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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA MINERALS ASSOCIATION, INC.

Petitioner,

vs.

CASE NO. 01-0746RU *57H*

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Respondent,

RESPONDENT'S RESPONSE IN OPPOSITION TO
MOTION FOR DECLARATORY STATEMENT, OR ALTERNATIVELY TO STAY

The Respondent, Florida Fish and Wildlife Conservation Commission (Commission), appears for the limited purpose of filing this response in opposition to the Petitioner's Motion for Declaratory Statement, or Alternatively to Stay (Motion) and states:

1. On March 9, 2001, Petitioner, Florida Minerals Association, Inc. (FMA) filed its Motion seeking a declaratory statement as to the interpretation of Section 120.56(4) (e), Florida Statutes (2000).

2. While the Motion does not cite the legal authority under which FMA seeks a declaratory statement, Section 120.565(1), Florida Statutes (2000), addresses declaratory statements. The statute authorizes any "substantially affected person" to seek an

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agency's opinion as to the applicability of a statutory provision as it applies to a particular set of circumstances.

3. Chapter 28-105, Florida Administrative Code (F.A.C.), sets forth the Uniform Rule requirements for obtaining a declaratory statement. Rule 28-105.002, F.A.C., contains the mandatory contents of a Petition for Declaratory Statement. FMA's Motion does not conform to Rule 28-105.002, F.A.C.

4. FMA's Motion seeks to have the Division of Administrative Hearings (Division) confirm that "Section 120.56(4)(e), Florida Statutes prohibits the Respondent from relying upon the Relocation Guidelines..." [Motion, page 1]. In the alternative, FMA seeks an order from the Division to "stay the Respondent's implementation of the Relocation Guidelines prior to the entry of a final order in this proceeding." Id.

5. The relief FMA requests is not available from the Division since the Division is not an "agency" within the meaning of Sections 120.565 and 120.52(1)(b), Florida Statutes (2000). The Division is appended to the Department of Management Services. Sections 20.22(2)(f) and 120.65(1), Florida Statutes (2000). Additionally, the Division is not part of the judicial branch and has no authority to issue an order to enter a "stay" to prevent the Commission from application of the Relocation Guidelines during the pendency of this proceeding. For example,

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Section 120.65(9), Florida Statutes, authorizes the Division to adopt reasonable rules to establish sanctions, except contempt, for failure to comply with a reasonable order issued by an Administrative Law Judge, which is not under judicial review. While the Division has not adopted such rules, presumably they could not include the power to enjoin the Commission or a non-constitutional executive or legislative branch agency.

6. The Final Order reported as St. Johns River Water Management District v. Modern, Inc., 22 F.A.L.R. 3618 (D.O.A.H. June 15, 1999) is not authority for granting the relief that FMA requests in the Motion. The operative part of the Final Order provides:

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that: Rule 40C-4.041 is not an invalid exercise of delegated legislative authority; that portion of Rule 40C-4.051(11)(c) which limits the maintenance exemption to "functioning ditches" is an invalid exercise of delegated legislative authority; all of the agency statement violates Sections 120.54(1)(a) and 120.52(8)(a); the portions of the agency statement which limit the maintenance exemption to "functioning ditches" and to routine custodial maintenance violate Section 120.52(8)(c)(d) and (g). DONE AND ORDERED.....

Notably absent is an injunction or stay that prevents the Water Management District from reliance on the disputed agency statement, or which imposes any sanctions for past reliance on the disputed statement.

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7. The agency statement challenged in St. Johns River Water Management District v. Modern, Inc. was an executive branch statement involving application of a maintenance exemption for ditches and did not involve the Commission's exercise of its executive and regulatory powers with respect to wild animal life as authorized by Article IV, Section 9 of the Florida Constitution.

8. With regard to the requested stay, FMA's Motion cites Rules 28-106.211 and 28-106.305, F.A.C.¹ These portions of the Uniform Rules, applicable in proceedings before the Division, implement Sections 120.569 and 120.57, Florida Statutes. Nothing in these statutes suggests that the Division can adopt or apply the Uniform Rules to issue what amounts to an injunction. To the contrary, enforcement of a Division order imposing sanctions must be brought in circuit court. Section 120.569(2)(k)2, Florida Statutes (2000). In addition, a District Court of Appeal can immediately review any preliminary, procedural or intermediate order issued by the Division if review of the final decision would not provide an adequate remedy. Section 120.68(1), Florida Statutes (2000). The filing of a petition with a District Court

¹ Ironically, FMA's Response to the Commission's Motion to Dismiss, filed on March 8, 2001, argues that the Uniform Rules do not apply to its Petition. [Response to Motion to Dismiss, paragraphs 16-18].

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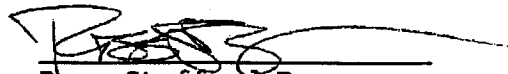
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to review an agency action does not stay enforcement of the agency decision; both a reviewing appellate court and the agency that took the action may grant a supersedeas or stay, however. Section 120.68(3), Florida Statutes (2000).

WHEREFORE, the Commission respectfully requests that FMA's Motion be DENIED, and all such other relief as is proper including attorney's fees.

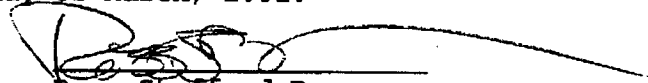
Respectfully submitted,



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Phone: (850) 487-1764

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was hand delivered to Frank Matthews, Esquire and Jody Lamar Finklea, Esquire, Hopping Green, et al., P.O. Box 6526, Tallahassee, Florida 32314 this 13th day of March, 2001.



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