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October 17, 2007

VIA FACSIMILE AND FEDERAL EXPRESS

County Attorney for Charlotte County
Attention: Janette Knowlton
18500 Murdock Circle
Port Charlotte, Florida 33948

Re: Ed de la Parte's October 12, 2007 Letter

Dear Ms. Knowlton:

On Saturday, October 13, 2007, The Mosaic Company ("Mosaic") learned for the first time that you had commissioned your outside counsel, Ed de la Parte, purportedly to "assess" the Phosphate Mining Compact (the "Compact"). The fact that we learned of Mr. de la Parte's assessment letter from the news media was disappointing to say the least, especially given that Mosaic has been engaged in good faith settlement negotiations with both you and Charlotte County (the "County") for roughly six months. More disturbing is that your swift actions to publicize the letter, coupled with the misleading contents of Mr. de la Parte's purported assessment, appear to be little more than an elaborate effort to undermine a concrete, comprehensive solution that achieves much more for the County and its residents than has been or could be achieved through costly, taxpayer-funded litigation.

It is a matter of public record that the County has spent more than \$9.5 million dollars litigating against Mosaic over a five-year period, and has paid Mr. de la Parte's firm more than \$4.7 million.¹ Thus, Mr. de la Parte is clearly incapable of performing an unbiased independent "assessment." Mr. de la Parte's position regarding the Compact reflects the inherent conflict of interest that arises when a highly-compensated advocate must "assess" a proposed settlement that concludes ongoing and very profitable litigation.² More importantly, as a substantive matter, Mr. de la Parte's criticisms are erroneous and overreaching and demonstrate a mistaken belief that he can do more for the County by perpetuating his costly litigation strategy or holding out for impractical and unnecessary further concessions, to which no prudent company could ever agree.

¹ That calculation of expenditures is from May 2001 through September 2005. We do not know how much the County has spent on litigation against Mosaic over the last two years, *i.e.*, since October 2005, but we believe that this incremental amount, if revealed to the public, would prove to be substantial, particularly in light of the remand hearing in the Ona Fort Green Extension hearing and appeal, including the court's temporary relinquishment of jurisdiction at the urging of Charlotte County.

² Moreover, Mr. de la Parte has demonstrated that he has a "track record" of being an impediment to reaching practical resolutions. Recall, in particular, the Tampa Bay water wars of the 1980s and 1990s where Mr. de la Parte also profited substantially at taxpayers' expense. As the St. Petersburg Times stated in a May 1999 editorial, "de la Parte seldom finds a water issue he won't litigate. And why should he? He's paid by the hour. On water issues, Pinellas taxpayers have given him and his law firm a staggering \$6.6-million."

Without question, the Compact is a product of tough, arms-length negotiating by diligent officials from multiple counties, the Peace River Manasota Regional Water Supply Authority (the "Water Authority"), and Mosaic. Under the Compact, Mosaic makes unprecedented commitments to the County and its citizens that it had no legal duty to make, and contractually obligates itself to conduct its operations under conditions that exceed applicable regulatory performance standards and which control, limit, and condition Mosaic's future mining operations far more than any on-going litigation could ever possibly achieve.³ This unique model of ongoing public/private cooperation could serve as a model for future public/private cooperation agreements between local governments and Florida's largest natural resource export industry. This is exemplified by the fact that the Water Authority, which is the statutory body created to provide reliable supplies of high-quality water in a manner that both protects and preserves the environment, supports the Compact because it furthers its directive.

The negotiated Compact successfully resolves the County's environmental concerns that have been the basis of past challenges to Mosaic permits and is far superior to the current unproductive approach. Under the Compact, Mosaic is obligated to take "additional independent steps not currently required by law" to safeguard water quality and water quantity in the Peace River Basin and the Myakka River Basin. Notably, the Compact subjects Mosaic's operations to a comprehensive, continuous monitoring program modeled after the successful Horse Creek Stewardship Program, which the Water Authority describes as the "best solution for the long-term protection of the creek, Charlotte Harbor and the Peace River." This provides better and more timely information to the County relating to the Peace and Myakka River Basins. Further, any disputes as to Mosaic's performance under the Compact are subject to an effective and efficient alternate dispute resolution ("ADR") mechanism that resolves disagreements inexpensively and efficiently through negotiation, mediation, and ultimately binding arbitration before a body of independent expert adjudicators. Finally, Mosaic has agreed to provide \$50 million in financial assurances, which exceeds legal requirements. There simply is no equivalent standard of performance that can otherwise be achieved, regardless of how long the County continues to litigate or how much taxpayer money it spends.

As will be illustrated below, the purported assessment commissioned from Mr. de la Parte lacks credibility for two reasons: (i) it misrepresents the Compact and its provisions through factual inaccuracy and obfuscation, and (ii) he attacks terms that he himself has previously argued were necessary to reach a settlement.

The Assessment Grossly Misrepresents the Compact and its Provisions by Factual Inaccuracy and Obfuscation

³ Contrary to Mr. de la Parte's claim of notable victories over Mosaic, and the threat of continued litigation, Mosaic's legal right to operate in accordance with established regulatory standards has not been diminished, and cannot be diminished. The Compact offers the County much more than what is currently available under the prevailing regulatory scheme, and does so without the high cost of continued litigation. A valid query is whether the purported "notable" victories have resulted in any net benefit to the environment or to the water supply of the County.

Contrary to the many misrepresentations Mr. de la Parte makes, the Compact offers concrete benefits to the County and extracts corresponding concessions from Mosaic that the County cannot achieve through litigation:

- The fundamental premise on which Mr. de la Parte's purported assessment bases his entire argument as to why the Compact should be rejected is fundamentally flawed. He asserts that there is nothing new in this agreement. On the contrary, the operative terms and conditions go above and beyond what the law requires of Mosaic. Mr. de la Parte saying otherwise does not make it so. Moreover, Mr. de la Parte also apparently believes that there is no benefit to a resolution that ends expensive litigation that cannot accomplish the benefits offered under the Compact. His flawed premise also assumes that a government can extract extra-legal concessions from a statutorily regulated industry operating in accordance with law.⁴ One must ask a critical question: If we cannot put our differences behind us and change the manner in which we address these issues, when might the litigation end? Mosaic believes there is a better approach.
- Paragraph 1 of the Compact expresses that the County and Mosaic agree to engage in a regular, cooperative dialogue in order to address the mutual concerns and objectives addressed in the Compact. Yet, Mr. de la Parte quite amazingly concludes his analysis by stating that the County should "conduct a workshop and develop a new phosphate strategy that emphasizes cooperation and communication with Mosaic rather than confrontation and litigation." Ms. Knowlton, you know as well as anyone that Mosaic has consistently conveyed this objective to the County over the past several years, as most recently demonstrated by our efforts over the last six months. Mosaic has structured the Compact with this new, forward-looking approach in mind. We prefer to work with the County, the Water Authority, and other stakeholders in a productive and mutually beneficial fashion. Mr. de la Parte continues to be mired in his customary adversarial stance. The simple truth is that the Compact emphasizes cooperation and communication, while the status quo emphasizes confrontation and litigation.
- Under Paragraph 2, Mosaic has agreed not to mine in the counties of Charlotte, Lee, and Sarasota and to restrict mining to limited areas in Hardee, DeSoto, and Manatee. You might recall that Mosaic developed this geographical boundary collaboratively with your own negotiating team. In addition, the Compact's proposed mining area is remarkably similar to the mining area set forth in Mr. de la Parte's markup of a prior

⁴ See *Escambia County v. Trans Pac*, 584 So. 2d 603, 605 (Fla. 1st DCA 1991) ("State environmental permitting is based on the premise that a state permit enforces a minimum standard to protect the state's interest regardless of local decisions about the same project.").

draft of the Compact. It is noteworthy that this was omitted from Mr. de la Parte's *post hoc* rejection of the Compact.

- Under Paragraph 3, Mosaic has agreed to higher standards than those currently applicable to the regulation of clay-settling areas and adopts monitoring standards identical to the Horse Creek Stewardship Program unequivocally endorsed by the Water Authority.

Mr. de la Parte contradicts his own criticisms of the Compact's requirements by stating that the design criteria "are in fact stricter than the standards contained in DEP rules for the design and construction of clay settling areas." Also belying the assessment is its contradictory assertion that freeboard and wave size run-up should meet even higher standards than those proposed by Mosaic, yet he is unable to point to a single incident when the use of such unnecessary additional measures have been required and effective. Conversely, when Hurricanes Charley, Frances, and Jeanne swept across southwest-central Florida just three years ago, causing catastrophic damage to homes, buildings, and personal property, our clay settling areas withstood the onslaught without an environmental incident.

In addition, Mr. de la Parte asserts that a settlement agreement with Mosaic's predecessor, IMC Phosphates Company (the Horse Creek Stewardship Program settlement), already requires Mosaic to implement the standards that Mosaic offers under the Compact. His assertion obfuscates the fact that the land area covered under the IMC settlement does not cover the areas that would be covered under the Compact. The Compact proposes to extend the identical clay-settling area standards under the Horse Creek Stewardship Program to the entire Peace River and Myakka River Basins. To say that the Compact offers "nothing new" is simply wrong.

- Under Paragraph 4, Mosaic clearly has agreed to higher standards than those currently applicable to the regulation of dewatering impacts.

Here, too, Mr. de la Parte misstates the facts. For example, he asserts that "this provision does not require Mosaic to apply for or obtain operation permits, without which the injection system could not operate." This is not correct because an operation permit for a Class V, Group 2 well (an injection well) is required only when the fluids being injected do not meet the primary and secondary drinking water standards. Mosaic, of course, will obtain operating permits as necessary to meet any permit or Compact requirements. Similarly, Mr. de la Parte asserts that DEP's environmental resource permit for the Ona Fort Green Extension, "which is an area where mining depth exceeds fifty feet, specifically requires Mosaic to obtain both construction and operation permits and install injection wells

every 50 feet along the perimeter of the mined area before mining is allowed to take place.” This, too, is a misrepresentation. DEP’s environmental resource permit actually requires Mosaic to install wells and to space them between 140 to 170 feet apart, approximately three times the distance represented in Mr. de la Parte’s purported assessment. In addition, the proposed Ona Fort Green Extension permit only requires Mosaic to install the injection wells and then to operate them as needed.

Mr. de la Parte also states that “the Settlement Agreement entered into by Charlotte County and Mosaic on May 23, 2006, and the subsequently issued environmental resource permit for the Altman Tract, which is an area where site specific mining depths do not exceed 50 feet, require[s] Mosaic to to [sic] obtain both construction and operation permits for injection wells within one year of the commencement of mining. . . .” This, again, mischaracterizes the facts. The terms of the Altman Settlement Agreement, require Mosaic to “use all due diligence” to obtain the injection well permits. The compact is no less demanding.

- Under Paragraphs 5 and 6, Mosaic has agreed that future mining operation will not have an adverse impact standard on downstream water quality, heightened design standards, and continuous water quality monitoring to be modeled after the Horse Creek Stewardship Program. Contrary to Mr. de la Parte’s assertions, those standards not only exceed applicable legal standards, but also they are modeled on and actually go further than the extremely successful Horse Creek Stewardship Program. Mosaic believes that one of the main reasons the Water Authority supports the Compact is because of Mosaic’s demonstrated track record of successful environmental performance and accountability under the Horse Creek Stewardship Program. Mr. de la Parte’s contention that design standards “are generally more lenient than existing criteria” is simply untrue.
- Under Paragraph 7, Mosaic has agreed not to mine within the 100-year floodplains of the Peace River, Myakka River, and a significant number of major tributaries. Here too, Mr. de la Parte contradicts his own ostensible assessment of the Compact by acknowledging that the Compact’s provision “create[s] stricter standards than those currently required of Mosaic.” In fact the standard boundary restriction for mining is the 25-year floodplain, and the standard stream restoration ratio is 1:1. Under the Compact, however, Mosaic proposes to restrict itself from mining within the substantially larger 100-year floodplain, and proposed stream restoration at a 1.25:1 ratio. Mr. de la Parte further asserts that Mosaic will mine all remaining streams. This is not true. Mosaic will not agree to the 100-year floodplain standard for lesser tributaries, but will continue to be subject to all regulatory and permitting restrictions imposed by the Florida Department of Environmental Protection and to a new 125%

stream restoration standard. Mosaic is held to a high standard and sensitive environmental areas are protected through this process.

In addition, Mr. de la Parte relies on a letter from Dr. Janicki to support the proposition that more streams should be added to the area covered under the Compact. Dr. Janicki's conclusions, however, are inconsistent with the findings in past administrative law proceedings that relied on an objective review of scientific and engineering data, which determined that there is no reduction of flows to the tributaries, which Dr. Janicki added, that can be attributed to mining operations.

- Under Paragraph 8, Mosaic is prohibited from locating clay-settling areas inside the 100-year floodplains of the Peace River, Myakka River, and a significant number of other tributaries. The most Mr. de la Parte can say is that the Compact is not even more restrictive. But, Mr. de la Parte contradicts his criticisms of the Compact by admitting that the use of the 100-year floodplain provision under the Compact exceeds current regulatory standards.
- Under Paragraph 9, Mosaic has agreed to provide \$50 million in financial assurance in the unlikely event of a damaging discharge or release. Mr. de la Parte falsely asserts that Mosaic can cancel the \$50 million insurance policy on a whim. That is untrue. What he fails to note is that Mosaic can only substitute insurance coverage if external industry or economic conditions prevent Mosaic from obtaining such insurance. However, Mosaic is still obligated under the Compact to employ alternative sources to secure the same \$50 million in financial assurance. Moreover, under the Compact, the County can seek expedited process under ADR if it disagrees with the substitute assurance—a right that is not currently available to the County. Mr. de la Parte states that “[i]f Mosaic is finding it financially difficult to obtain a \$50 Million policy, then it would be logical to assume the company will not be as diligent in funding the maintenance and upkeep of the clay settling areas.” This statement is simply unfounded, and, frankly, irresponsible.
- Under Paragraph 10, Mosaic agrees to provide meaningful water storage volume plus future land for a reservoir targeted to hold 15,000- to 20,000-acre feet of storage at no charge to the Water Authority. Mr. de la Parte concedes that this Compact provision “offers a substantial benefit to Charlotte.”
- Under Paragraph 13, the County agrees not to oppose Mosaic's mining activities, operations, or permitting activities in the areas covered under the Compact. Mr. de la Parte incorrectly asserts that the provision “imposes a significant and disproportionate cost on Charlotte County by

limiting any existing or future legal challenges and restricting any public comment in opposition to current or future mining by Mosaic.” That conclusion is classic “spin.”

First, given that the Compact requires Mosaic to exceed federal and state standards applicable to its operations, there should be no need to litigate. Furthermore, if a dispute does arise, the Compact provides an expedited ADR mechanism that will place the parties before an expert panel of independent arbitrators to adjudicate such disputes. The court system offers no equivalent, expedited ADR mechanism before a panel of expert adjudicators.

Second, the contention that “the Compact provides Charlotte County no benefits with respect to Mosaic’s existing mining operations, while restricting Charlotte County from challenging or commenting on Mosaic’s current operations” is also untrue since the ADR mechanism under the Compact applies to both Mosaic’s current and future mining operations. All the ADR mechanism does is change the forum of adjudication, not the right to seek adjudication for permitting-related disputes.

Third, the contention that the Compact extinguishes the County’s rights to go to court is also patently false. The County can go to court to enforce the ADR mechanism, the decisions of the arbitrators, or any other rights of the County regarding non-permitting matters that are not governed by the Compact. For example, the Compact does not affect the County’s right to go to Court to recover natural resource damages in the very unlikely event of a future release from a Mosaic facility. Any dispute regarding the Compact’s change of control provision is also excluded from ADR.

- Under Paragraph 15, Mosaic and the County release each other from mutual claims relating to Mosaic’s mining activities in or concerning the Peace and Myakka River Basins. Mr. de la Parte asserts that the County’s release “will continue in perpetuity long after the Compact has terminated and Charlotte County is no longer receiving contractual benefits.” This is untrue. The Release applies only to existing claims about which the County has knowledge as of the date of the Compact.
- Finally, under Paragraph 16, Mosaic and the County agree to ADR. Mr. de la Parte asserts that engaging in ADR would be more expensive than years of protracted litigation, which has already cost the county taxpayers over \$9.5 million, with no meaningful results. This is an absurd statement, and Mr. de la Parte stands virtually alone in that conclusion.⁵ Under the

⁵ According an authoritative text on ADR,

Compact's ADR mechanism, the parties can discuss any permitting-related dispute under the negotiation phase and possibly resolve any dispute *before* the County spends *any* money on legal fees. As a next step the parties can proceed to mediation, which similarly does not require significant litigation expense. Even more ridiculous is his speculation that arbitration will occur more frequently than administrative procedures. Ask yourself: If Mosaic is contractually obligated under the Compact to operate in a manner that exceeds current regulatory standards, what is there to litigate and why would the County spend taxpayer money in such an unwise way?

I could continue, but this is a representative list of the benefits the County and its citizens receive under the Compact that it could never achieve under the status quo strategy of continued litigation. An objective examination of the Compact clearly shows that Mosaic is committed to building a proactive, forward-looking collaborative relationship with the County and the Water Authority that focuses on environmental protection and constructive solutions, not protracted delay and costly litigation. We are gratified that several of the commissioners with whom we have met express the same desire.

The Settlement Is a "Win" for the Region if Reasonable, Objective Minds Prevail

If Charlotte County's Commissioners carefully consider the high cost of litigation, objectively weigh the level of true environmental protections derived from five years and \$12 million spent fighting phosphate permits, and closely review the benefits the Compact definitively confers to the County (as opposed to misleading and self-serving characterizations of its contents), we believe they will recognize the significant long-term value and historic achievement this settlement can represent for the County's taxpaying citizens, the Peace River, and Charlotte Harbor. Accordingly, we urge that the County's Commissioners give Mr. de la

Arbitration can provide a prompt and efficient method for resolving disputes without the expense, delays, or complications that are inherent in litigation. In most instances, arbitration is able to produce a decision more quickly than the courts are capable of accomplishing, and it can function at lower cost than litigation. The informal atmosphere of the arbitration may, in some cases, promote goodwill in a dispute, thus allowing a long-term relationship to continue. . . . Arbitration may be particularly appropriate when it is desirable for the decision-maker to possess technical or scientific experience, or to have experience in the industry. Jay E. Grenig, 1 *Alternative Dispute Resolution* § 6:2 (3d ed. 2007).

See also William Tetley, *Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering*, 35 J. Mar. L. & Com. 561, 593 (2004) ("It can be claimed that the advantages of arbitration include: (a) impartiality of the decision maker; (b) finality (appeals are not permitted except in cases of fraud); (c) confidentiality (if desired); (d) expertise (of the arbitrators in the particular subject under dispute); (e) simplicity (parties may limit discovery and other procedures if they so desire, making the process less onerous); (f) speed (the process is quicker); (g) harmony (arbitration is less adversarial and thus enhances negotiation and future business relations); and (h) finally, economy (the overall costs of settlement are reduced.")).

Letter to J. Knowlton

October 17, 2007

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Parte's purported assessment no more than the consideration it merits, and support the Compact, which achieves more than his divisive strategy has or ever will.

As always, please feel free to contact me directly if you would like to discuss this matter before we address the County Commission.

Sincerely,

A handwritten signature in cursive script, appearing to read "R. Mack", followed by a horizontal line extending to the right.

Richard L. Mack