FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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RICK SCOTT
GOVERNOR

HERSCHEL T. VINYARD JR.
SECRETARY

July 9, 2013

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

Re: Conservation Alliance of St. Lucie County, Inc. and Elaine Romano vs. Ft. Pierce Utilities Authority, DEP & Allied New Technologies
DOAH Case No.: 09-1588 DEP/OGC Case No.: 09-0225

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. FPUA & Allied Technologies Exception to Recommended Order
3. DEP's Exceptions to Recommended Order
4. Petitioners' Exceptions to Recommended Order
5. FPUA & Allied New Technologies Response to Exceptions to Recommended Order
6. Petitioners' Response to Respondents' Exceptions to Recommended Order
7. DEP's Response to Petitioners' Exceptions to Recommended Order

If you have any questions, please do not hesitate to contact me at 245-2212 or lea.crandall@dep.state.fl.us.

Sincerely,

Lea Crandall

Lea Crandall
Agency Clerk

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

CONSERVATION ALLIANCE OF ST. LUCIE COUNTY, INC. and ELAINE ROMANO,	)	
Petitioners,	)	
vs.	)	**OGC CASE NO. 09-0225**
	)	**DOAH CASE NO. 09-1588**
FORT PIERCE UTILITIES AUTHORITY and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents,	)	
and	)	
ALLIED NEW TECHNOLOGIES, INC.,	)	
Intervenor.	)	

FINAL ORDER

An Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), on May 24, 2013, submitted a Recommended Order of Dismissal ("ROD") to the Department of Environmental Protection ("DEP" or "Department") in the above captioned administrative proceeding. The ROD is attached hereto as Exhibit A. The ROD shows that copies were served to counsel for all the parties. On June 10, 2013, the Petitioners, Conservation Alliance of St. Lucie County, Inc. ("Conservation Alliance"), and Elaine Romano ("Petitioners") filed their Exceptions to the Recommended Order. The Respondent, Fort Pierce Utilities Authority ("FPUA") and Intervenor, Allied New Technologies, Inc. ("Allied"), filed Exceptions to the

Recommended Order on June 10, 2013. The Respondent Department also filed Exceptions to the Recommended Order on June 10, 2013. All parties filed Responses to Exceptions on June 20, 2013. This matter is now on administrative review before the Secretary of the Department for final agency action.

BACKGROUND

FPUA provides utility service to the City of Fort Pierce, Florida. FPUA owns and operates a Class I industrial injection well ("IW-1"). The Department issued a permit modification to FPUA, on December 30, 2008, for disposal into IW-1 of a brine waste-stream generated by Allied. Allied owns and operates a chlorine bleach manufacturing facility which produces the brine waste-stream that is proposed for disposal to IW-1.

Notice of the permit modification was published in the Fort Pierce Tribune newspaper on January 9, 2009. On February 4, 2009, the Petitioners, 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 forwarded to DOAH. The administrative proceeding was abated for a lengthy period of time while issues related to the disqualification of various lawyers, law firms, and the initially assigned ALJ were resolved.

The parties agreed to a preliminary bifurcated hearing on the standing of the Petitioners and the timeliness of the Petition. The parties agreed that this procedure

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 the 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. Elsa Millard, on January 23, 2013, filed a Notice of Voluntary Dismissal without Prejudice. Ms. Millard was dismissed as a party at the commencement of the hearing, a ruling that was memorialized by an order on May 7, 2013. The preliminary hearing was held on January 23, 2013. The parties filed proposed orders for consideration by the ALJ, who subsequently issued the Recommended Order of Dismissal on May 24, 2013.

SUMMARY OF THE RECOMMENDED ORDER OF DISMISSAL

In the ROD the ALJ recommended that the Department enter a final order dismissing the Petition for Formal Proceeding, as amended. (RO at page 45).

Timeliness

The ALJ concluded that the Petition for Formal Proceeding, as amended, filed by the Petitioners, Conservation Alliance of St. Lucie County, Inc. and Elaine Romano, was not timely. (RO ¶ 126). The ALJ found that the 14th day after publication of the notice of permit modification fell on January 23, 2009. (RO ¶¶ 18-19, 49). The ALJ found that the initial Petition for Formal Proceedings, with the Conservation Alliance as a party,

was filed on February 4, 2009. (RO ¶ 50). The ALJ further found that the Amended Petition for Formal Proceedings, which added Elaine Romano as a party, was filed on February 12, 2009. (RO ¶ 51). The ALJ concluded that the evidence did not establish that there were any defects in the published notice, that either the Conservation Alliance or Elaine Romano were entitled to actual notice, or that the DEP misled or lulled the Petitioners into inaction such that equitable tolling should apply to permit them to file an untimely petition. (RO ¶¶ 29-30, 32-35, 36-38, 39-48, 118-127).

Standing of Elaine Romano

The ALJ found that Ms. Romano does not live in the service area of the FPUA, and is not served by the FPUA. (RO ¶¶ 64, 115). The ALJ found that 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." (RO ¶¶ 66, 116). Thus, the ALJ concluded that Ms. Romano did not demonstrate standing to initiate and maintain this proceeding. (RO ¶¶ 117, 128).

Standing of Conservation Alliance

The ALJ found that the Conservation Alliance did not prove that a substantial number of its members are substantially affected by the proposed permit modification as alleged in the Petition, and therefore failed to establish standing under chapter 120, Florida Statutes. (RO ¶¶ 98, 101, 128). The ALJ found that despite having its standing to maintain this proceeding placed squarely at issue, the Conservation Alliance did not produce a 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. (RO ¶¶ 55-57, 99). The ALJ also found that the Conservation Alliance did not offer 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. (RO ¶¶ 60-62, 100). The ALJ concluded that a single member was not a "substantial number" of members in the context of the Conservation Alliance's total membership of approximately 200 persons, and was insufficient to support a determination that the Conservation Alliance had standing in this proceeding. (RO ¶¶ 100, 128).

The ALJ concluded that the Conservation Alliance established the facts necessary to demonstrate standing under section 403.412(6), Florida Statutes, though it did not plead that it had standing under that statute. (RO ¶¶ 114, 129). The ALJ concluded and agreed with the Conservation Alliance that, had the Conservation Alliance motioned for leave to amend the petition to allege standing under section 403.412(6), Florida Statutes, the motion would be granted. The ALJ deemed the statement in footnote 1 of the Petitioners' Proposed Recommended Order "an inartfully pled motion to amend" the Conservation Alliance's standing allegations. The ALJ further concluded that the elements of standing under section 403.412(6), Florida Statutes, were proven without reliance upon any stipulation of membership; and found no prejudice to the other parties would result from an amendment of the petition by the Conservation Alliance to plead section 403.412(6) as a basis for standing. (RO ¶¶ 112-114).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2012); *Charlotte Cty. v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See, e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez,* 29 So.3d 1191, 1192 (Fla. 5th DCA 2010).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. Sch. Bd.,* 652 So.2d 894 (Fla. 2d DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See, e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). If there

is competent substantial evidence to support an administrative law judge's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So.2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So.2d 622 (Fla. 1st DCA 1986).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cty.*, 746 So.2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001). If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So.2d 161, 168 (Fla. 5th DCA 1994). Neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law," however, in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So.2d 1224 (Fla. 1st DCA 2007).

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla.*

Power & Light Co. v. Fla. Siting Bd., 693 So.2d 1025, 1028 (Fla. 1st DCA 1997). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio,* 622 So.2d at 609.

RULINGS ON EXCEPTIONS

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So.2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So.2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. v. Bradley*, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward Cty.*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So.2d 540, 542 (Fla. 4th DCA 2003). An agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, however, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2012); *Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

Finally, in reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception."

See § 120.57(1)(k), Fla. Stat. (2012). The agency need not rule on an exception, however, that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

PETITIONERS' EXCEPTIONS

Exception No. 1

The Petitioners take exception to Conclusion of Law paragraph 126 of the ROD on the basis that the ALJ erroneously concluded that the Petition was untimely. The Petitioners argue that the ALJ ignored the threshold issue of whether FPUA and Allied's October 7, 2009, Motion for Summary Dismissal for untimeliness was itself untimely. The Petitioners assert that FPUA and Allied's Motion was filed beyond the "20-day window" for filing a motion to dismiss under the 2007 version of Florida Administrative Code Rule 28-106.204, such that FPUA and Allied waived the right to challenge the Petition's timeliness. *See* Petitioners' Exceptions at pages 2-5. The Petitioners seek a remand of the case back to the ALJ to address this alleged "threshold issue."

Contrary to the Petitioners' assertion, FPUA and Allied's Motion was the chapter 120, Florida Statutes, equivalent of a motion for summary judgment in civil court. Under the authority of section 120.57(1)(i), Florida Statutes, FPUA and Allied's Motion alleged that there were no disputed issues of material fact such that the ALJ should relinquish jurisdiction back to the Department. *See* § 120.57(1)(i), Fla. Stat. (2012). Unlike the motion to dismiss contemplated by Florida Administrative Code Rule 28-106.204, the consideration of a motion to relinquish jurisdiction is not limited to the "four corners" of

the petition for hearing. *See, e.g., Altee v. Duval Cty. School Bd.*, 990 So.2d 1124, 1129 (Fla. 1st DCA 2008)(An ALJ may dispose of a matter by relinquishing jurisdiction to the agency upon a determination from the pleadings, depositions, answers to interrogatories, and admissions on file, together with supporting and opposing affidavits (if any) that no genuine issue as to any material fact exists.).

In addition, as pointed out by FPUA and Allied in their response, "the issue of timeliness was present for determination in this case because the Petitioners put the matter at issue by making affirmative factual assertions in their Second Amended Petition that unsuccessfully attempted to demonstrate the timeliness of their original Petition." *See* FPUA and Allied's Response to Petitioners' Exceptions at page 2. The ALJ found that the original Petition and Amended Petition adding Elaine Romano as a party, were dismissed by the Department's March 4, 2009, order of dismissal. (RO at page 3). The Department's March 4, 2009, order of dismissal gave the Petitioners leave to amend to show why the original Petition and Amended Petition adding Elaine Romano as a party, should be considered timely in light of the January 9, 2009, publication of notice. The factual allegations that were made in the Second Amended Petition, which was then referred to DOAH, put the timeliness of the original Petition and Amended Petition, at issue.

The Petitioners seek a remand to address the question of whether FPUA and Allied waived the issue of timeliness of the original Petition. A remand to address the question of waiver is unnecessary, given the above ruling on the Petitioners' alleged "threshold issue," and the ALJ's ruling that the Petitioners did not carry their burden to

prove the timeliness of their Petitions (RO ¶ 68 and endnote 4 at page 48). Additional factual findings are not necessary in order for the Department to enter a coherent final order. *See Cohn v. Dep't of Prof. Regulation,* 477 So.2d 1039, 1047 (Fla. 3d DCA 1985).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 1 and remand request are denied.

Exception No. 2

The Petitioners take exception to Conclusion of Law paragraph 98, where the ALJ concluded that "[t]he 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." (RO ¶ 98). The Petitioners assert that the ALJ's conclusion is erroneous based on the contents of the Second Amended Petition. *See* Petitioners' Exceptions at page 6. The ALJ's findings in paragraphs 53, 54, and 58, to which the Petitioners did not take exception,[1] form the basis for the ALJ's ultimate finding in paragraph 98 that "[t]he Conservation Alliance did not plead . . . that it would suffer an injury in fact of sufficient immediacy to entitle it to a hearing in its individual capacity." (RO ¶ 98).[2] The Petitioners essentially argue that the Department should reject the ALJ's view of the

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[1] A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward Cty.*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991).

[2] A paragraph that is essentially an ultimate factual determination should not be labeled a conclusion of law in order to modify or overturn what an agency may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So.2d 1224 (Fla. 1st DCA 2007).

evidence and make a different determination based on the same evidence. Under the applicable standard of review, however, if there is competent substantial evidence to support an ALJ's finding of fact, it is irrelevant that the evidence may also support a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So.2d 276, 280 (Fla. 1st DCA 1991).

The Petitioners assert that in finding of fact paragraph 52, the ALJ allegedly recognized a novel assertion of "general purpose of protecting the 'water' . . . of St. Lucie County," as a "substantial interest" under the *Agrico*[3] standing test. The Petitioners' assertion is not supported by Florida law. *See Fla. Wildlife Fed. v. CRP/HLV Highlands Ranch, LLC,* Case No. 12-3219 (Fla. DOAH April 11, 2013; Fla. DEP June 14, 2013). The test for standing for environmental organizations recognized under Florida case law is the *Florida Home Builders Association*[4] "associational standing" test. *See, e.g., St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.,* 54 So.3d 1051, 1054 (Fla. 5th DCA 2011) (applying the *Florida Home Builders Association* standing test); *Friends of the Everglades, Inc. v. Bd. of Trustees of the Int. Imp. Trust Fund,* 595 So.2d 186, 188 (Fla. 1st DCA 1992). Under the applicable standard of review, the Petitioners' novel assertion does not support its request for modification or rejection of the ALJ's conclusion that "[t]he Conservation Alliance did not . . . prove that it would suffer an injury in fact of sufficient immediacy to entitle it to a hearing in its individual capacity." (RO ¶ 98). *See* § 120.57(1)(l), Fla. Stat. (2012).

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[3] *Agrico Chemical Co. v. Dep't of Envtl. Regulation,* 406 So.2d 478, 482 (Fla. 2d DCA 1981).

[4] 412 So.2d 351, 353-354 (Fla. 1982).

The Petitioners also take exception to Conclusion of Law paragraph 128, where the ALJ concluded "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." (RO ¶ 128). The ALJ found that the Conservation Alliance did not offer competent substantial evidence to prove that a substantial number of its members would be substantially affected by the Department's proposed agency action. (RO ¶¶ 98, 99, 100; Brady Tr. Vol. 1, pp. 41-43, 55-57, 65, 68-69; Stinnette Tr. Vol. 1, pp. 74-75, 108-109, 113, 124-125; Jones Tr. Vol. 2, pp. 150-154; Romano Tr. Vol. 2, pp. 164-165, 171-172; 181). With respect to the standing of Ms. Romano, the ALJ found that she does not live in FPUA's service area; is not served by FPUA; and did not offer any evidence that she used or enjoyed the natural resources of St. Lucie County. (RO ¶¶ 115-117; Romano Tr. Vol. 2, pp. 164-165, 171-172, 181).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 2 is denied.

Exception No. 3

The Petitioners take exception to Findings of Fact paragraphs 34 and 35, where the ALJ found that "[t]he 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;" and that "the DEP's failure to provide written notice . . . to Indian Riverkeeper did not adversely affect any rights or remedies available to the Conservation Alliance or Ms. Romano. . ." The Petitioners assert that in 2003, a

member of the Conservation Alliance's board of directors (Kevin Stinnette) asked to be placed on the Department's UIC mailing list, but did not receive the notice of the permit modification. (RO ¶ 32). At the administrative hearing, however, a question arose as to whether the board member was acting on behalf of the Conservation Alliance at the time he requested that his name be placed on the Department's UIC mailing list. In that regard, the ALJ made the findings in paragraphs 34 and 35, which are supported by competent substantial record evidence. (Stinnette Tr. Vol. 2, pp. 186-187).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 3 is denied.

Exception No. 4

The Petitioner, Elaine Romano, takes exception to Finding of Fact paragraph 63 and Conclusions of Law paragraphs 115-117 and 128. Ms. Romano argues that the ALJ did not recognize her individual interest; but rather solely as a member of the Conservation Alliance. Ms. Romano argues that the ALJ did not adequately apply the *Agrico* standing test to her interests and concerns. *See* Petitioners' Exceptions at pages 11-12.

Contrary to Ms. Romano's arguments, the ALJ did not consolidate, or otherwise confuse, the substantial interests of Ms. Romano with the alleged interests of the Conservation Alliance. Based on competent substantial record evidence, the ALJ found that Ms. Romano's alleged substantial interests concerned 1) the potential adverse effect of the permit modification on the FPUA public water supply that allegedly served Ms. Romano and, 2) the potential adverse effect of the permit modification on the ability

of Ms. Romano to recreate and enjoy the waters of St. Lucie County. (RO ¶¶ 53, 63-66; Second Amended Petition ¶ 100). The ALJ found that Ms. Romano does not live in FPUA's service area; is not served by FPUA; and did not offer any evidence that she used or enjoyed the natural resources of St. Lucie County. (RO ¶¶ 63-66, 115-117; Romano Tr. Vol. 2, pp. 164-165, 171-172, 181). As to any other of Ms. Romano's individual interests, the ALJ determined that "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." (RO ¶ 117).

Ms. Romano's exception seeks to have the Department reweigh the evidence, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See, e.g., Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that the evidence may support a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So.2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So.2d 622 (Fla. 1st DCA 1986).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 4 is denied.

Exception No. 5

The Petitioners take exception to Conclusions of Law paragraphs 118-125 and 127, where the ALJ determined that the doctrine of equitable tolling did not apply to excuse the Petitioners' late-filed petition. (RO ¶ 122). The Petitioners contend that the ALJ misapplied the equitable tolling doctrine to the facts of the situation, which the Petitioners describe as "a myriad of mishaps." *See* Petitioners' Exceptions at pages 12-13. Since the ALJ's application of the law of equitable tolling is not within this agency's substantive jurisdiction, the ALJ's determination cannot be modified or rejected in this Final Order. *See* § 120.57(1)(l), Fla. Stat. (2012); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001).

In addition, as pointed out by the Respondents in their responses, the Petitioners did not take exception to the ALJ's underlying findings of fact in paragraphs 27, 31, 38, 46, 47, and 48. A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward Cty.*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So.2d 540, 542 (Fla. 4th DCA 2003).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 5 is denied.

Exception No. 6

In this exception the Petitioners contend that the ALJ did not allow argument on whether the permit modification was a major or minor modification and cites to a brief

exchange between counsel for the Petitioners and the ALJ during the hearing. *See* Petitioners' Exceptions at page 15. The Petitioners contend that this "error in classification resulted in an improper notice of the [permit] modification pursuant to Rule 62-528.315 which requires public notice of major modifications by the applicant of the modification or FDEP." *See* Petitioners' Exceptions at page 14.

The Petitioners did not take exception, however, to Finding of Fact paragraph 9, where the ALJ found that "the DEP issued the Permit Modification as a minor modification of the FPUA operation permit." (RO ¶ 9). A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward Cty.*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So.2d 540, 542 (Fla. 4th DCA 2003).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 6 is denied.

RESPONDENTS' AND INTERVENOR'S EXCEPTION

Respondents' and Intervenor's Exception

The Respondents DEP and FPUA and Intervenor Allied ("Respondents") take exception to Conclusions of Law paragraphs 106, 113, 114, and 129, where the ALJ concludes that the Conservation Alliance has standing under section 403.416(6), Florida Statutes. The ALJ deemed a statement in footnote 1 of the Petitioners' Proposed Recommended Order "an inartfully pled motion to amend" the Conservation Alliance's standing allegations. The ALJ granted the motion and concluded that the

elements of standing under section 403.412(6), Florida Statutes, were established by the facts. The ALJ found that no prejudice to the other parties would result from an amendment of the petition by the Conservation Alliance to plead section 403.412(6) as a basis for standing. (RO ¶¶ 112-114).

The Respondents argue that standing under section 403.412(6), Florida Statutes, was not an issue in this proceeding because the Conservation Alliance chose not to make it an issue before or during the hearing. The Respondents essentially argue that it was improper for the ALJ to amend the Conservation Alliance's pleading to conform it to the evidence adduced during the hearing. Since this procedural ruling is not within the Department's substantive jurisdiction, however, it cannot be modified or rejected in this Final Order. *See, e.g., Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993).

Therefore, based on the foregoing reasons, the Respondents' Exception to Conclusions of Law paragraphs 106, 113, 114, and 129, is denied.

CONCLUSION

Having considered the applicable law in light of the rulings on the Exceptions, and being otherwise duly advised, it is

ORDERED that:

A. The Recommended Order of Dismissal (Exhibit A) is adopted in its entirety and incorporated herein by reference.

B. The Petitioners' request for a remand is DENIED.

C. The Petition for Formal Proceeding, as amended, challenging the issuance of the minor modification to Operation Permit 171331-002-UO for IW-1 under 171331-003-UC, is DISMISSED.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by filing a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 8th day of July, 2013, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

HERSCHEL T. VINYARD JR.
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Lea Crandall
CLERK

7/8/13
DATE

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

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by electronic filing to:

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The DeSoto Building
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and by hand delivery to:

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this 9th day of July, 2013.

STATE OF FLORIDA DEPARTMENT
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