



# Florida Department of Environmental Protection

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August 19, 2016

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United States Environmental Protection Agency  
Attention: Docket ID Nos. EPA-HQ-SFUND-2009-0265  
and EPA-HQ-SFUND-2009-0834  
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RE: Florida Department of Environmental Protection - Federalism Consultation Comments  
CERCLA Section 108(b) Docket ID No. EPA-HQ-SFUND-2009-0265 and EPA-HQ-  
SFUND-2009-0834

The Florida Department of Environmental Protection (Department) is the executive agency for the State of Florida with primary responsibility for implementing land reclamation, surface water, ground water and related environmental protections for phosphate mining and associated land reclamation activities. The Department is also responsible for ensuring cleanup and rehabilitation of sites contaminated with hazardous substances within the state, and for implementing related programs to prevent pollutant discharges and to control exposure and potential risk of exposure to humans and the environment.

The Department appreciates the opportunity to comment on the Office of Resource Conservation and Recovery (ORCR) efforts to develop appropriate and enforceable financial responsibility requirements under the authorities of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). These comments on EPA's planned rulemaking share details about our concerns with inaccurate risk information that is referenced in the rulemaking's supporting documentation, and the potential for adverse impacts to and preemption of existing state regulatory requirements for phosphate mining in Florida. Our comments also provide you with input for your Federalism Consultation as requested in the July 7, 2016, "CERCLA 108(b) Proposed Rulemaking for Hardrock Mining," call with states.

It is our understanding that EPA is considering including phosphate mining in Florida under proposed regulations that would require financial responsibility for hardrock mining industries,

and that EPA is required to publish a proposed rule by December 1, 2016<sup>1</sup>. The Department appreciates the ORCR's intent to ensure that financial responsibility requirements are provided to address risks from hazardous substances. However, the Department has critical concerns about the decision making basis to include Florida phosphate mining with hardrock mining, and the similar overlap with and preemption of state regulations that are currently providing environmental protections and financial assurances. Such preemption could lead to a reduction in protections for Floridians.

Inclusion of Florida phosphate mining in EPA's financial assurance requirements for the hardrock mining industry would be based on a misunderstanding of and confusion about operations for phosphate extraction, beneficiation, and processing in Florida. Phosphate mining in Florida is not "hardrock mining," nor are the operations and actual risks sufficiently similar to warrant EPA's inclusion under regulations specifically designed to address hardrock mining concerns.

The Department has discovered that relevant supporting information in EPA's records related to operations and risks is inaccurate and mischaracterizes phosphate mining in Florida. Importantly, any risks that do exist, particularly with respect to related mineral processing facilities, are already comprehensively addressed in Florida by a unique combination of existing state and federal laws and regulatory actions.

In addition, inclusion of Florida phosphate mining in the proposed rules presents federalism concerns by interfering with the state's right to implement effective environmental protection programs, and could specifically preempt state's rights given the provisions under Section 114(d) of CERCLA. Given our discovery of the fundamental misunderstanding of operations and associated risk in EPA's supporting information, and our concerns regarding unintended impacts to Florida's laws and existing protections, direct consultation with the Department is warranted and should be done in advance of any proposal of CERCLA financial responsibility rules for any mining activities in Florida.

Attached are Florida's comments summarizing the concerns we have identified to date. Our general comments are included in Attachment A. Attachment B offers comments in response to the questions provided in EPA's July 7, 2016, call with States as part of the Federalism Consultation.

We hope these comments are informative. We appreciate the intent of the proposed rulemaking to provide protections for cleanup liability and related hazardous substance response actions. In this case, we believe that the proposed rule simply is not warranted in Florida, and could negatively impact the comprehensive and rigorous existing requirements under state and federal programs that are currently providing important environmental protections and benefits in this

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<sup>1</sup> EPA slides from May 17, 2016, webinar on, "CERCLA Section 108(b) Financial Responsibility," for hardrock mining, from <https://www.epa.gov/superfund/superfund-financial-responsibility>, July 2016.

Federalism Consultation Comments  
CERCLA Section 108(b) Docket ID No. EPA-HQ-SFUND-2009-0265 and EPA-HQ-SFUND-2009-0834

Florida Department of Environmental Protection

August 19, 2016

Page 3

state. If you have any questions on these comments, please contact me at your convenience at

**Ex. 6** or by email at [john.coates@dep.state.fl.us](mailto:john.coates@dep.state.fl.us).

Sincerely,



John A. Coates, P.E., Director  
Division of Water Resource Management  
Florida Department of Environmental Protection

Attachments: As noted.

cc: Sonya Sasseville, Director, EPA ORCR  
Anna Krueger, EPA ORCR  
Paula Cobb, Deputy Secretary, Regulatory Programs, FDEP  
Joseph Ullo, Director, Division of Waste Management, FDEP  
Franklin Hill, Director, Superfund Division, EPA Region 4  
Anita Davis, Enforcement Branch Chief, Superfund Division, EPA Region 4

The Florida Department of Environmental Protection (Department) offers the following general comments and preliminary observations in response to the requested Federalism Consultation:

#### Inaccurate Information on Risk and Conclusions

- EPA appears to be preparing to regulate phosphate mining in Florida as a type of hardrock mining. The Department strongly believes that this classification is not technically supportable, and is based on a fundamental misunderstanding of Florida phosphate mining and mineral processing risks. The Department also believes it will lead to unintended consequences that could weaken and frustrate Florida's efforts to ensure that phosphate mining in Florida is accountable for both land reclamation obligations, and for operating in a manner that protects our state's land and water resources. Phosphate mining in Florida is conducted by excavation of pebble phosphate deposits and does not involve many of the activities that are primarily associated with the hardrock mining industry. It is critical that EPA acknowledge that phosphate mining in Florida does not involve those activities such as blasting, and in-situ chemical treatments that are often relevant to the evaluation of risk for those activities commonly associated with the hardrock mining sites.
- EPA's 2009 Federal Register (FR) Notice (74 FR 37213) relied on information in an earlier 2004 EPA Office of Inspector General Report that provided background information for EPA's proposed nationwide identification of hardrock mining sites and associated risks<sup>2</sup> (2004 Report). The underlying information is unfortunately incorrect in regards to phosphate mining in Florida. Please note the following concerns:
  - A review of EPA's agency responses in the 2004 Report indicates that there was an incorrect belief that there is a "likelihood of acid mine drainage" at phosphate mining sites in Florida. This represents a critical misunderstanding about these mining sites in Florida. There is no amount or potential for acid mine drainage given the nature of the pebble phosphate deposits that occur and are mined in Florida. Accordingly, any conclusions about potentially elevated risks due to the erroneous conclusion that there is a "likelihood of acid mine drainage" at Florida phosphate mining sites is factually incorrect. As stated previously, phosphate mining in Florida is not hardrock mining and does not involve many of the operations that would commonly be associated with such activities. This is a significant difference where Florida phosphate mining does not have the particular

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<sup>2</sup> See "Evaluation Report, Nationwide Identification of Hardrock Mining Sites," Report No. 2004-P-00005, March 31, 2004, United States Environmental Protection Agency Office of Inspector General.

risks that may otherwise be associated with true hardrock mining operations, and as such warrants EPA's reconsideration of whether or not to incorporate Florida phosphate mining in regulations intended for the hardrock mining industry.

- This incorrect information led to additional false conclusions in the 2004 Report, including the belief that hazardous substance related cleanup costs at each phosphate mining site could be on the order of \$100 million or more because of the false expectation that there could be acid mine drainage at each of these mines in Florida. Since acid mine drainage is not a possibility, let alone a risk at Florida phosphate mines, assigning risk and any associated cost liability for cleanup of acid mine drainage and any associated hazardous substances responses is fundamentally incorrect.
- Finally, the 2004 Report inappropriately attributes these costs to 22 phosphate mining sites that were then identified in EPA's inventory for Florida, indicating that the total for cleanup costs could range from \$2.2 to \$11 billion, a difference of \$8.8 billion between the low and high end according to EPA's analysis. In reality, there is essentially zero risk and no associated liability for acid mine drainage at Florida phosphate mining sites.
- The plans for proposed rules would also cover beneficiation of phosphate in Florida. However, it is not apparent on review of the underlying information sources referenced in EPA's July 9, 2009 Notice whether EPA has properly evaluated existing information that evaluates the relative risk of phosphate beneficiation in Florida. The Department has conducted its own studies related to the potential or release of hazardous substances from phosphate beneficiation facilities. The Department encourages EPA to further discuss and review this information to better understand the low level of risk and current regulations that are applied to these activities in Florida.

#### Direct Conflicts with State and Other Federal Laws Relating to Hazardous Substances

- EPA's plans to promulgate CERCLA 108(b) financial assurance regulations for extraction, beneficiation, and processing of phosphate as part of regulations for the hardrock mining industry would adversely impact both state laws and federal requirements related to protections for liability connected to the release of a hazardous substance.
- CERCLA Section 114(d) provides that an owner or operator of a facility which establishes and maintains evidence of financial responsibility under section 108(b) cannot be required under state law, "to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance..." The Department is gravely concerned that EPA's planned rulemaking could adversely impact Florida's state laws, and our existing environmental protections related to such financial responsibility requirements.

- The phosphoric acid processing (aka, mineral processing) facilities in Florida, are separate and distinct operations from phosphate mining sites. Indeed, these mineral processing facilities do have the potential for releases of hazardous substances; however, they are significantly fewer in number and size than phosphate mining sites. As a result of the potential for release of hazardous substances, these mineral processing facilities have been extensively regulated under Florida laws including Sections 403.4154 and 403.4155, F.S. Regulations implemented under these laws include extensive construction, operational, closure and associated financial responsibility obligations under Department rules that are focused on preventing and addressing the liabilities related to potential releases of hazardous substances. Establishment of an overlapping and duplicative CERCLA financial responsibility obligation would at least cause an unnecessary regulatory burden on the State of Florida and the Department when having to resolve conflicts between state and duplicative federal requirements for the same purpose. At worst, the state's existing regulatory programs could be severely restricted or pre-empted by the provisions of CERCLA Section 114(d).
- As correctly noted in the 2004 Report, the State of Florida did determine that its then existing financial assurance requirements needed strengthening after the 2001 bankruptcy of a company that mined and processed phosphate in Florida. In 2005, the State of Florida completed that rulemaking and adopted revised state financial assurance rules that strengthened requirements for financial responsibilities including important provisions to provide more accurate cost estimates for treating hazardous substances and nutrients in acidic process water at these facilities. The Department has not found any evidence in the record to suggest that EPA has reviewed or had any concerns with Florida's revised regulations for financial assurances. Most importantly, without such review, EPA would not be able to accurately evaluate risk for the Florida phosphate mineral processing in the absence of the planned CERCLA Section 108(b) financial responsibility rulemaking.
- In Florida, the mined phosphate rock is utilized in separate phosphoric acid and fertilizer manufacturing facilities where acidic process water is stored and reused in open impoundments. It is apparent that the 2004 Report incorrectly attributed the potential for releases of acidic process water to phosphate mining sites when the consideration would only be relevant for the separate mineral processing facilities. The 2004 Report does not appear to properly differentiate between potential risks at phosphate mining sites and those applicable to mineral processing facilities. This misunderstanding is critical since hazardous substance risks at the mineral processing facilities have already been addressed by state rules and are also addressed by actions being taken under EPA's National Enforcement Initiative for Mining and Mineral Processing. During the intervening 12 years since the time of the 2004 Report, EPA's Resource Conservation and Recovery Act (RCRA) program staff in Region 4 and EPA Headquarters have been extensively engaged in federal regulatory activities under EPA's RCRA National Enforcement Initiative for Mining and Mineral Processing. As a results of those activities, EPA and the Department have been negotiating RCRA settlements related to the operational, closure, and financial

assurance requirements that are also directly, “in connection with liability for the release of a hazardous substance,” as referenced under Section 114(d) of CERCLA. Both Florida and EPA are parties to the settlements that have been reached to date in Florida. As a result of these settlements under federal RCRA regulations, there is already both state and federal regulatory oversight and financial assurance requirements covering the potential for related hazardous substance releases. Accordingly, efforts to include Florida phosphate mining in the upcoming CERCLA financial assurance rulemaking would be duplicative, is unnecessary to effect further environmental protection, and potentially frustrates and preempts the effectiveness of existing state and federal regulatory programs designed to address the potential hazardous substance releases and financial responsibilities for the referenced mineral processing facilities. Accordingly, efforts to include Florida phosphate mining in the upcoming CERCLA financial responsibility rulemaking would be duplicative, is unnecessary to effect further environmental protection, and potentially frustrates and preempts the effectiveness of existing state and federal regulatory programs designed to address the potential hazardous substance releases and financial responsibilities for the referenced mineral processing facilities. The Department believes that EPA should update the 2004 Report to correct inaccurate Florida specific information and to address relevant Florida developments that occurred since 2004, particularly if EPA chooses not to reconsider the risk factors as discussed in our comments. The Department is available for direct consultation and believes such is warranted prior to publication of any proposed rule that would include mining activities in Florida.

- We have serious concerns that EPA’s plan to include Florida phosphate mining in the CERCLA section 108(b) rulemaking will undermine the Department’s ability to enforce state regulatory programs in accordance with related settlement agreements. The most recent settlement under EPA’s National Enforcement Initiative for Mining and Mineral Processing (Civil Action No. 8:15-cv-0286-JDW-TBM) was just entered by the United States District Judge for the Middle District of Florida on August 5, 2016, and includes important provisions for Florida to act under related state law provisions. The Department notes that because of Section 114(d) of CERCLA, where an owner or operator would be required under CERCLA to establish evidence of financial responsibility in accordance with section 108(b), such an owner or operator could not be required under any state or local law “to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such vessel or facility.” The settlements under EPA’s National Enforcement Initiative for Mining and Mineral Processing in Florida each contain carefully negotiated provisions that bind the United States and the Department, and which rely heavily on the Department’s ability to implement state laws and regulations related to the potential release of hazardous substances from these mineral processing facilities. EPA’s plans to include Florida phosphate mining in the CERCLA financial responsibility rulemaking may very well preempt Florida’s ability to effectively implement state laws

that are incorporated into these settlements for the facilities covered thereunder, and preempt implementation of state regulations at similar facilities that are not covered under the settlements.

#### Relationship to Other State Regulations that also Relate to Hazardous Substance Risks at Mining Sites

- Florida's Environmental Resource Permitting (ERP) requirements are applicable to any new phosphate mining and phosphate reclamation areas in the state. The statutory and regulatory requirements under the state's ERP program (see Part IV, Chapter 373, F.S., and Chapter 62-330, F.A.C.) are extensive and require critical water quality protections for both surface water and ground waters in the state. As such, both phosphate mining activities and mandatory reclamation activities are required to be planned and implemented in a manner that does not violate the state's water quality standards, including those for hazardous substances, for both surface water and ground water. Accordingly, the combination of state mandatory mine reclamation and state water resource protections are already in place for any newly permitted mining activities, and work to ensure that hazardous substances are not a significant or meaningful risk for phosphate mining in Florida.
- In accordance with Part II, Chapter 378, F.S., and Chapter 62C-16, F.A.C., new lands mined for phosphate after July 1, 1975, and after July 1, 1984 for lands used for clay settling areas, are subject to mandatory reclamation requirements. As such, they are also subject to corresponding financial responsibility requirements designed to ensure that reclamation activities are completed in a timely manner. Since the application of these state reclamation and financial responsibility requirements also addresses the potential for hazardous substance related risks through state permitting requirements, additional financial responsibility to address hazardous substance related liabilities is unnecessary in Florida for such new mining or reclamation areas. In addition, the Department is very concerned that imposition of CERCLA financial responsibility requirements for phosphate mining in Florida would potentially interfere with or preempt the state's phosphate reclamation financial responsibility requirements.
- The ORCR's inclusion of Florida phosphate mining in the rule to be proposed for the hardrock mining industry would also appear to be duplicative of state laws intended to address liabilities and damages for the release of hazardous substances, including financial responsibility provisions for facilities under Sections 376.308 and 376.309, F.S., and additional liability provisions under Section 403.727, F.S.
- Although EPA's rulemaking is intended to be forward looking, the imposition of CERCLA financial responsibility rules is also unnecessary to address reclamation activities that would be done in the future, on lands that were mined for phosphate prior to the state's mandatory reclamation requirements that first became effective in 1975.

Florida's legislatively established program continues to provide state funding from a portion of Florida's phosphate severance taxes for the purpose of funding reclamation of those historically mined lands so that they may be returned to beneficial uses (see Part I, Chapter 378, F.S., and Chapter 62C-17, F.A.C.). The applicable regulatory requirements include provisions specifically for addressing applicable water quality standards, and any health or safety hazards on the land. In addition, reclamation done under this existing state funding program is also required to be conducted in accordance with the ERP regulatory criteria that require compliance with state surface water and ground water quality criteria. Therefore, these regulations also require that any risks from hazardous substances also be addressed as part of state funded reclamation on pre-1975 phosphate mined lands. Accordingly, Florida's regulatory programs address both historical and current mining related operations.

## Attachment B

### Responses to Selected EPA Federalism Consultation Questions

#### Florida Department of Environmental Protection

Federalism Consultation Comments - CERCLA Section 108(b) Docket ID No. EPA-HQ-SFUND-2009-0265 and EPA-HQ-SFUND-2009-0834

Page 1

The responses below are provided by the Florida Department of Environmental Protection (Department) in an attempt to provide constructive input specifically related to the actual environmental circumstances and existing regulatory programs that are being implemented in Florida for phosphate mining. We encourage EPA to consult further with the Department prior to any proposal of rules for the hardrock mining industry, if EPA intends to include Florida phosphate mining, beneficiation, or processing in the proposed rules.

1. Since states have raised concerns about potential preemption or duplication of state hardrock mining financial assurance requirements, we would like to give you the opportunity to discuss those concerns with us, or any other concerns with or questions about the CERCLA 108(b) hardrock mining financial assurance rulemaking. We are forwarding letters we received regarding the CERCLA Section 114(d) preemption provision, from the states of Alaska, Arizona, Colorado, and New Mexico in 2011, and would like to give the state participants an opportunity to elaborate on or discuss current state thinking on this issue.

Florida has provided information related to these concerns in our general comments in response to the requested Federalism Consultation. Based on our review of the relevant information, we strongly recommend that additional and direct consultation is needed with the Department to provide a full understanding of the level of risk associated with Florida phosphate mining, beneficiation, and processing operations, particularly given the interplay of existing state and federal regulatory actions in this state.

2. How do your programs apply on mines located on land with shared federal-state ownership?

Florida has extensive regulatory programs that apply to extraction activities, beneficiation, associated mineral processing facilities, and to corrective actions in response to releases of hazardous substances. These programs apply regardless of ownership type. Our general comments show the interdependence of our regulatory programs that have a connection with the release of hazardous substances in Florida.

3. How does your state approach spills or releases of hazardous substances from a mining site? Does your state require financial responsibility specifically for such releases?

The Department's laws under Chapter 376, F.S., and Chapters 62-780 and 62-777, F.A.C., are applicable to any releases of hazardous substances, including those from a mining site in Florida. In addition, the regulations cited in our general comments, in conjunction with additional regulatory authorities implemented under our state's authorized Resource Conservation and Recovery Act (RCRA) and Clean Water Act National Pollutant Discharge Elimination System (NPDES) permitting programs are also

Attachment B  
Responses to Selected EPA Federalism Consultation Questions  
Florida Department of Environmental Protection  
Page 2

utilized to regulate potential sources of pollutants, including hazardous substances, at mining extraction, beneficiation, and processing facilities in Florida.

4. What reporting requirements do you have for mining facilities, either related to mine operations or maintenance of their financial instruments? Do you have any difficulties with compliance with these requirements?

Reporting requirements apply to each of the required state regulatory programs that are referenced in the Department's general comments and in these question responses. The Department relies on these reporting requirements in conjunction with our various regulatory inspections programs and do not have any unaddressed or overriding difficulties with compliance with these requirements.

5. How frequently has your state needed to take enforcement actions against a mining entity for violations relating to financial assurance? How would you characterize the types of violations that trigger enforcement?

The Department closely oversees and ensures compliance with applicable requirements for financial assurance. With respect to financial responsibility related to hazardous substances at phosphate mineral processing facilities, the Department has issued three orders since the state financial assurance requirements were strengthened in 2005, not including the referenced mineral processing settlements that were discussed for the Florida phosphate industry in our general comments.

6. Does your state require third party certification for assessing mine site features or to verify the calculation of cost estimates related to your state programs? If so, we would be interested in hearing about your experience with these approaches.

The Department requires that cost estimates be certified by a third party engineer in relation to financial responsibility for phosphate related mineral processing facilities in Florida. The Department would be happy to further discuss any questions with EPA.

7. What is your experience with Environmental Management Systems, ISO certification, third party inspection programs, or similar types of programs in reducing risk from mining operations?

The Department does not currently rely on Environmental Management Systems, or ISO certifications in its regulatory programs. Our regulations often require inspections by a qualified and licensed professional engineer where appropriate for compliance and safety related evaluations.