STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CONSERVATION ALLIANCE OF ST. LUCIE COUNTY, INC., and ELAINE ROMANO,	)	
Petitioners,	)	Case No. 09-1588
vs.	)	
FORT PIERCE UTILITIES AUTHORITY and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents,	)	
and	)	
ALLIED NEW TECHNOLOGIES, INC.,	)	
Intervenor.	)	

RECOMMENDED ORDER OF DISMISSAL

Pursuant to notice, a hearing was held in this case on January 23, 2013, in Fort Pierce, Florida, before E. Gary Early, the Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Robert N. Hartsell, Esquire
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For Intervenor Allied New Technologies, Inc.:

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STATEMENT OF THE ISSUE

The issue to be determined by this Order is whether the Petition for Formal Proceedings filed with the Department of Environmental Protection (DEP) on February 4, 2009, was timely [1/] and, if so, whether Petitioners have standing to challenge the DEP's issuance of the Minor Modification to FDEP Operation Permit 171331-002-UO for IW-1 under 171331-003-UC (the Permit Modification).

PRELIMINARY STATEMENT

This case arose upon the issuance of the Permit Modification by the DEP to Respondent, Fort Pierce Utilities Authority (FPUA) for the disposal of a brine waste-stream

generated by Intervenor, Allied New Technologies (Allied) into FPUA's existing Class I industrial injection well. The Permit Modification was issued on December 30, 2008. Notice of the permit issuance was published in the Fort Pierce Tribune newspaper on January 9, 2009.

On February 4, 2009, Petitioners, Conservation Alliance of St. Lucie County, Inc. (Conservation Alliance) and Elsa Millard filed their Petition for Formal Proceedings with the DEP. The Petition was amended on February 12, 2009, to add Marion Scherer and Elaine Romano as Petitioners. On March 4, 2009, the Petition and Amended Petition were dismissed by the DEP, with leave to amend. A Second Amended Petition for Formal Proceedings was filed within the time allotted by the DEP, and was thence forwarded to the Division of Administrative Hearings.

The proceeding was held in abeyance for a lengthy period as issues related to the disqualification of various lawyers, law firms, and the initially assigned Administrative Law Judge were resolved. The procedural history leading to the assignment of this case to the undersigned and its return to active status may be determined by reviewing the docket.

It was agreed upon by the parties that a preliminary bifurcated hearing on the standing of the Petitioners and the timeliness of the Petition would allow for a more efficient utilization of effort, with there being no need for a hearing on

the merits if it was determined that Petitioners lacked standing, or that the Petition was not timely filed. Pursuant to notice, a hearing to address those issues was scheduled for January 23, 2013, in Fort Pierce, Florida.

On December 28, 2012, a Notice of Deceased Petitioner was filed indicating that Marion Scherer had died, and that her estate declined to proceed as a party to the litigation. On January 7, 2013, Ms. Scherer was dismissed as a party to this proceeding.

On January 23, 2013, Elsa Millard filed a Notice of Voluntary Dismissal without Prejudice. Based thereon, Ms. Millard was dismissed as a party at the commencement of the hearing, an order that was memorialized on May 7, 2013.

On January 21, 2013, the parties filed their Prehearing Stipulations. Stipulations of fact have been incorporated herein.

The preliminary hearing was held on January 23, 2013, as scheduled. At the preliminary hearing, the parties submitted Joint Exhibits 1-5, which were received in evidence.

Petitioners called as witnesses Anthony Brady, president of the Conservation Alliance; Kevin Stinnette,[2/] a member of the Board of Directors of the Conservation Alliance; George Jones, an officer member of the Board of Directors of the Conservation Alliance during the period of 2008-2009; and Elaine Tronick

Souza, formerly known as Elaine Romano. Though Ms. Souza no longer goes by the name Elaine Romano, she will be referred to as Elaine Romano for purposes of this Recommended Order of Dismissal. Petitioners' Exhibits 1-4, 6, 8, 37, and 38 were received in evidence. Petitioners' Exhibit 38 is the deposition testimony of Lucinda Sparkman who was, at all times pertinent to this proceeding, a paralegal for the Ruden McClosky law firm (Ruden McClosky). Ms. Sparkman's deposition transcript has been accepted and considered as though the witness testified in person.

FPUA called as its witness Dr. Robert Maliva, who was accepted as an expert in hydrogeology, sedimentary geology, and underground injection control (UIC) operations. Respondent's Exhibits 2, 3, 10B, and 21 were received in evidence. Respondent's Exhibit 21 is the deposition testimony of Ronald H. Noble who was, at all times pertinent to this proceeding, an attorney with the Fowler, White, Boggs law firm. Mr. Noble's deposition transcript has been accepted and considered as though the witness testified in person.

Allied presented its case in conjunction with that of FPUA, and did not independently call any witnesses or move any exhibits into evidence.

The DEP did not call any witnesses or move any exhibits into evidence.

Official recognition was taken of the Petition for Formal Proceedings, the Amended Petition for Formal Proceedings, and the Second Amended Petition for Formal Proceedings.

The three-volume Transcript was filed on February 20, 2013. After two unopposed extensions of time for filing post-hearing submittals were requested and granted, the parties filed their proposed orders, which have been considered in the preparation of this Recommended Order of Dismissal.

FINDINGS OF FACT

The Parties

1. The Conservation Alliance is a Florida not-for-profit corporation in good-standing, with its corporate offices currently located at 5608 Eagle Drive, Fort Pierce, Florida. The Conservation Alliance has approximately 200 members.

2. Elaine Romano is a resident of St. Lucie County, Florida.

3. The DEP is an agency of the State of Florida having jurisdiction for permitting UIC facilities and the waste-streams being discharged to such facilities, pursuant to chapter 403, Florida Statutes, and the rules promulgated thereunder. Pursuant to that authority, the DEP issued the Permit Modification that is the subject of this proceeding.

4. FPUA provides utility service to the City of Fort Pierce, Florida. FPUA owns and operates a Class I industrial

injection well (IW-1), discharges to which are the subject of the Permit Modification.

5. Allied owns and operates a chlorine bleach manufacturing facility which produces a brine waste-stream that is proposed for disposal to IW-1.

Issuance of the Permit Modification

6. On December 19, 2008, the DEP issued a Notice of Permit, Permit Number 171331-002-UO (FPUA operation permit), which authorized the operation of IW-1 at the Gahn wastewater treatment plant. The Gahn wastewater treatment plant and IW-1 are owned and operated by the FPUA. The FPUA operation permit authorized the disposal of concentrate and water treatment by-product from FPUA's reverse-osmosis water facility at a permitted rate of 2.8 million gallons per day.

7. FPUA also owns and operates water production wells that serve the City of Fort Pierce potable water supply system. IW-1 was constructed within 500 feet of three of the FPUA production wells, which required FPUA to obtain a variance from setback requirements.

8. On July 17, 2008, prior to the issuance of the FPUA operation permit, Allied submitted an application for a major modification of the FPUA operation permit. The application proposed the disposal to IW-1 of up to 21,600 gallons per day of a brine waste-stream that is a by-product of the production of

chlorine bleach. The application cover letter provides that "[w]hile we have been notified that this project is only a Minor Permit Modification, we feel by submitting for a Major Permit Modification that the Department will have the ability to review the application and downgrade the application to a Minor Permit Modification, if needed."

9. On December 30, 2008, the DEP issued the Permit Modification as a minor modification of the FPUA operation permit. The Permit Modification allowed a maximum of 21,600 gallons of brine to be received at the FPUA facility and disposed of in IW-1.

Notice of the Permit Modification

10. On or about September 12, 2008, a paralegal for Ruden McClosky, Lucinda Sparkman, requested information from the DEP regarding the procedure for receiving notification of permit applications and DEP action thereon. Her request was subsequently refined to request notice regarding two permits, those being "injection Well Construction, application #171331-003," and the other being "Water-Industrial Wastewater, application #FLA017460-004." DEP File No. 171331-003 is that pertaining to the Permit Modification.

11. At the time of the request, Ruden McClosky represented Odyssey Manufacturing Company (Odyssey), an economic competitor of Allied.[3/]

12. On September 24, 2008, Ms. Sparkman asked to be "put on the distribution list for the URIC permit for Fort Pierce."

13. From September 24, 2008 through December 15, 2008, Ms. Sparkman made periodic requests for information, and received periodic updates from the DEP.

14. On December 19, 2008, the DEP sent Ms. Sparkman an e-mail indicating that the FPUA operation permit had been issued, and later that same day sent Ms. Sparkman an electronic copy of the permit.

15. On December 19, 2008, Ruden McClosky made a public records request to FPUA for, among other items, records pertaining to the disposal of brine to the Gahn Water Plant underground injection well, and any agreements between FPUA and Allied regarding the disposal of brine. The request was made on behalf of Florida Tire Recycling, Inc. (Florida Tire).

16. On December 22, the DEP sent Ms. Sparkman a copy of the notice of intent for the FPUA operation permit.

17. There is no record evidence of further communication or inquiry between Ruden McClosky and the DEP from December 22, 2008 to January 14, 2009.

18. On January 9, 2009, notice of the Permit Modification was published in the Fort Pierce Tribune. The notice was prepared and publication arranged by counsel for Allied.

19. The published notice provides the information required by rule 62-110.106(7)(d), and stated that any challenge to the Permit Modification was required to be received by DEP within 14 days of publication or, for persons that requested actual notice, within 14 days of receipt of such actual notice.

20. On January 14, 2009, Ms. Sparkman called her contact person at the DEP to inquire about the Permit Modification. That call was not returned.

21. On January 21, 2009, Ms. Sparkman again called the DEP to inquire about the Permit Modification. In response to Ms. Sparkman's inquiry, the DEP sent Ms. Sparkman an electronic copy of the Permit Modification. Ms. Sparkman made further inquiry on January 21, 2009, as to whether the notice of the Permit Modification had been published in a newspaper. On January 22, 2009, the DEP replied that "[e]verything was noticed as required."

22. On January 22, 2009, the Fort Pierce Tribune prepared an affidavit of publication of the notice. The affidavit of publication was received by counsel for Allied on January 28, 2009, who sent the affidavit to the DEP by certified mail on January 29, 2009.

Alleged Defects in the Notice of Permit Modification

23. Petitioners have alleged a number of procedural defects that they contend render the published notice

ineffective to establish a deadline of 14 days from the date of the notice to file a challenge to the Permit Modification.

Late Proof of Publication

24. Petitioners allege that Allied filed the proof of publication with the DEP more than seven days from the date of publication, and that delay made such publication ineffective to establish a deadline for filing the petition. Although the proof of publication was provided to the DEP on or shortly after January 29, 2009, the evidence demonstrates that Allied provided the proof of publication to the DEP immediately upon receipt from the Fort Pierce Tribune newspaper. The delay in filing was not within the control of Allied, or anyone else associated with the Permit Modification.

25. As established by rule 62-110.106(9), proof of publication is required by the DEP to provide assurance to the DEP that required notice has, in fact, been published, with the sanction being the delay or denial of the permit. The rule does not suggest that a delay in providing proof of publication to the DEP serves to alter or extend the time for filing a petition.

26. There is little case law construing the effect of a delay in providing proof of publication on the petition rights of a person challenging the proposed agency action. However, the undersigned agrees with, and adopts, the following analysis

of the issue provided by Administrative Law Judge P. Michael Ruff:

> . . . the purpose of requiring an applicant to publish notice of agency action is to give substantially affected persons an opportunity to participate in an administrative proceeding. See Section 403.815, Florida Statutes, and Rule 17-103.150(4), Florida Administrative Code. Consequently, the crucial element in the Department's publication requirement is that the notice be published to trigger the commencement of the time for affected persons to request a hearing. The requirement that proof of publication be provided to the Department does nothing to affect the rights of third parties, but merely is a technical requirement which allows the Department to determine whether a third party has timely exercised its rights to contest a published notice of intended agency action. If an applicant publishes notice of intended agency action, but fails to timely provide the Department with proof of that publication, the deficiency is one which is easily cured. No harm will occur because the permit will not be issued until proof of publication is received by the Department, in any event, because of Rule 17-103.510(4), Florida Administrative Code.

Bio-Tech Tracking Systems, Inc. v. Dep't of Envtl. Reg., Case No. 90-7760, ¶32 (Fla. DOAH Apr. 3, 1991; Fla. DER May 17, 1991).

27. The filing of the notice beyond the seven-day period in rule 62-110.106(5) was, at most, harmless error, did not adversely affect any rights or remedies available to

Petitioners, and does not affect the fairness of this proceeding.

Notice Prepared by Counsel

28. Petitioners allege that the notice was prepared by Allied's counsel, rather than the DEP, and that the notice was therefore ineffective to establish a deadline for filing the petition. Publication of the notice of the Permit Modification was not required, since it was a minor modification. Thus, publication was at Allied's option.

29. Rule 62-110.106(10)(a) provides, in pertinent part, that:

> Any applicant or person benefiting from the Department's action may elect to publish notice of the Department's intended or proposed action . . . in the manner provided by subsection (7) or (8) above. Upon presentation of proof of publication to the Department before final agency action, any person who has elected to publish such notice shall be entitled to the same benefits under this rule as a person who is required to publish notice.

The most logical construction of rule 62-110.106 is that the DEP is responsible for preparing required notices pursuant to rule 62-110.106(7)(c), but that non-required notices may be prepared and published at the applicant's or beneficiary's option without direct DEP involvement. In this case, the notice was prepared by an authorized agent of the corporate "person" that benefitted from the Permit Modification.

30. The more salient point regarding the preparation of the notice is whether it contained all of the information required by rule. The evidence demonstrates that it did, and that the notice was sufficient to provide a meaningful and complete point of entry to the public of the Permit Modification and the rights attendant thereto.

31. The fact that the notice was prepared by Allied's counsel was, at most, harmless error, did not adversely affect any rights or remedies available to Petitioners, and does not affect the fairness of this proceeding.

Lack of Actual Notice

32. Petitioners allege error in the notice process because actual notice of the Permit Modification was not provided to Petitioners. The basis for the alleged deficiency was that Mr. Stinnette had, in 2003, asked to be placed on the DEP's UIC mailing list, but did not receive the notice of the Permit Modification.

33. Rule 62-110.106(2) provides that published notice establishes the point of entry for the public to challenge proposed agency action "except for persons entitled to written notice personally or by mail under Section 120.60(3), Florida Statutes, or any other statute." Section 120.60(3) provides that a notice of proposed agency action shall be mailed "to each

person who has made a written request for notice of agency action."

34. The preponderance of the evidence demonstrates that Mr. Stinnette was acting solely as an agent of Indian Riverkeeper when he requested to be placed on the UIC mailing list. He was not requesting notices in his personal capacity, or as an agent of the Conservation Alliance or Ms. Romano. Thus, Indian Riverkeeper was entitled to notice of the Permit Modification. Indian Riverkeeper is not a party to this proceeding. The undersigned is not willing to attribute a request for actual notice to any person other than the person requesting such notice.

35. The DEP's failure to provide written notice of the Permit Modification to Indian Riverkeeper did not adversely affect any rights or remedies available to the Conservation Alliance or Ms. Romano, and does not affect the fairness of this proceeding.

Lack of Information Pursuant to Rule 62-528.315(7)

36. Finally, Petitioners argue that the published notice was ineffective because it did not include the name, address, and telephone number of a DEP contact person, citing rule 62-528.315(7)(d). The provision cited by Petitioners involves DEP notices that are required when the DEP has prepared a draft

permit, draft consent order, or has scheduled a public meeting as identified in rule 62-528.315(1).

37. The notice requirement in rule 62-528.315(7) does not apply to a notice of proposed agency action, which is governed by rule 62-528.315(10), and which provides that:

> "[a]fter the conclusion of the public comment period described in Rule 62-528.321, F.A.C., and after the conclusion of a public meeting (if any) described in Rule 62-528.325, F.A.C., the applicant shall publish public notice of the proposed agency action including the availability of an administrative hearing under Sections 120.569 and 120.57, F.S. This public notice shall follow the procedure described in subsection 62-110.106(7), F.A.C. (emphasis added).

The published notice of the Permit Modification was consistent with the notice described in rule 62-110.106(7), and therefore complied with rule 62-528.315(10).

38. For the reasons set forth herein, there were no defects in the published notice of proposed agency action that serve to minimize the effect of that published notice on the time for filing a petition challenging the Permit Modification, that adversely affect any rights or remedies available to the Conservation Alliance or Ms. Romano, or that affect the fairness of this proceeding.

Representation of Petitioners by Ruden McClosky

39. Petitioners were not represented by Ruden McClosky at the time Ruden McClosky requested actual notice of any DEP agency action regarding FPUA.

40. Petitioners were not represented by Ruden McClosky at the time Ruden McClosky requested actual notice of any DEP agency action regarding Allied.

41. The parties stipulated that an attorney-client relationship was formed between the Petitioners and Ruden McClosky on or after January 1, 2009. No further specificity was stipulated.

42. On February 3, 2009, Ruden McClosky sent an engagement letter to the Conservation Alliance regarding governmental and administrative challenges to the Permit Modification. The engagement was accepted by Mr. Stinnette on behalf of the Conservation Alliance on February 4, 2009. The Petition for Formal Proceedings, which named the Conservation Alliance as a party, was filed with the DEP on February 4, 2009.

43. On February 10, 2009, Ruden McClosky sent an engagement letter to Ms. Romano regarding governmental and administrative challenges to the Permit Modification. There is no evidence that the engagement was accepted by Ms. Romano. Ms. Romano testified that she has never spoken or corresponded with anyone from Ruden McClosky, and had no knowledge that she

was being represented by Ruden McClosky. Ms. Romano had no input in drafting any of the petitions filed on her behalf, and had no recollection of having ever read the petitions. The Amended Petition for Formal Proceedings, which named Ms. Romano as a party, was filed with the DEP on February 12, 2009.

44. Both of the Ruden McClosky engagement letters reference an "Other Client" that had an interest in challenging the Permit Modification, which "Other Client" would be responsible for paying all fees and costs, and would be involved in the approval of all work performed by Ruden McClosky. The parties stipulated that the "Other Client" was Odyssey.

45. The date of an engagement letter is not dispositive as to the date on which an attorney-client relationship is established. It is, however, evidence that can be assessed with other evidence to draw a conclusion as to the date that the relationship commenced.

46. The preponderance of the evidence demonstrates that requests for notice made prior to January 21, 2009, regarding the FPUA operation permit and the Permit Modification that is the subject of this proceeding were made on behalf of Odyssey or Florida Tire, existing clients of Ruden McClosky.

47. The preponderance of the evidence leads the undersigned to find that Ruden McCloskey commenced its representation of the Conservation Alliance with regard to the

instant case no earlier than January 21, 2009, the date on which Ruden McClosky received notice that the Permit Modification had been issued.

48. The preponderance of the evidence leads the undersigned to find that Ruden McCloskey commenced its representation of Ms. Romano with regard to the instant case after January 21, 2009, if at all.

Filing of the Petitions

49. The 14th day after publication of the notice of the Permit Modification fell on January 23, 2009.

50. On February 4, 2009, the initial Petition for Formal Proceedings was filed challenging the DEP issuance of the Permit Modification. The Petition named the Conservation Alliance as a party.

51. On February 12, 2009, an Amended Petition for Formal Proceedings was filed that, among other things, added Ms. Romano as a party.

Allegations of Standing - Conservation Alliance

52. The Conservation Alliance is a non-profit, Florida corporation incorporated in 1985. It has at least 100 members that reside in St. Lucie County. It was formed for the general purpose of protecting the "water, soil, air, native flora and fauna," and thus the environment of St. Lucie County.

53. In the Petition for Formal Proceedings, as it has been amended, the Conservation Alliance made specific allegations as to how the issuance of the Permit Modification may affect its substantial interests. Those allegations are related, first, to the effect of the Permit Modification on the FPUA public water supply that serves members of the Conservation Alliance and, second, to the effect of the Permit Modification on the ability of the members to recreate and enjoy the waters of St. Lucie County.

FPUA Water Service

54. In its Second Amended Petition for Formal Proceedings, the Conservation Alliance alleged that "[m]embers of the Alliance own real property or otherwise reside within the service area of FPUA, and are, in fact, serviced by FPUA." As a result, the members "will be adversely affected by the injection of the Allied waste stream into IW-1, which is located within 500 feet of three potable water supply sources, from which . . . Romano and the Alliance's members are provided with potable water," resulting in "a potential for those contaminants and hazardous materials to get into Petitioners' source of potable water."

55. Mr. Brady, the Conservation Alliance's president, does not receive water service from the FPUA.

56. Mr. Brady did not know how many members of the Conservation Alliance received water service from the FPUA. Persons living in unincorporated areas of Fort Pierce do not receive potable water from the FPUA. A mailing address of "Fort Pierce" does not mean that the person lives in the incorporated City of Fort Pierce. Mr. Brady "assumed" many of the members lived in the City of Fort Pierce, but offered no admissible, non-hearsay evidence of any kind to support that assumption.

57. Mr. Stinnette testified that he was "confident that we have members that receive water from [FPUA]" but was not able to quantify the number of said members. As with Mr. Brady, Mr. Stinnette offered no admissible, non-hearsay evidence of any kind to support his belief.

Recreational and Environmental Interests

58. In its Second Amended Petition for Formal Proceedings, the Conservation Alliance alleged that ". . . Romano and the Alliance's members utilize and protect the waters of St. Lucie County. Petitioners' recreational and environmental interests will be adversely affected if the Allied waste stream leaves the injection well area and flows into the rivers, streams, and or ocean."

59. Mr. Brady understood that one member of the Conservation Alliance, George Jones, fished in the C-24 canal, although Mr. Brady had not personally fished there for 25 years.

Mr. Brady otherwise provided no evidence of the extent to which members used or enjoyed the waters in or around St. Lucie County.

60. Mr. Stinnette has recreated in various water bodies that are tributaries of the Indian River Lagoon system. He indicated that he had engaged in recreational activities in and on the waters of St. Lucie County with "dozens" of people over the past 16 years, some of whom were members of the Conservation Alliance. There was no evidence offered as to how many of those persons were members of the Conservation Alliance, as opposed to members of other organizations or of no organization at all, or whether they were current members during the period relevant to this proceeding. Mr. Stinnette testified that the previously mentioned Mr. Jones said that he kayaked in the waters of St. Lucie County but, as to the recreational activities of other members, testified that "I don't know, I don't keep up with their day-to-day activities to that extent."

61. Although Mr. Jones testified at the hearing, he provided no information as to the nature or extent of his recreational uses of the waters of St. Lucie County.

62. The only evidence of Mr. Jones' use of the waters of St. Lucie County is hearsay. Thus, the only finding that can be made as to the recreational use of the waters of St. Lucie County by current members of the Conservation Alliance is

limited to the recreational use by a single member, Mr. Stinnette.

Petitioner, Elaine Romano

63. Ms. Romano is a member of the Conservation Alliance. The allegations regarding Ms. Romano's substantial interests in this proceeding were the same as those of the Conservation Alliance as set forth above.

FPUA Water Service

64. Ms. Romano has her primary residence at 3436 Roselawn Boulevard, Fort Pierce, Florida. Her residence is not served by FPUA.

65. Ms. Romano is the executor of the estate of her mother, Marion Scherer. The estate owns a residence at 1903 Royal Palm Drive, Fort Pierce, Florida that is currently vacant. That residence is served by FPUA. The estate is not a party to this proceeding.

Recreational and Environmental Interests

66. Ms. Romano attends certain meetings and functions of the Conservation Alliance, but offered no testimony of her use or enjoyment of any natural resources that could be affected by the Permit Modification. In that regard, her interest in this case was precipitated by a desire to support her mother's interest in ecology.

CONCLUSIONS OF LAW

Jurisdiction

67. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

Timeliness

Burden of Proof

68. Petitioners have the burden of proving that the Petition for Formal Proceedings was timely filed since its timeliness has been challenged by FPUA and Allied. Potter v. Dep't of Envtl. Prot., Case No. 10-9417 (Fla. DOAH Oct. 14, 2011; Fla. DEP Jan 4, 2012); Hasselback v. Dep't of Envtl. Prot., Case No. 07-5216 (Fla. DOAH Jan. 28, 2010; Fla. DEP Mar. 12, 2010), rev. on other grounds, Hasselback v. Dep't of Envtl. Prot., 54 So. 3d 637 (Fla. 1st DCA 2011).[4/]

Analysis

69. Section 120.569(1) states, in pertinent part, that:

> Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review; and shall state the time limits which apply.

70. Pursuant to chapter 120, persons affected by agency action must be given a "clear point of entry" to challenge that action. In that regard:

> an agency's rules must clearly signal when the agency's free-form decisional process is completed or at a point when it is appropriate for an affected party to request formal proceedings . . . . In other words, an agency must grant affected parties a clear point of entry, within a specified time after some recognizable intended agency action to formal or informal administrative proceedings.

Capeletti Bros. v. Dep't of Transp., 362 So. 2d 346, 348 (Fla. 1st DCA 1978).

71. Rule 62-110.106, entitled Decisions Determining Substantial Interests, provides, in pertinent part, as follows:

> (2) "Receipt of Notice of Agency Action" Defined. As an exception to subsection 28-106.111(2), F.A.C., for the purpose of determining the time for filing a petition for hearing on any actual or proposed action of the Department as set forth below in this rule, "receipt of notice of agency action" means either receipt of written notice or publication of the notice in a newspaper of general circulation in the county or counties in which the activity is to take place, whichever first occurs, except for persons entitled to written notice personally or by mail under Section 120.60(3), Florida Statutes, or any other statute.
>
> * * *
>
> (3) Time for Filing Petition.
>
> (a) A petition shall be in the form required by Rule 28-106.201 or 28-106.301, F.A.C., and must be filed (received) in the office of General Counsel of the Department within the following number of days after receipt of notice of agency action, as

> defined in subsection (2) of this rule above:
>
> 1. Petitions concerning Department action or proposed action on applications for permits under Chapter 403, Florida Statutes, and related authorizations under Section 373.427, Florida Statutes, (except permits for hazardous waste facilities): fourteen days;
>
> * * *
>
> (10)(a) Any applicant or person benefiting from the Department's action may elect to publish notice of the Department's intended or proposed action (or notice of a proceeding on such intended action) in the manner provided by subsection (7) or (8) above. Upon presentation of proof of publication to the Department before final agency action, any person who has elected to publish such notice shall be entitled to the same benefits under this rule as a person who is required to publish notice.

72. Notice of the Permit Modification was published in the Ft. Pierce Tribune on January 9, 2009. That notice established a clear point of entry that met the requirements of rule 62-110.106.[5/]

73. The Petition for Formal Proceeding was initially filed on February 4, 2009, well after the January 23, 2009, deadline established by the notice.

74. Petitioners argue that their time for filing the Petition for Formal Proceeding ran from the time Ruden McClosky received actual notice of the Permit Modification on January 21, 2009.

75. Ruden McClosky requested notice of the Permit Modification on behalf of existing clients, well before any attorney-client relationship was formed between Ruden McClosky and Petitioners.

76. The notice of the Permit Modification was published prior to any attorney-client relationship having been formed between Ruden McClosky and Petitioners.

77. At the time the notice was published, Petitioners had not requested actual notice of the Permit Modification, and had no agency relationship with any person or entity that had requested such notice on their own behalf. Thus, the time frame for Petitioners to file a challenge to the Permit Modification commenced upon the publication of the notice on January 9, 2009.

78. The undersigned concludes that the subsequently-formed relationship between Petitioners and Ruden McClosky did not serve to extend Petitioners' time to file a challenge to the Permit Modification that was established pursuant to the clear point of entry provided by the published notice.

79. The issue in this case of the attribution of notice based on an attorney-client relationship is analogous to that addressed in Hasselback v. Fla. Dep't of Envtl. Prot., 54 So. 3d 637 (Fla. 1st DCA 2011). The facts of that case, as set forth in the underlying orders,[6/] are as follows:

80. In 2000 and 2002, Mr. Hasselback was represented by a law firm in challenges to DEP agency action regarding coastal construction adjacent to property owned by Mr. Hasselback and others. During the period that the attorney-client relationship was in effect, the law firm requested, on behalf of Mr. Hasselback and the other property owners, notice of other permit applications that might affect their interests.

81. The final order denying the 2002 action was entered in August 2003, at which time Mr. Hasselback asserted the attorney-client relationship ended. No written evidence of the termination existed. The law firm continued to hold itself out as representing Mr. Hasselback and the other property owners.

82. In 2004, the DEP issued a coastal construction permit that affected Mr. Hasselbacks's substantial interests. Pursuant to the earlier request, the DEP provided actual notice of the permit to the law firm. The notice was not published.

83. Three years after the 2004 coastal construction permit was issued, Mr. Hasselback filed a petition, alleging that he had not received notice. The administrative law judge and the DEP determined an attorney-client relationship continued to exist between Mr. Hasselback and the law firm at the time the notice was received by the law firm, and therefore the notice requested by the law firm could be attributed to Mr. Hasselback.

The result was the dismissal of Mr. Hasselback's petition as being untimely filed.

84. On appeal, the First District Court of Appeal determined that the 2004 written notice of the permit provided to the law firm, pursuant to its earlier request, could not be attributed to Mr. Hasselback because:

> [t]here is also no evidence that an attorney-client relationship existed between Hasselback and the law firm at the time of the notice . . . . Although the law firm requested notice of any agency action relating to the adjacent property, that request did not reference Hasselback. (emphasis added).

Hasselback v. Fla. Dep't of Envtl. Prot., 54 So. 3d at 638.

85. Although Hasselback differs in some respects from the facts of this case, the general principles regarding the establishment and effect of an agency relationship on a point of entry to an administrative proceeding expressed in Hasselback are applicable.

86. Ruden McClosky did not represent Petitioners and was not acting on behalf of Petitioners at the time it requested notice of the Permit Modification from the DEP. Ruden McClosky did not represent Petitioners and was not acting on behalf of Petitioners at the time the notice of the Permit Modification was published. The "clear point of entry" provided by the published notice became effective as to Petitioners on

January 9, 2009, and was not modified or extended as a result of its subsequently-created relationship with Ruden McClosky.

87. As set forth in the findings of fact, the alleged deficiencies in the notice are not sufficient to invalidate the clear point of entry, or to alter the time to bring a challenge to the Permit Modification as established by the published notice. Therefore, Petitioners' deadline for filing their Petition was January 23, 2009.

88. Based on the foregoing, the Petition for Formal Proceedings filed on February 4, 2009, was untimely, and should be dismissed.

Standing

Burden of Proof

89. As the persons asserting party status, Petitioners have the burden of demonstrating the requisite standing to initiate and maintain this proceeding. Palm Beach Cnty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); Agrico Chem. Co. v. Dep't of Envtl. Reg., 406 So. 2d 478, 482 (Fla. 2nd DCA 1981).

Standard

90. Standing to challenge agency action is generally determined by application of the two-pronged test for standing in formal administrative proceedings established in the seminal case of Agrico Chemical Corp. v. Department of Environmental

Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, 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.

Id. at 482.

91. Agrico was not intended as a barrier to the participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action. Rather, "[t]he intent of Agrico was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings." Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot., 948 So. 2d 794, 797 (Fla. 1st DCA 2006)(citing Gregory v. Indian River Cnty., 610 So. 2d 547, 554 (Fla. 1st DCA 1992)).

92. The standing requirement established by Agrico has been refined, and now stands for the proposition that standing to initiate an administrative proceeding is not dependent on proving that the proposed agency action would violate applicable law. Instead, standing requires proof that the Petitioner has a

substantial interest and that the interest reasonably could be affected by the proposed agency action. Whether the effect would constitute a violation of applicable law is a separate question. Thus, as presently applied:

> Standing is "a forward-looking concept" and "cannot 'disappear' based on the ultimate outcome of the proceeding." . . . When standing is challenged during an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests "could reasonably be affected by . . . [the] proposed activities."

Palm Beach Cnty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot., 14 So. 3d at 1078(citing Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1083 (Fla. 2nd DCA 2009) and Hamilton Cnty. Bd. of Cnty. Comm'rs v. State, Dep't of Envtl. Reg., 587 So. 2d 1378 (Fla. 1st DCA 1991)); see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011) ("Ultimately, the ALJ's conclusion adopted by the Governing Board that there was no proof of harm or that the harm would be offset went to the merits of the challenge, not to standing.").

93. The Conservation Alliance has alleged standing as an association acting on behalf of the interests of its members.[7/] It is well established that:

> for an association to establish standing under section 120.57(1) when acting solely as a representative of its members, it must demonstrate that "a substantial number of its members, although not necessarily a majority, are substantially affected by the challenged rule," that "the subject matter of the challenged rule is within the association's general scope of interest and activity," and that "the relief requested is of a type appropriate for a trade association to receive on behalf of its members."

St. John's Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d at 1054,(citing Farmworker Rights Org., Inc. v. Dep't of HRS, 417 So.2d 753 (Fla. 1st DCA 1982)); see also Florida Home Builders Ass'n v. Dept. of Labor & Emp. Sec., 412 So. 2d 351 (Fla. 1982).

94. Although St. John's Riverkeeper, Inc. involved a rule-challenge proceeding, its identification of the factors necessary for an association to demonstrate standing apply with equal force in a licensing proceeding. See Friends of the Everglades, Inc. v. Bd. of Trs. of the Int. Imp. Trust Fund, 595 So. 2d 186, 188 (Fla. 1st DCA 1992)("To meet the requirements of standing under the APA, an association must demonstrate that a substantial number of its members would have standing.").

Standing of the Conservation Alliance under Chapter 120

95. The Conservation Alliance Articles of Incorporation establish that it was formed to "protect the water, soil, air,

native flora and fauna, upon which all the earth's creatures depend for survival."

96. The challenge to the Permit Modification is based on the adverse effects of "the injection of the Allied waste stream into IW-1, which is located within 500 feet of three potable water supply sources, from which . . . Romano and the [Conservation] Alliance's members are provided with potable water," and on the adverse affects on "Petitioners' recreational and environmental interests . . . if the Allied waste stream leaves the injection well area and flows into the rivers, streams, and or ocean."

97. The subject matter of the challenge to the Permit Modification is within the Conservation Alliance's general scope of interest and activity. Furthermore, the relief requested, i.e., denial of the Permit Modification, is of a type appropriate for an organization of the nature of the Conservation Alliance to receive on behalf of its members.

98. The Conservation Alliance did not plead or prove that it would suffer an injury in fact of sufficient immediacy to entitle it to a hearing in its individual capacity. Thus, the remaining issue for the determination of the Conservation Alliance's standing is whether a substantial number of its members are substantially affected by the proposed Permit Modification as alleged in the Second Amended Petition for

Formal Proceedings. The Conservation Alliance failed to prove this element of standing.

99. Despite having its standing to maintain this proceeding placed squarely at issue, the Conservation Alliance produced no business record, service-area map, or other admissible, non-hearsay evidence that could have established that its members reside in the FPUA service area or are served by the FPUA water system. Mr. Brady's "assumption" and Mr. Stinnette's "confidence" that there must be members who receive water service from FPUA are insufficient to support a finding of fact on the issue. In short, despite specific allegations in the petition that members were served by FPUA, there was no competent, substantial evidence of any member receiving water service from FPUA.

100. Similarly, the Conservation Alliance offered no competent, substantial, and non-hearsay evidence of any member, other than Mr. Stinnette, who engaged in recreation or otherwise used the waters of St. Lucie County. A single member is not a "substantial number" of members in the context of the Conservation Alliance's total membership of approximately 200 persons, and is insufficient to support a determination that the Conservation Alliance has standing in this proceeding.

101. For the reasons set forth herein, the Conservation Alliance failed to demonstrate that its substantial interests

would be affected by the Permit Modification, and therefore failed to establish that it has the requisite standing under chapter 120 to initiate and maintain this proceeding.

Standing of the Conservation Alliance under Section 403.412(6)

102. Section 403.412(6), provides that:

> 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.

103. Despite this case having been pending for more than four years, the Conservation Alliance's standing under section 403.412(6) was never pled.

104. During the course of the hearing on standing and timeliness, standing under section 403.412(6) was raised on several occasions at which time it was acknowledged that section 403.412(6) was not being asserted by the Conservation Alliance as a basis for standing. Among the exchanges were the following:

> THE COURT: Right. All right. So Mr. Hartsell, in terms of standing, why don't we start with 09-1588, and if you want to put your standing witnesses on to

demonstrate that they're substantially affected or that they meet the standing elements, and I believe 403.412, Sub (6) was alleged as an element of standing in [09-1588].
MR. HARTSELL: Okay.

MR. CLEVELAND: No, Your Honor, actually in the [09-1588] case, 403.412(6) is not one of the bases and we -- Mr. Hartsell and I discussed that and set up the stipulations accordingly.

THE COURT: All right. Then Mr. Hartsell, put on your standing witnesses and we'll proceed.

MR. HARTSELL: Okay. . . [8/]

and

MR. BEASON: Your Honor, just if I could, I don't want to restate the obvious, but I believe at least the 09-1588 case is a 403.412, Subsection (6) standing --

MR. BANDKLAYDER: Negative.

MR. CLEVELAND: No, that's not true.

MR. BEASON: Then what -- I thought it was. What is the standing issue? Because that's going to define the scope of the relevance.

MR. BANDKLAYDER: The claim is that the Petitioners will suffer substantial impacts.

MR. BEASON: So Sub (5)?

MR. ATKINSON: They only cite 403.412 in the [10-3807] case.

MR. BEASON: My apologies.

MR. HARTSELL: Substantial interest.

MR. ATKINSON: I think that was not your Petition, Mr. Hartsell.

MR. HARTSELL: Right. I didn't make that -- [9/]

105. The discussions at the hearing reflected a clear understanding of all of the parties that standing under section 403.412(6) had not been asserted in this case.

106. Despite its failure to plead section 403.412(6) as a basis for standing, the Conservation Alliance notes in its Proposed Recommended Order that "[t]here is no reason why the Conservation Alliance would not be granted leave to amend their Petition to allege standing under Section 403.412(6), Florida Statutes if it motioned this Honorable Administrative Law Judge to do so." That statement begs the question of why such a direct motion has not been made.

107. It is plain that standing must be proven by the person asserting party status. The more difficult question is whether proof of the facts necessary to establish standing is sufficient on its own to determine the issue, or whether the specific statute under which standing is sought, in this instance section 403.412(6), must be pled. There is scant case law directly addressing the issue.

108. In St. Johns Riverkeeper, Inc. v. St. Johns River Water Management District, Case No. 08-1316 (DOAH Jan. 12, 2009; SJRWMD Apr. 15, 2009), Administrative Law Judge J. Lawrence

Johnston took up an ore tenus motion made at the conclusion of the Petitioner's case to conform its petition to the evidence, and allow the petition to be amended to allege standing under section 403.412(6). After considerable discussion -- which included recognition of the fact that Petitioner had, only days before the hearing, added members in Seminole County, Florida, to meet the requirement that there be more than 25 members in that county -- Judge Johnston concluded that the facts necessary to support standing under section 403.412(6) had been proven, and granted the motion to amend in his Recommended Order.[10/]

109. In its Final Order, the St. Johns River Water Management District disagreed with the concept that first alleging 403.412(6) standing at the conclusion of a hearing could serve to "initiate" a proceeding, but ultimately decided that "in an abundance of caution . . . the appropriate course of action at this time is to not deny Riverkeeper standing under section 403.412(6), F.S. The entire matter is more appropriately addressed by the appellate court, which may review the District's statutory interpretation without any issue as to substantive jurisdiction."[11/]

110. By the time the matter was taken up on appeal, the issue of standing under section 403.412(6) was apparently no longer in dispute, having been accepted and thereupon relegated

to a footnote. St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011).

111. Well-established principles of law regarding the amendment of pleadings suggest that, if the facts necessary to support standing have been proven, it would be an abuse of discretion to dismiss a petition based on a lack of standing. As stated by the First District Court of Appeal:

> "Public policy favors the liberal amendment of pleadings, and courts should resolve all doubts in favor of allowing the amendment of pleadings to allow cases to be decided on their merit." Laurencio v. Deutsche Bank Nat. Trust Co., 65 So. 3d 1190, 1193 (Fla. 2d DCA 2011) (citations omitted). "As a general rule, refusal to allow amendment of a pleading constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party; the privilege to amend has been abused; or amendment would be futile." Bill Williams Air Conditioning & Heating, Inc. v. Haymarket Coop. Bank, 592 So. 2d 302, 305 (Fla. 1st DCA 1991). Leave to amend a complaint should be given freely to allow a plaintiff to state a cause of action "unless, of course, it is clear that a plaintiff will not be able to state a cause of action." Town of Micanopy v. Connell, 304 So. 2d 478, 480 (Fla. 1st DCA 1974); see also Fla. Nat'l Org. for Women, Inc. v. State, 832 So. 2d 911, 914 (Fla. 1st DCA 2002).

Lewis v. Morgan, 79 So. 3d 926, 930 (Fla. 1st DCA 2012).

112. The undersigned finds that the elements of standing under section 403.412(6) were proven without reliance upon any stipulation of membership. Given the length of time that this

case has been pending, the fact that the substantive issues relating to the Permit Modification have been well pled, and since the case has not yet been scheduled for final hearing, the undersigned finds no prejudice on the part of the DEP, FPUA, or Allied that would result from an amendment of the petition by the Conservation Alliance to plead section 403.412(6) as a basis for standing.

113. Given the foregoing, the undersigned agrees with the Conservation Alliance that, had a motion been made, leave to amend the petition to allege standing under section 403.412(6) would have been granted. In order to facilitate the judicially-recognized policy of allowing liberal amendment of pleadings, the undersigned is willing to accept the statement in footnote 1 of Petitioners' Proposed Recommended Order as an inartfully pled motion to amend the Conservation Alliance's standing allegations to include section 403.412(6). Based thereon, the undersigned grants the motion.

114. Based on the findings of fact and conclusions of law set forth herein, and subject to other issues of standing and timeliness, the Conservation Alliance has demonstrated its standing under section 403.412(6).

Standing of Elaine Romano

115. Ms. Romano does not live in the service area of the FPUA, and is not served by the FPUA.

116. Ms. Romano offered no evidence that she used or enjoyed any of the natural resources of St. Lucie County. Her stated interest was limited to supporting her mother's interest in "ecology."

117. Ms. Romano failed to demonstrate that she would suffer injuries in fact of sufficient immediacy as a result of the Permit Modification, and therefore failed to establish that she has the requisite standing to initiate and maintain this proceeding.

Equitable Tolling

118. Petitioners argue that the doctrine of equitable tolling should be applied in this case to extend the time limits for filing the otherwise untimely petition. Equitable tolling may be raised "as a defense to the untimely filing of a petition." § 120.569(2)(c), Fla. Stat.

119. The burden is on Petitioners to prove by a preponderance of evidence that the doctrine of equitable tolling applies to allow them to file a petition more than 14 days from the publication of the notice of proposed agency action. Steadman v. Dep't of Mgmt. Servs., Case No. 10-8928 (Fla. DOAH Jan. 26, 2011; Fla. DMS Apr. 12, 2011); see also Dept. of Envtl. Reg. v. Puckett Oil Co., 577 So.2d 988 (Fla. 1st DCA 1991) (late filing presumed to be a waiver of rights, but may be rebutted at an evidentiary hearing).

120. The doctrine of equitable tolling is applicable in circumstances where a Petitioner has been "misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." Machules v. Dep't of Admin., 523 So. 2d 1132, 1134 (Fla. 1988).

121. The doctrine of equitable tolling is not available if the Petitioners failed to exercise due diligence in preserving their legal rights. See Jancyn Mfg. Corp. v. Dept. of Health, 742 So. 2d 473, 476 (Fla. 1st DCA 1999) (finding that the failure to seek an extension of time or to file a petition was the result of the party's own inattention, and therefore equitable tolling did not apply where the agency did not mislead the party).

122. Petitioners failed to meet their burden of proof to establish that equitable tolling should be applied to excuse their late-filed petition. Allied published a notice that constituted a clear point of entry into the administrative process on January 9, 2009. Neither the Conservation Alliance nor Ms. Romano had requested actual notice, and neither was represented by any attorney or agent at the time the notice was published. Petitioners failed to monitor the newspaper of general circulation in which the notice appeared.

123. Petitioners cannot rely on alleged deficiencies in the DEP notice to Ruden McClosky because, at all times relevant, Ruden McClosky was not counsel to Petitioners. By the time an attorney-client relationship was formed between Petitioners and Ruden McClosky, Ruden McClosky knew of the issuance of the Permit Modification. If time remained,[12/] Ruden McClosky could have, with the exercise of reasonable diligence, filed a request for an extension of time to file the petition, or filed the petition itself. It did neither.

124. There is absolutely no evidence that the DEP misled or lulled Petitioners into inaction, nor did any party to this proceeding prevent Petitioners in some extraordinary form from asserting their rights. Rather, as was the case in Environmental Resource Associates v. Department of General Services, 624 So. 2d 330, 331 (Fla. 1st DCA 1993), "the problem in this case is the too ordinary occurrence of a [party] failing to meet a filing deadline."

125. Petitioners failed to meet their burden of proving by a preponderance of the evidence that equitable tolling should apply to permit them to file an untimely petition to challenge the Permit Modification.

Conclusions

126. The undersigned concludes that the Petition for Formal Proceeding, as amended, filed by Petitioners,

Conservation Alliance of St. Lucie County, Inc. and Elaine Romano, was not timely.

127. The undersigned concludes that Petitioners, Conservation Alliance of St. Lucie County, Inc. and Elaine Romano, failed to prove that the untimely Petition for Formal Proceeding should nonetheless be accepted as a result of the application of the doctrine of equitable tolling.

128. The undersigned concludes that Petitioners, Conservation Alliance of St. Lucie County, Inc. and Elaine Romano, failed to prove that they are substantially affected by the issuance of the Minor Modification to FDEP Operation Permit 171331-002-UO for IW-1 under 171331-003-UC.

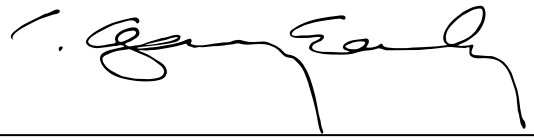
129. The undersigned concludes that Petitioner, Conservation Alliance of St. Lucie County, Inc., though it failed to plead that it had standing pursuant to section 403.412(6), established the facts necessary to demonstrate standing under that statute.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED that Respondent, Department of Environmental Protection, enter a final order dismissing the Petition for Formal Proceeding as amended.

DONE AND ENTERED this 24th day of May, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of May, 2013.

ENDNOTES

[1/] The February 4, 2009 Petition was amended on February 12, 2009, to add Marion Scherer and Elaine Romano as Petitioners. As to those new parties, the February 12, 2009, filing date shall be the date of their initial pleading in this matter. On March 4, 2009, the Petition and Amended Petition were dismissed by the Department, with leave to amend. The Petition was timely amended and re-filed, and was thence forwarded to the Division of Administrative Hearings. Since the filing of the initial pleadings in this matter, Petitioners Marion Scherer and Elsa Millard have, by death or voluntary dismissal, dismissed their claims.

Under relevant authority, the date of the Amended Petition for Formal Proceedings and the Second Amended Petition for Formal Proceedings relate back to the date of filing of the initial pleading for each of the parties, those dates being February 4, 2009, for the remaining original petitioner, Conservation Alliance of St. Lucie County, Inc., and February 12, 2009, for the remaining added petitioner, Elaine Romano. As stated by the Third District Court of Appeal, "[t]he [relate back] doctrine is to be applied liberally to achieve its salutary ends. We have articulated the test to be whether 'the original pleading gives fair notice of the general fact

situation out of which the claim or defense arises.'" (citations omitted) Flores v. Riscomp Indus., 35 So. 3d 146, 148 (Fla. 3rd DCA 2010); see also Holley v. Innovative Technology of Destin, Inc., 803 So. 2d 749 (Fla. 1st DCA 2001); Ron's Quality Towing, Inc. v. Southeastern Bank of Fla., 765 So. 2d 134 (Fla. 1st DCA 2000). Although the cases cited applied Florida Rule of Civil Procedure 1.190, the policy of liberal application of the doctrine applies with equal force in proceedings under chapter 120, Florida Statutes. See Terwilliger v. South Fla. Water Mgmt. Dist. and Fla. Power & Light Co., Case No. 01-1504, ¶122 (Fla. DOAH Feb. 27, 2002; SFWMD Apr. 16, 2002). The Petition for Formal Proceedings gave fair notice of the general fact situation out of which the challenge to the Permit arose.

Based on the foregoing, February 4, 2009, shall be the date by which all analysis of the timeliness of the Petition as to the Conservation Alliance of St. Lucie County, Inc. shall be measured, and February 12, 2009, shall be the date by which all analysis of the timeliness of the Petition as to Elaine Romano shall be measured.

[2/] Mr. Stinnette was recalled to the stand several times to address issues as they arose in the course of the hearing. He was initially called as Petitioners' witness, and will therefore be identified as such.

[3/] Odyssey has paid the attorney's fees and expenses of litigation for each of the Petitioners in this case.

[4/] There is authority for the proposition that, when notice has not been published or provided by a means by which a date certain may be established, and the issue is the date upon which a substantially affected person received actual notice, that parties "seeking to establish waiver based on the passage of time following action claimed as final must show that the party affected by such action has received sufficient notice to commence the running of the time period within which review must be sought." Henry v. Dep't of Admin., 431 So. 2d 677, 680 (Fla. 1st DCA 1983); see also Bryant v. Dep't of HRS, 680 So. 2d 1144 (Fla. 3rd DCA 1996); Symons v. Dep't of Banking and Fin., 490 So. 2d 1322, 1323 (Fla. 1st DCA 1986); see also Terwilliger v. South Fla. Water Mgmt. Dist. and Fla. Power and Light Co., Case No. 01-1504, ¶125 (Fla. DOAH Feb. 27, 2002; SFWMD Apr. 16, 2002)("It is concluded that, while [petitioner] had the burden to prove the merits of his Petition, including his standing, . . . [respondent] had the burden to prove receipt of actual notice

more than 21 days before the filing of [petitioner's] Petition.").

Notice in this case having been published, the "actual notice" cases are not applicable. Thus, since Petitioners seek to avoid the effect of published notice, it is their burden to prove the timeliness of their Petitions, filed more than 14 days after the date of publication.

[5/] As established in the findings of fact herein, the notice was not deficient in any manner that would cause it to be ineffective to establish a deadline for filing the petition. However, even if the notice was deficient for reasons that were not material, e.g., because proof of publication was provided to the DEP more than seven days after publication of the notice, or because the notice was prepared by counsel for Allied, the notice conveyed the information required to establish the clear point of entry. As stated in Judge Ervin's concurring opinion:

> I consider the essential facts in the present case to be practically on all fours with those in Lamar Advertising Co. v. Department of Transportation, 523 So. 2d 712 (Fla. 1st DCA 1988), wherein this court held that although the agency's notice denying a sign permit did not track the precise language in the department's rule concerning such denials, the notice "clearly informed appellant that the application had been denied and that appellant had the right to request a 120.57 hearing within 30 days of the date of the notice." Id. at 713. We thereupon concluded that the applicant had been provided a clear point of entry to administrative review, which had been waived by its noncompliance with the limitation period stated in the notice.

Environmental Resource Assocs. v. State, Dep't of Gen. Servs., 624 So. 2d 330, 331-332 (Fla. 1st DCA 1993).

[6/] Hasselback v. Dep't of Envtl. Prot., Case No. 07-5216 (Fla. DOAH Jan. 28, 2010; Fla. DEP Mar. 12, 2010).

[7/] Second Amended Petition, ¶100.

[8/] Transcript, vol. 1, pg. 28, line 18 through pg. 29, line 7.

[9/] Transcript, vol. 1, pg. 61, line 17 through pg. 62, line 10.

[10/] St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., Case No. 08-1316 (DOAH Jan. 12, 2009; SJRWMD Apr. 15, 2009), Recommended Order at ¶¶106, 138-141.

[11/] St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., Case No. 08-1316 (DOAH Jan. 12, 2009; SJRWMD Apr. 15, 2009), Final Order at p. 9 of 72.

[12/] The facts in this case indicate that the attorney-client relationship was formed between Petitioners and Ruden McClosky no earlier than January 21, 2009. It may have been formed after that date, up to and including the February 4, 2009, date of the engagement letter. If the relationship was formed after the January 23, 2009, deadline for filing the petition, further discussion of equitable tolling would be moot. Riverwood Nursing Ctr., LLC v. Ag. for Health Care Admin., 58 So. 3d 907, 910-911 (Fla. 1st DCA 2011).

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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.