. Riverkeeper has demonstrated standing under *Agrico* and *Florida Home Builders* to initiate and be a party to this proceeding. Riverkeeper has demonstrated that it will suffer a sufficiently immediate injury in fact that is of the type the proceeding is designed to protect. Riverkeeper has demonstrated through competent substantial evidence that there is a reasonable likelihood that a failure of the stormwater management facilities and associated berms, proposed only in concept by Clearwater, will harm the Apalachicola River and floodplain if there is flooding and release of

contaminants present at the Site to the environment. This environmental harm is clearly the type of harm this permitting proceeding is designed to protect.

145. Riverkeeper also satisfies the "associational standing" requirements of *Florida Home Builders*. A substantial number of Riverkeeper's more than 1,300 members actively and frequently use and enjoy the Apalachicola River. Riverkeeper exists to represent its members' interests by advocating for the protection of the Apalachicola River. The relief requested, denial of the Proposed Permit, is of the type that is appropriate for an association such as Riverkeeper to obtain on behalf of its members. Riverkeeper has established standing under the standards established by *Agrico* and *Florida Home Builders*.

Nature of Proceeding and Burden of Proof

146. This is a *de novo* proceeding designed to formulate final agency action and not to review action taken preliminarily. *See Young v. Dep't of Cmty. Aff.*, 625 So. 2d 831, 833 (Fla. 1993). Because this is a *de novo* proceeding, and not merely a review of the prior agency action, the parties may present additional evidence not included in the permit application and other documents previously submitted to DEP during the permit application review process. An application may be amended even after an agency issues its notice of intent to approve or deny a permit so long as due process is preserved. *Hamilton Cnty. Bd. of Cnty. Comm'rs v. State Dep't of Env't Regul.*, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); *Dep't. of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 785 (Fla. 1st DCA 1981).[18]

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

147. As the applicant, Clearwater has the burden of showing by a preponderance of the credible and credited evidence that it is entitled to approval of the Proposed Permit. *Dep't. of Transp. v. J.W.C. Co.*, 396 So. 2d at 789.

Permitting Standards

148. Section 377.241, titled "Criteria for issuance of permits," provides, in relevant part:

> The division, in the exercise of its authority to issue permits as hereinafter provided, shall give consideration to and be guided by the following criteria:
>
> (1) The nature, character and location of the lands involved; whether rural, such as farms, groves, or ranches, or urban property vacant or presently developed for residential or business purposes or are in such a location or of such a nature as to make such improvements and developments a probability in the near future.
>
> (2) The nature, type and extent of ownership of the applicant, including such matters as the length of

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In *City of West Palm Beach v. Palm Beach County, et al.*, 253 So. 3d 623, the issue was whether the ALJ in an ERP permitting case erred in not granting a continuance to the Petitioner in light of permit application amendments made a week before the scheduled start of the hearing. The court concluded that due process required the Petitioner to have an opportunity to fully address the amended application and that it was error to deny the Petitioner additional time to prepare. *Id*. at 627. The court cited three factors to consider in weighing whether to give a challenger additional time to address post-approval amendments: the subject matter is highly technical; the proceeding is administrative as opposed to a civil jury trial; and "the proceeding's outcome pertains to issues regarding the future impact to the environment and public water supply." *Id*.

The undersigned suggests that similar criteria be employed by DEP in future situations where an applicant makes substantial modifications to a permit application after preliminary approval of the permit and after litigation challenging the permit has been initiated. In such situations, DEP is as close to a neutral party as is available and certainly possesses greater subject matter expertise than the ALJ. Rather than pressing forward with the hearing and deferring to the applicant's judgment, as occurred here, DEP might consider performing an independent reassessment of the application in light of the amendments. Such a reassessment would prove useful to the ALJ's deliberations. Nonetheless, the undersigned was able to assess the information provided by each of the parties, both in Clearwater's application and at hearing, to determine whether the Proposed Permit meets the standards established by statute and rule.

> time the applicant has owned the rights claimed without having performed any of the exploratory operations so granted or authorized.
>
> (3) The proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis….

149. Section 377.241 governs DEP's decisions on oil and gas permits. The decisional standard under this statute was most recently set forth in *Kanter Real Estate, LLC v. Department of Environmental Protection*, 267 So. 3d 483, 488 (Fla. 1st DCA 2019):

> In [*Coastal Petroleum Company v. Florida Wildlife Federation, Inc.*, 766 So. 2d 226 (Fla. 1st DCA 1999], this Court held that the Department "correctly determined" that section 377.241 stated a multi-factor balancing test that "requires the agency to 'weigh' the criteria of section 377.241, balancing environmental interests against the right to explore for oil." 766 So.2d at 228….
>
> Whether we afford deference to the Department's statutory interpretation, as we did when *Coastal Petroleum* was decided, or apply a de novo review, we hold that the Department and this Court were correct that the statute states a list of factors to be weighed, as opposed to a checklist of minimum requirements. See § 377.241, Fla. Stat. (2018) (declaring that the Department "shall give consideration to and be guided by" the listed criteria).

150. As to section 377.241(1), DEP and Clearwater correctly note that the Site itself includes no special characteristics that would preclude the drilling of an oil well. As stated in the Findings of Fact, the drilling pad is located entirely in disturbed uplands, surrounded by active silviculture operations. There are no protected species on the Site. Existing private timber roads lead from the public road to the drilling pad and are sufficient to move equipment

and material on and off the Site, though not at all times due to seasonal flooding. Neither the roads nor drill site were constructed in or through sensitive resources.

151. However, the parties fundamentally disagreed on the scope of the nature, character, and location of the lands involved. DEP and Clearwater insisted that the analysis be confined to the Site, i.e., the drilling pad and immediately adjacent disturbed uplands. Riverkeeper more persuasively argued that the Site's location in the Apalachicola River floodplain requires a wider range of concern than the footprint of the Site.

152. The Site is within the 100-year floodplain of the Apalachicola River and within one mile of two ponds that are hydrologically connected to the Apalachicola River. There are also channels within a one-mile radius of the Site. The Site is surrounded by swamplands. A spill would have catastrophic consequences due to the proximity of the well to nearby streams, wetlands, and ponds.

153. FWCC's comments to DEP stated that the Site "is located near, within, or adjacent to potential habitat" for several federal and state-listed species, including reticulated flatwood salamander, eastern indigo snake, Gulf sturgeon, Barbour's map turtle, and five species of mussel. FWCC's comments were submitted after DEP issued the NOI provisionally granting the Permit and thus were seemingly disregarded by DEP, despite the agency's willingness to consider post-approval amendments by Clearwater.

154. DEP unreasonably concluded that the Proposed Permit is not in a sensitive area or environment in spite of its proximity to the Apalachicola River basin and the Apalachicola National Estuarine Research Reserve. The Proposed Permit should have been reviewed pursuant to rule 62C-30.005, but neither DEP nor Clearwater made a case that the Proposed Permit would meet the rule's requirements. Riverkeeper established by a preponderance of the evidence that the Proposed Permit failed to satisfy the rule.

155. The overall conclusion might have been different had Clearwater presented a better plan for stormwater containment on the Site. Mr. Jones described it as adequate for "a Dollar General in Blountstown," but not for handling the toxic materials used in oil drilling. Mr. Jones's detailed criticisms, set forth in the Findings of Fact above, established persuasively that the stormwater management plan originally proposed was inadequate.

156. Clearwater apparently agreed with at least some of Mr. Jones's critique because it dispatched Mr. Messina from Kleinfelder to shore up the plan in response. However, Mr. Jones again persuasively established that the conceptual plan produced by Mr. Messina lacked detail as to the building specifications for the critical containment berms that would keep toxic materials from escaping the Site during flood conditions.[19]

157. As to section 377.241(2), Clearwater satisfied its requirements by establishing its property rights to engage in the drilling activities that the Proposed Permit would allow. Riverkeeper did not contest that Clearwater satisfied section 377.241(2).

158. As to section 377.241(3), Clearwater did not establish the indicated likelihood of the presence of oil in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis. Based on his research and testing, Mr. Craft informally estimated a 30% likelihood of striking oil at the Site. Mr. Craft's work was persuasive and his estimate was reasonable. DEP did not ask for further analysis as to the commercial viability of the Proposed Permit, finding that Clearwater's willingness to fund the project was proof enough of the positive financial prospect. However, one's willingness to spend money does not establish a project's commercial profitability.

[19] Clearwater's hurricane plan was adequate but presumed four days' notice to remove all toxic materials and shut down the Site. Clearwater's plans were less reassuring as to other flooding scenarios with shorter lead times.

159. Mr. Moore made a strong economic case as to the lack of commercial potential of the single well to be drilled at the Site, so strong that Clearwater deemed it prudent to develop an alternative economic projection based on the prospect of seven wells. At the hearing, Mr. Moore convincingly argued that the seven-well analysis relied on multiple doubtful assumptions, including the certainty that the first well would strike oil and a 100% chance that subsequent wells would be successful. Basing the economic case for a single well on the assumption that six more successful wells will almost certainly follow is pure speculation.

160. As found above, a single well economic analysis is more appropriate. Mr. Moore's argument against the economic viability of a single well was persuasive. The speculative nature of the seven-well analysis, as highlighted by Mr. Moore, renders it an unrealistic basis for assessing the economic viability of the Proposed Permit for one exploratory well.

161. Weighing the criteria of section 377.241, balancing environmental interests against the right to explore for oil, leads to the conclusion that the Proposed Permit should be denied.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Environmental Protection enter a final order denying proposed Oil and Gas Permit No. 1388 for an exploratory oil well.

DONE AND ENTERED this 28th day of April, 2025, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
DOAH Tallahassee Office

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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