STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KILLINGSWORTH ENVIRONMENTAL, INC.; ENVIRONMENTAL SECURITY, INC.; ENVIRONMENTAL SECURITY OF OKALOOSA, INC.; ENVIRONMENTAL SECURITY OF PANAMA CITY, INC.; AND ENVIRONMENTAL SECURITY OF GAINESVILLE, INC.,	)	
Petitioners,	)	
vs.	)	Case No. 01-3038RP
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, this cause came on for formal hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings, in Panama City, Florida, on August 22 and 23, 2002.

APPEARANCES

For Petitioners: Robert O. Beasley, Esquire
Litvak and Beasley, L.L.P.
220 West Garden Street, Suite 205
Post Office Box 13503
Pensacola, Florida 32591-3503

For Respondent: Jack W. Crooks, Esquire
Department of Agriculture and Consumer Services
407 South Calhoun Street
Mayo Building, Room 520
Tallahassee, Florida 32399-0800

STATEMENT OF THE ISSUES

The issues to be resolved are as follows:

1. With regard to Count Four of the Amended Petition, whether the Petitioners have sufficiently alleged a rule challenge and more particularly whether sufficient facts have been alleged to identify the challenged rule, whether existing, proposed, or unpromulgated; and whether, through an unpromulgated rule, the Department (Respondent) has prohibited the installation of "pest control insulation" or borate containing insulation by anyone other than a card-carrying employee of a certified pest control operator or licensee. If so, it must be determined whether such action is outside the Respondent's rulemaking authority, whether it is contrary to statute, whether it disregards the exceptions proved in Section 482.211(9), Florida Statutes, and whether it violates Section 482.051, Florida Statutes.

2. With regard to Count Five of the Amended Petition, whether the Petitioners have sufficiently alleged a rule challenge to a proposed or existing rule or have offered evidence legally sufficient to establish a rule, proposed, or existing, which the Petitioners are challenging relating to the Respondent allegedly having selectively investigated pest control operators performing 100 or more pre-construction

termite treatments annually, and whether such action is an invalid exercise of delegated legislative authority.

3. With regard to Count Six of the Amended Petition, whether the Petitioners have sufficiently alleged a rule challenge to a proposed or existing rule or have offered evidence legally sufficient to establish a rule, proposed, existing, or unpromulgated, which the Petitioners are challenging relating to the Respondent's alleged enforced application of termiticide arbitrarily and capriciously by not requiring the best available technology and not regulating according to acceptable standards in the manner in which it conducts field investigations.

4. With regard to Count Seven of the Amended Petition, whether the Petitioners have sufficiently alleged a rule challenge based on a proposed or existing rule or have offered legally sufficient evidence to establish a rule, proposed, existing, or unpromulgated, which the Petitioners are challenging relating to the Respondent's enforcement of Chapter 482, Florida Statutes, as it relates to preventive soil treatments for new construction and its alleged failure to protect the public.

5. With regard to Counts Two, Three, and Eight of the Amended Petition, whether the Petitioners have alleged any facts or presented any evidence to establish a proposed, existing, or

unpromulgated rule substantially affecting the interests of the Petitioners.

6. Whether either the Petitioners or the Respondent are entitled to recovery of attorney's fees and costs.

PRELIMINARY STATEMENT

The Petitioners initiated this administrative action with the filing of a Petition with the Division of Administrative Hearings. The Respondent filed a Motion to Dismiss the nine-count Petition and the Motion to Dismiss was granted by Order of March 7, 2002, in which the Administrative Law Judge ruled that the motion was timely because it raised jurisdictional issues and ordering dismissal with leave to amend. An Amended Petition was filed and served on March 27, 2002, consisting of eight counts, alleged to be an administrative rule challenge pursuant to Section 120.56, Florida Statutes.

The Respondent filed a Motion to Dismiss and Motion for More Definite Statement on April 12, 2002, as well as a supplement to the motion dated April 18, 2002. Oral argument was had on the motions and the responses thereto, and an Order was entered May 14, 2002, granting the motion to the extent that the challenge to the Respondent's memoranda numbered 705 and 705a, as unpromulgated rules, was rendered moot because the memoranda had been rescinded by the agency.

The Respondent filed a motion for summary final order, attorney's fees and costs shortly before hearing, and this was addressed at the outset of the formal hearing on August 22, 2002. The Respondent at that time, through counsel, renewed its Motion to Dismiss and the Motion for Summary Final Order. In this instance, the Respondent is contending the Petitioners have not legally carried the burden of showing that there was a challenge to a rule and have not shown with specificity any provisions of a rule, statement, or agency action with sufficient facts to show that such constituted a rule, which affected the substantial interests of the Petitioners.

The Petitioners, at hearing, presented no evidence or argument concerning Count Eight of the Amended Petition, stating that Count One had been eliminated by virtue of the previous Order on the Motion to Dismiss and that Counts Two and Three were related to Count One and, thus, expired along with Count One and had been rendered moot by the earlier ruling on the Motion to Dismiss. Thus, no evidence was presented as to Counts One, Two, Three, or Eight.

Evidence was presented at hearing concerning Counts Four, Five, Six, and Seven. The Petitioners presented testimony from four witnesses and various exhibits introduced into evidence as Exhibits A through T. The Respondent presented testimony from five witnesses and Exhibits numbered One through Six which were

admitted into evidence. Official recognition was taken of Chapter 482, Florida Statutes, and Chapter 5E-14, Florida Administrative Code.

Upon conclusion of the proceeding, a transcript thereof was ordered and an extended briefing schedule requested by the parties, which was approved by the Administrative Law Judge. The Proposed Final Orders were timely filed and have been considered in the rendition of this Final Order.

FINDINGS OF FACT

1. The Petitioners conceded at hearing that the Order on the Motion to Dismiss, prior to the hearing, concerning the mootness caused by the withdrawal of the above-referenced agency memos not only disposed of Count One of the Amended Petition, but had rendered moot Counts Two and Three, as well. No evidence was presented as to the those counts. Neither was any evidence or argument presented regarding Count Eight of the Amended Petition. Thus, Counts Two, Three, and Eight, as well as Count One, should be dismissed.

2. The Petitioners, with regard to Count Four of the Amended Petition, did not allege the text of any statement or description of one which could be construed as an unpromulgated rule by the agency, which prohibited the installation of insulation containing borate by anyone other than a "card-carrying" employee of a certified pest control operator or

licensee. There was no evidence to establish the existence of such an unpromulgated statement or rule of general application.

3. Cliff Killingsworth testified that he was an officer and party representative of the Petitioners' companies in this case. "In-cide" is a cellulose fiber with borate or borate-containing materials for fire retardancy and fungal control. The manufacturer had increased the borate content in the material so that it could make claims with the Environmental Protection Agency (EPA) for the product's pest control value. Mr. Killingsworth acknowledged that it was a licensed and registered "pest control product." While Mr. Killingsworth agreed that claims to the public about the pest control value of the product should be done by a pest control operator, he felt that should not prevent him from subcontracting the installation of the insulation material to a professional insulation installer so that the material would be properly installed in a home or other building.

4. Mr. Killingsworth met with Steve Dwinell and Joe Parker, representatives of the Respondent agency, in Jacksonville, Florida, in the summer of 1997. He provided them with a 30-to-40-page report regarding installation of the insulation with its pest control properties. He received no communication from the Respondent following this meeting and

sought no written opinion from the Respondent about the use of the material before he began using it.

5. Mr. Killingsworth invited George Owens, a field inspector for the Respondent in the Northwest Florida area, to observe the product being installed in a structure. Mr. Killingsworth testified that Mr. Owens, thereafter, sent him a letter stating that the Respondent was not going to regulate that material. Mr. Killingsworth, however, did not produce that letter or a copy of it.

6. Mr. Owens testified that he had visited a site in Destin, Florida, at Mr. Killingsworth's invitation, where "Green Stone" insulation was being applied by being blown into a small section of a wall. He did not know that a subcontractor was making the application when he visited the site. He thought that an employee of Mr. Killingsworth was performing the installation of the material. Mr. Owens did not recall telling Mr. Killingsworth or any of his representatives that application of the product by an agent other than Mr. Killingsworth's own company would be prohibited. It was not Mr. Owens' belief that he had authority to make those decisions. He did not believe that he had authority to approve or disapprove the application of a pesticide.

7. Mr. Killingsworth invited Mike McDaniels, another field investigator with the Respondent in the Gainesville, Florida,

area to observe the installation of the product in the spring of 1998. Mr. McDaniels commented to Mr. Killingsworth that he was glad that they were doing it, but he made no report. After the Petitioners' companies had been operating for two or three months in the Gainesville area, sharing space with Green Stone Industries, the company producing the insulation, Mr. McDaniels returned. He informed Mr. Killingsworth that the Respondent agency had changed its position on the application of the product. Because it was a "labeled material," that is, labeled and promoted as a certified pest control product, for purposes of EPA regulations, it had to be installed and handled only by a pest control operator meeting the definition of an employee under Chapter 482, Florida Statutes.

8. Mr. McDaniel was shown the insulation in question by Mr. Killingsworth and how it was installed at a job site. He never told Mr. Killingsworth whether he could use the product or not, but during a "non-adversarial inspection," he told him that he had to have "ID cardholders" (i.e., employees of a licensed pest control operator) install the insulation, since it had advertised pesticide qualities. Mr. McDaniel was shown a warehouse with two different types of insulation. One had borate advertised as a fire retardant. The other had a higher content of borate which was advertised to have pesticide qualities. Mr. McDaniel determined that employees applying the

second type of product were conducting pest control by installing that product and should, therefore, have pest control operator identification cards. He explained that to Mr. Killingsworth and thought he may have written that opinion on an inspection form which he supplied to Mr. Killingsworth. He also believes he notified his supervisor, Phil Helseth. His normal practice, when a new material is reported to him or observed, is to inform his superior of the facts concerning that product. He never told Mr. Killingsworth or his representatives that they could not install the product in question. He informed them that since it was listed as a pesticide that they would have to be have employees of a licensed pest control operator to legally install the product.

9. Mr. McDaniel did not consult with anyone at the Respondent agency about this, but rather relied on his own judgment as to agency policy and the interpretation of the statutes and rules enforced by the Respondent. He testified that he had no central direction from his superiors at the Department on the issue and was unaware what other districts or regions under the Department's regulation were doing to address this question. He simply determined that if the Petitioners' personnel were applying a product that was a registered pesticide insulation that, under his understanding of the broad statutory definition of pesticides as anything that "curbed,

mitigated, destroyed, or repelled insects," then the installers would have to be employees of a registered pesticide operator.

10. Mr. Dwinell testified as the bureau chief for the Bureau of Entomology and Pest Control. He met with Mr. Killingsworth along with Mr. Parker, another employee of the bureau. Mr. Killingsworth made a presentation regarding the product in dispute, the borate-impregnated cellulose insulation. He determined that the product was a pesticide because it was advertised as a registered pesticide and performed pesticide functions, in addition to its insulation function. He did not recall that the precise issue of subcontracting with a non-licensed pest control operator or insulation installer was a topic of their conversation. Following that meeting, he may have discussed the question with Mr. Helseth, in a general way, but does not recall discussing it with any other person. He recalls some discussion concerning the Gainesville office of the Killingsworth companies and whether Mr. Killingsworth, or that office of his company, was licensed as a certified operator. He believes he recalls that a cease and desist letter informing the Killingsworth companies of the need to have the application of the product performed by someone licensed to do pest control may have been sent, although he is not certain.

11. Mr. Dwinell established that the Respondent agency had never published anything regarding pest control insulation. He

noted that a pesticide was a pesticide under the statutory definition, whether a corn bait, insulation, or mixed in a jug. The same laws applied to it and under Chapter 482, Florida Statutes, a pesticide must be applied by a licensed applicator.

12. Mr. Killingsworth insisted that the insulation product, though a registered pesticide, was exempt from the provisions of Section 482.211(9), Florida Statutes, because it was a derivative wood product. He agreed that the product in question was a wood by-product and not wood. If a product did not meet the statutory definition of being exempt, then it would be appropriate for the Respondent to issue a cease and desist directive until the Petitioners came into compliance with Chapter 482, Florida Statutes.

13. Mr. Dwinell opined that the subject insulation product was not exempt under the provisions of Section 482.211(9), Florida Statutes. Unlike pre-treated lumber, which is exempt, the installation product at issue is a registered pesticide. Pre-treated lumber, though treated with pesticide in the manufacturing process, is not intended to be used as pesticide, nor is it a registered pesticide.

14. The Petitioners have not stated a basis for a rule challenge pursuant to Section 120.56, Florida Statutes, as to Counts Five and Six of the Amended Petition. Although references were made to alleged "actions" by the Respondent

agency, the Petitioners have not alleged with particularity, nor adduced any competent, substantial evidence of any rule provisions alleged to be invalid, nor have they shown, in an evidential way, any to be invalid. The evidence does not show that there is a rule, either proposed, existing, or as an unpromulgated agency statement of general applicability, which is actually being challenged by the Petitioners. There has not been a definitive showing by preponderant evidence that such exists concerning the product and operation at issue.

15. The Petitioners in Count Seven of the Amended Petition have not stated any basis for a rule challenge in accordance with Section 120.56, Florida Statutes. There are numerous references to provisions of Chapter 482, Florida Statutes, but it is not alleged with any particularity which rule provisions are purported to be invalid, nor has preponderant evidence been adduced to establish any rule provisions either proposed, existing, or as unpromulgated agency statements, which have imposed a substantial effect on the Petitioners. In this regard, the Petitioners' counsel argued at the hearing:

> Your Honor, what we have suggested is that the rule that's being challenged is the Department's statutory obligation under the statute as it relates to their promulgated Rule 5E-14.105, and as it relates to their treatment guarantees or warranties that are required by that regulation for a treatment that just doesn't work.

> The Department rule requires a certain warranty and requires a renewable warranty, placing that upon the pest control operator under the guise of protecting the consumer, but the fact of the matter is, it doesn't protect the consumer, and it just endangers the pest control operator.
>
> And so I guess the actual rule is the 5E-14.105. In addition to that we have the statutory obligations of the Department, which is to provide a protection to the public health and the economic benefit of the consumer and evaluate these chemicals that they are requiring warranties for.
>
> That's the basis of the rule challenge, and admittedly, this one is a little bit nebulous, but there is a regulatory, I guess, mandate of these preconstruction soil treatments as a method, as the preferred method, and to the extent that the operators, who are the regulated entity in this case are required to--is mandated to require a warranty for a method they know doesn't work . . . .

16. Mr. Killingsworth acknowledged in his testimony that he was not contending that there should not be a warranty requirement for treatments of subterranean termites, as stated in the above-cited Rule 5E-14.105, Florida Administrative Code. He also acknowledged that he was not contending that the Respondent should require warranties from pest control companies for every kind of pest control performed. He thought there were a lot of factors not within a pest control operator's control affecting particular wood fungi, but what was in the pest operator's control was the opportunity to do a preventive

treatment for more than just subterranean termites and they, in his view, should not be prevented from doing so. When asked what preventive treatment he had been prevented from doing by the Respondent, his reply was:

> The effect of memos and other actions prevented us from doing our choice of preventative treatment, the borate application, through the effects of raising questions in building officials' eyes, through the effects of increasing the economic impact to us to get it done. Builders will not pay enough to do both soil treatment and bait and borate.

17. The memoranda referred to as preventing Mr. Killingsworth from doing his choice of preventive treatment were not actually identified in the record, however. Mr. Dwinell testified that the EPA guidelines require an efficacy standard for soil treatments which states: "Data derived from such testing should provide complete resistance to termite attack for a period of five years." The EPA also provides guidelines for preventive treatment/wood impregnation: "When acceptable data derived from testing for at least two years, or less than five years, shows complete resistance to termite attack, the product may be registered." The efficacy standard for borate, thus, was not five years, but two years.

18. Mr. Dwinell had concerns about the type of data that had been relied upon by the EPA for registration and how that data related to the situation in Florida. That was the basis

for the negotiated rulemaking process that the Respondent was engaged in at the time of the hearing in this case. The purpose of the negotiated rulemaking process was to comply with the statute that required a rule, but ultimately the purpose was to have a mechanism in the State of Florida where the product was registered for use under construction and a reliable set of data that could show whether the product would actually protect against termites when applied. The ultimate goal of the statute at issue is to protect the consumer, which is the Respondent's statutory duty.

19. Borate pesticides are registered for use, with label directions for use during construction. They are one of three categories of materials for use in construction, including soil-applied pesticide materials, baiting products, and wood treatments, the last being the borates. There are no directives issued by the Respondent that specifically preclude the use of either borate as a stand-alone treatment or a baiting system as a stand-alone treatment. The Respondent does not require soil treatments only. Mr. Dwinell has never told any licensee that he could not use borate products if he were licensed.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter hereof. Sections 120.57, 120.569, and 120.56, Florida Statutes.

21. No evidence has been presented as to Counts One, Two, Three, and Eight of the Amended Petition and, consequently, those counts should be dismissed.

22. Concerning Counts Four, Five, and Six of the Amended Petition, no competent and substantial, preponderant evidence has been presented to establish an existing rule, proposed rule, or unpromulgated rule or agency statement of general applicability, which could be construed as a rule substantially affecting the Petitioners and subject to challenge under the provisions of Section 120.56, Florida Statutes. Therefore, because there is no preponderant proof advanced of any actual, proposed, or unpromulgated rule or agency statement which is being challenged, these counts should also be dismissed.

23. Additionally, with regard to Count Four, Section 482.021(21)(a), Florida Statutes, defines "pest control," in pertinent part, as "the application of any substance to prevent, destroy, repel, mitigate, curb, control, or eradicate any pest in, on, or under a structure." "Pesticide" is defined in pertinent part by Section 482.021(22)(a), Florida Statutes, as any substance or mixture of substances intended for "preventing, destroying, repelling, or mitigating any insects, rodents, nematodes, fungi, weeds, or other forms of plant or animal life or viruses . . . ." Section 482.071(1), Florida Statutes, provides that it is "unlawful for any person to operate a pest

control business that is not licensed by the department." Section 482.091(1)(a), Florida Statutes, provides that each employee who performs pest control for a licensee must have an ID or identification card.

24. The Petitioners have conceded that the insulation containing borate, which it wants to apply using unlicensed personnel or employees without ID cards, is a registered pesticide. The Petitioners also concede that it is a wood by-product. As such, it is not exempted from the provisions of Chapter 482, Florida Statutes, by Section 482.211(9), Florida Statutes. The foregoing statutory law, not any rule, is what prohibits the application of the registered pesticide installation by anyone other than a properly licensed pest control operator or his employees, who have been provided with ID cards in accordance with the provisions of Chapter 482, Florida Statutes.

25. Concerning Count Seven of the Amended Petition, there is no competent, substantial, preponderant evidence to establish an existing rule, proposed rule, or agency statement of general applicability (unpromulgated rule) by the Respondent which could be construed as a rule substantially affecting the Petitioners. The Petitioners' counsel argued that Rule 5E-14.105, Florida Administrative Code, was the rule which was being challenged (even though this was not alleged in the Amended Petition),

along with the statutory obligations of the Respondent. In counsel's own words, "that's the basis of the rule challenge, and admittedly, this one is a little bit nebulous . . . ."

26. Section 120.56(1)(b), Florida Statutes, provides:

> The petition seeking an administrative determination must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by it.

27. There is no competent, substantial evidence presented by the Petitioners which can preponderantly show that Rule 5E-14.105, Florida Administrative Code, is invalid or that the Petitioners have been adversely affected by it. Mr. Killingsworth conceded that he was not contending that there should not be a warranty requirement for treatment of subterranean termites, which is required by Rule 5E-14.105, Florida Administrative Code. As articulated by Mr. Killingsworth, the Petitioners' real complaint seems to be that certain "other memos and actions," which were not identified with particularity, prevented the Petitioners from using the borate treatments as a method of prevention. This was purportedly because the memoranda or actions raised questions in building officials' eyes regarding the effectiveness of borate

as a treatment and because builders would not pay enough to do both a soil treatment and a bait and borate treatment. The purported memoranda were not identified with particularity and, thus, cannot form the basis of a rule challenge, in an evidential sense, in this proceeding.

28. Neither Rule 5E-14.105, Florida Administrative Code, nor any other rule or directive issued by the Respondent specifically precluded the use of either borate as a stand-alone treatment or a baiting system as a stand-alone treatment for new construction in Florida. The Respondent agency has not been shown to have a policy or a statute or rule-based authority for requiring the application of soil treatments only. There is no preponderant evidence to show that it is doing so.

29. Finally, it is noted that the Respondent and Petitioners have moved for attorney's fees and costs based upon Section 120.569(2)(e), Florida Statutes. That provision authorizes the award of attorney's fees in a proper situation, within the discretion of the Administrative Law Judge, when it is determined that a party has participated in a proceeding for an improper purpose. The motions for attorney's fees are denied because it has not been established that the Petitioners participated in this proceeding for an improper purpose, as that standard is elucidated in Section 120.569(2)(e), Florida Statutes. In fact, it has not been demonstrated that either

party participated for an improper purpose or in any wise failed to advance its positions with good faith, such that the various bases in the above statutory provision justifying an award of attorney's fees would come into play. The motions for attorney's fees and costs are denied.

ORDER

Accordingly, having considered the foregoing Findings of Facts and Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is

ORDERED:

That the Amended Petition is denied, including any claims for attorney's fees by the Petitioners, as well as by the Respondent. The Petition is hereby dismissed.

DONE AND ORDERED this 3rd day of January, 2003, in Tallahassee, Leon County, Florida.

_____

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of January, 2003.

COPIES FURNISHED:

Robert O. Beasley, Esquire
Litvak & Beasley, L.L.P.
220 West Garden Street, Suite 205
Post Office Box 13503
Pensacola, Florida 32591-3503

Jack W. Crooks, Esquire
Department of Agriculture and
Consumer Services
407 South Calhoun Street
Room 520, Mayo Building
Tallahassee, Florida 32399-0800

Honorable Charles H. Bronson
Commissioner of Agriculture
Department of Agriculture and
Consumer Services
The Capitol, Plaza Level 10
Tallahassee, Florida 32399-0810

Richard D. Tritschler, General Counsel
Department of Agriculture and
Consumer Services
The Capitol, Plaza Level 10
Tallahassee, Florida 32399-0810

Brenda D. Hyatt, Bureau Chief
Bureau of License and Bond
Department of Agriculture and
Consumer Services
407 South Calhoun Street
Mail Stop 38
Tallahassee, Florida 32399-0800

Carroll Webb, Executive Director
Joint Administrative Procedures Committee
120 Holland Building
Tallahassee, Florida 32399-1300

Liz Cloud, Chief
Bureau of Administrative Code
The Elliot Building
Tallahassee, Florida 32399-0250

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.