STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CONSERVATION ALLIANCE OF ST. LUCIE COUNTY, INC., and TREASURE COAST ENVIRONMENTAL DEFENSE FUND, INC., a/k/a INDIAN RIVERKEEPER, INC.	)	Case No. 10-3807
Petitioners,	)	
vs.	)	
ALLIED UNIVERSAL CORPORATION, CHEM-TEX SUPPLY CORPORATION and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents,	)	

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

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STATEMENT OF THE ISSUE

The issue to be determined by this Recommended Order of Dismissal is whether the Petitioners have standing to challenge a Settlement Agreement in OGC File No. 07-0177 (the Settlement Agreement), entered into by the Department of Environmental Protection (DEP) and Respondents, Allied Universal Corporation (Allied) and Chem-Tex Supply Corporation (Chem-Tex), for the assessment and remediation of contamination at a bleach-manufacturing and chlorine-repackaging facility in St. Lucie County.

PRELIMINARY STATEMENT

This case arose as a result of an enforcement action taken by the DEP in response to contamination of soil and groundwater at a bleach-manufacturing and chlorine-repackaging facility (the Facility) owned and operated by Respondents. The enforcement action culminated in the negotiation and entry of the Settlement Agreement that called for, among other things, the performance of remedial measures and payment of a monetary penalty by Respondents. The Settlement Agreement was executed by the DEP and Respondents on June 21, 2010. As required by the Settlement Agreement, notice was published in the St. Lucie News Tribune on June 28, 2010.

On August 12, 2010, Petitioners, Conservation Alliance of St. Lucie County, Inc. (Conservation Alliance) and Treasure Coast Environmental Defense Fund, Inc., a/k/a Indian Riverkeeper, Inc. (Indian Riverkeeper), electronically filed their Petition for Formal Administrative Proceedings (Petition) with the DEP.[1/] On August 27, 2010, the Petition was 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 and law firms 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.

On November 19, 2012, a telephonic pre-hearing conference was held, during which the parties and the undersigned agreed that a preliminary bifurcated hearing on the standing of the Petitioners 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. A hearing to address those issues was scheduled for January 23, 2013, in Fort Pierce, Florida.

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 6 and 7, 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 and an officer and member of the Board of Directors of Indian Riverkeeper; George Jones, a member of Indian Riverkeeper; and Elaine Tronick Souza, formerly known as Elaine Romano, a member of the Conservation Alliance. Petitioners' Exhibits 1-4, 18, 23-26, and 37 were received in evidence.

Allied and Chem-Tex called as their witness, Dr. Robert Maliva, who was accepted as an expert in hydrogeology,

sedimentary geology, and underground injection control (UIC) operations. Respondents did not 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 Administrative 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, incorporated in 1985, with its corporate offices currently located at 5608 Eagle Drive, Fort Pierce, Florida. It has approximately 200 members, at least 100 of which reside in St. Lucie County. The Conservation Alliance was formed to "protect the water, soil, air, native flora and fauna, upon which all the earth's creatures depend for survival."

2. Indian Riverkeeper is a Florida, not-for-profit corporation in good standing, incorporated in 1999, with its

corporate offices currently located at 1182 Southeast Mendavia Avenue, Port St. Lucie, Florida. It has approximately 150 members. The parties agreed, by stipulation, that Indian Riverkeeper has 25 or more members that live in St. Lucie County. Indian Riverkeeper was formed "to enforce local, state and federal environmental laws through citizen suits, [and] scientific and educational programs to increase awareness of citizens' standing to compel government to enforce laws to protect the environment."

3. The DEP is an agency of the State of Florida having jurisdiction to control and prohibit pollution of air and water, pursuant to chapters 376 and 403, Florida Statutes, and the rules promulgated thereunder. Pursuant to that authority, the DEP took the enforcement action that culminated in the entry of the Settlement Agreement that is the subject of this proceeding.

4. Allied owns and operates the Facility, and is responsible for the remediation of contamination resulting from activities at the Facility.

5. Chem-Tex owns the real property on which the Facility is located.

Entry of the Settlement Agreement

6. On June 21, 2010, the DEP, Allied, and Chem-Tex entered into the Settlement Agreement that is the subject of this proceeding. The Settlement Agreement required Allied and Chem-

Tex to pay a monetary penalty to the DEP, and to identify, prevent, and remediate contamination on the Facility.

7. The Settlement Agreement required publication of a notice of the Settlement Agreement, which provided that persons whose substantial interests are or will be affected could, within 45 days of the date of publication, petition for a hearing to challenge the proposed Settlement Agreement. The notice was published on June 28, 2010. Thus, the last date for filing a timely petition was August 12, 2010.

8. On August 12, 2010, Petitioners electronically filed their Petition with the DEP.

Allegations of Standing

9. Petitioners alleged standing to challenge the Settlement Agreement based on the following, as set forth in the Petition:

a. The Conservation Alliance is a conservation group based in Fort Pierce, Florida, organized for the purpose of protection of the State's natural resources, including drinking water, and the rivers and other waters in St. Lucie County.

b. Indian Riverkeeper is a citizen's group, organized for the purpose of protecting and restoring the State's natural resources within St. Lucie County.

c. Members of both the Conservation Alliance and Indian Riverkeeper own real property within St. Lucie County.

d. Substantial amounts of hazardous waste have contaminated the Facility, which has caused significant environmental harm to the groundwater underlying the site and resulted in off-site surface water discharges.

e. Contamination is spreading to adjacent properties which pump groundwater for potable water supply and agricultural irrigation purposes.

f. St. Lucie County has proposed a major drinking water wellfield within one-quarter mile of the Facility, which use is endangered by the existing groundwater contamination.

g. Petitioners have a substantial interest in ensuring that Allied and Chem-Tex comply with requirements established by the Resource Conservation and Recovery Act.

h. The DEP has executed a Settlement Agreement that will become valid and destroy the DEP's right to seek additional penalties and enforcement relating to Allied's violations.

i. Allied's past violations have created substantial plumes of contaminants in the groundwater system underlying its property, which if not remediated may migrate off-site and contaminate deeper zones of the surficial aquifer system.

Standing -- Effects of Contamination

10. Petitioners alleged that deficiencies in the Settlement Agreement may affect their substantial interests due to the effects of the contamination on the interests of their

members, who use the potable water and other resources affected by the contamination.

11. The only testimony offered at the hearing as to the use of the lands in the vicinity of the Facility was offered by Anthony Brady, the current president of the Conservation Alliance, who knew of no members of the Conservation Alliance that used any lands within five miles of the Facility. There was no testimony or other evidence offered regarding the use of lands in the vicinity of the Facility by any member of Indian Riverkeeper.

12. As to the allegations that deficiencies in the Settlement Agreement would affect "potable water and irrigation wells located in the immediate vicinity of the facility," there was no evidence that any member of the Conservation Alliance or Indian Riverkeeper received service from those wells.

13. Mr. Brady and Elaine Souza receive water service from unidentified public water supply sources in St. Lucie County. Kevin Stinnette receives water from a source other than the Fort Pierce Utilities Authority. There was no allegation or evidence that the sources of their water were threatened by the contamination -- regardless of whether any such threat could be proven on the merits.

14. There was no competent, substantial, non-hearsay evidence as to a particular source of potable water for <u>any</u>

member of either the Conservation Alliance or Indian Riverkeeper that would "connect the dots" between the general allegations of groundwater contamination at the Facility, and the potable water supply of any member. For example, Petitioners alleged that their members own property in St. Lucie County, and that contamination is spreading from the Facility to adjacent properties which pump groundwater for potable water supply and agricultural irrigation purposes and, that if not remediated, such contamination may impact deeper zones of the surficial aquifer system and affect potable water and irrigation wells in the vicinity of the Facility. However, Petitioners utterly failed to prove that any of their members use, own, or have any interest in the adjacent properties that are in jeopardy of being contaminated, or that they are served by any of the potable water or irrigation wells alleged to be threatened by the contamination.

15. The undersigned -- having accepted the allegations in the Petition of adverse effects of the contamination at the Facility and the deficiencies of the Settlement Agreement, having accepted and applied the testimony and evidence taken at the hearing, and without going to the merits of the Settlement Agreement -- is unable to find, based on the record of this proceeding, that Petitioners' substantial rights could be affected by the Settlement Agreement. Thus, Petitioners failed

to produce the quantum of admissible, non-hearsay evidence necessary to demonstrate that they or their members will suffer an injury in fact which is of sufficient immediacy to entitle them to a hearing to challenge the Settlement Agreement.

Standing -- Effects on Recreational Use

16. In addition to the foregoing, Petitioners assert in their Proposed Recommended Order that "[a] substantial number of [their] members use, recreate, and protect the waters of St. Lucie County," and that those members could be adversely affected by exposure to contamination due to the proximity of the Facility "to nearby navigable water bodies, fisheries, rivers and streams from which Conservation Alliance and Indian Riverkeeper members are provided with potable water and recreation."

17. The Conservation Alliance holds an Annual "Party in the Park" at the Fort Pierce Inlet State Park, and has monthly meetings at the Savannas State Preserve Education Center. There was no allegation or evidence as to how either of those locations were or could be affected by contamination from the Facility or by the Settlement Agreement.

18. Indian Riverkeeper holds an annual "Mullet Run Festival" in Fort Pierce, and "other quarterly events that are sort of like our meetings" at locations in Fort Pierce and Jensen Beach, Florida. The venues for the Indian Riverkeeper

events, beyond the cities in which they were held, were not identified. There was no allegation or evidence as to how those particular locations were or could be affected by contamination from the Facility or by the Settlement Agreement.

19. Mr. Brady understood that one of Petitioners' members, George Jones, fishes in the C-24 canal. Mr. Brady has not personally fished in the C-24 canal for 25 years. Mr. Brady otherwise provided no evidence of the extent to which he or any members of the Conservation Alliance used or enjoyed the waters in or around St. Lucie County.

20. 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 or Indian Riverkeeper. There was no evidence offered as to how many of those persons were members of either of the Petitioners, as opposed to friends that have visited his house to fish off of the dock, or whether they were current members during the period relevant to this proceeding.

21. Mr. Stinnette testified that the previously mentioned Mr. Jones told him that he kayaked in the waters of St. Lucie County. However, as to the recreational activities of other Conservation Alliance members, Mr. Stinnette testified that "I

don't know, I don't keep up with their day-to-day activities to that extent."

22. 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. The only evidence of Mr. Jones' recreational use of the waters of St. Lucie County is the hearsay testimony of Mr. Brady and Mr. Stinnette, which is not sufficient to support a finding of fact as to Mr. Jones' use.

23. 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 and Indian Riverkeeper is limited to a single member, Mr. Stinnette, who is a member of both organizations. Based thereon, Petitioners failed to prove that a substantial number of their members make any recreational or other use of the waters of St. Lucie County. Thus, Petitioners failed to produce the quantum of admissible, non-hearsay evidence necessary to demonstrate that they or their members will suffer an injury in fact to their substantial rights of use, recreation, and protection of the waters of St. Lucie County which is of sufficient immediacy to entitle them to a hearing to challenge the Settlement Agreement.

Standing -- Other Issues

24. Petitioners, and primarily Indian Riverkeeper, allege that their substantial interests are affected by the inadequacy of the penalty assessed in the Settlement Agreement, and by the purported preclusion of their right to "bring[] a citizen suit against Allied and Chem-Tex for their chemical spills . . . for violation of the Clean Water Act if it were not for the settlement negotiations taking place between Allied and the FDEP."

25. As to the issue of the inadequacy of the monetary penalty, the undersigned finds that the penalty to be assessed and paid by Respondents to the DEP has no effect on the substantial interests of Petitioners or their members. In that regard, the economic component of the Settlement Agreement does not result in any of Petitioner's members being exposed to contaminants, or in any restriction on their recreational or other uses of the lands or waters of St. Lucie County. Therefore, the penalty amount does not result in an injury in fact which is of sufficient immediacy to entitle Petitioners to a section 120.57 hearing. Cf. Dillard & Assocs. Consulting Eng'rs v. Fla. Dep't of Envtl. Prot., 893 So. 2d 702 (Fla. 1st DCA 2005) (finding no standing on the part of a DOT contractor to challenge an administrative penalty levied by the DEP against

DOT, even when the penalty may, at some time in the future, be assessed against the contractor).

26. As to the injury resulting from the alleged restriction on Petitioners' rights to bring a federal lawsuit under the Clean Water Act, there was no evidence of any current intent on the part of Petitioners to bring such a lawsuit, nor was there any evidence, beyond the bare assertion, of any such restriction or preclusion on bringing a suit. Thus, Petitioners failed to prove any injury in fact which is of sufficient immediacy to entitle Petitioners to a section 120.57 hearing. Furthermore, the effect of agency action on the ability of a person to bring an independent action in another forum is not an injury of the type or nature that this proceeding is designed to protect.

CONCLUSIONS OF LAW

Jurisdiction

27. 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.

Burden of Proof

28. 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

29. Section 120.569(1), provides, in pertinent part, that "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency."

30. 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 Corporation 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.

31. 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)).

32. 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 County Bd. of Cnty. Comm'rs v. State, Dep't of Envtl. Regulation, 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.").

33. Petitioners have alleged standing on behalf of the interests of their members. 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).

34. 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.").

35. It is generally recognized that when a petition is dismissed on the grounds that a petitioner lacks standing, the allegations in the petition are to be accepted as true. Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot., 948 So. 2d at 796. Cases standing for that proposition are typically those in which a petition has been dismissed on the pleadings. See, e.g., Id. at 795 ("Final Order of Dismissal with Prejudice [] that was entered by appellee, the Florida Department of Environmental Protection [], in response to appellant's Amended Petition for Administrative Hearing."); Hospice of Palm Beach Cnty., Inc. v. Ag. for Health Care Admin., 876 So. 2d 4 (Fla. 1st DCA 2004) ("AHCA denied the petition finding that HPBC had 'no standing to challenge the issuance of the license at issue.'"); Maverick Media Group v. Dep't of Transp., 791 So. 2d 491 (Fla. 1st DCA 2001) ("DOT, in a final order, dismissed Maverick's petition and denied its application for a state sign permit, ruling that Maverick does not have standing for a formal administrative hearing.").

36. In this case, an evidentiary hearing was held for the specific purpose of determining standing. While the hearing was not convened to address the merits of the Settlement Agreement, it was incumbent on the Petitioners to produce evidence, in addition to the bare factual allegations of the Petition, to demonstrate that the terms and conditions of the Settlement Agreement could affect its substantial interests and those of its members.

37. An example of the type of "non-merits" evidence found sufficient to prove standing in the course of an evidentiary hearing is found in St. John's Riverkeeper, Inc. v. St. Johns River Water Management District, 54 So. 3d at 1054-1055. In that case, St. Johns Riverkeeper established that its purpose and mission was the protection of the St. Johns River as a natural resource, and that its principal activities included the use and enjoyment of the river. In support of its standing to challenge an activity alleged to degrade the water quality of the river, St. Johns Riverkeeper produced evidence of its sponsorship of 20 three-day boat tours of the St. Johns River, involving 1,100 member participants. Those trips relied upon the health of the river, and would be adversely affected by increased nutrient concentrations and poor water quality caused by the activity that was the subject of the proposed agency action. That evidence, which did not go to the merits of

whether the proposed activity would actually cause the alleged impacts, was sufficient to demonstrate that St. Johns Riverkeeper, on behalf of its members, was substantially affected by the proposed agency action, and had standing to challenge the action. Evidence of a comparable scope was not produced in this case.

Standing under Chapter 120 -- Substantial Interests

38. The Petitioners' respective Articles of Incorporation establish that they were formed, generally, to protect the environment of St. Lucie County by means of education and legal action.

39. The challenge to the Settlement Agreement is within each Petitioner's general scope of interest and activity. Furthermore, the relief requested, i.e., modification of the Settlement Agreement to address the issues raised, or rejection of the Settlement Agreement in its present form, is of a type appropriate for organizations of their nature to receive on behalf of their members.

40. The remaining issue for a determination is whether a substantial number of Petitioners' members are substantially affected by the Settlement Agreement. Both the Conservation Alliance and Indian Riverkeeper failed to prove that element of standing.

41. Despite having the issue of their standing to maintain this proceeding placed squarely at issue, and as described in the findings of fact herein, Petitioners failed to produce any admissible, non-hearsay evidence that to establish that their members could be affected by any contamination on or under the Facility, or by any contamination that may be drawn into a water-supply well.

42. Similarly, Petitioners 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 Petitioners' total membership -- the Conservation Alliance having a total membership of approximately 200 persons, and Indian Riverkeeper having a total membership of approximately 150 persons -- and is insufficient to support a determination that Petitioners have standing in this proceeding.

43. For the reasons set forth herein, Petitioners failed to demonstrate that their substantial interests would be affected by the Settlement Agreement, and therefore failed to establish standing under chapter 120 to initiate and maintain this proceeding.

Standing under Section 403.412

44. Subsection 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. (emphasis added)

45. This case does not involve licensing, nor does the challenged settlement agreement involve any action for which an application for a permit, license, or authorization was required. Rather, this case involves an enforcement action designed to remediate existing contamination, and impose monetary penalties against Respondents Allied and Chem-Tex.

46. The parties stipulated to the elements that would be necessary to demonstrate standing under subsection 403.412(6) as to both the Conservation Alliance and Indian Riverkeeper, i.e., that they are both not-for-profit corporations; that they both have at least 25 current members residing in St. Lucie County; and that both were formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality. Thus, the issue for determination is

whether subsection 403.412(6) provides a basis for the initiation of a hearing to challenge proposed agency action of the type presented here.

47. In Morgan v. Department of Environmental Protection, 98 So. 3d 651 (Fla. 3rd DCA 2012), the court was asked to determine whether citizen intervention rights established in subsection 403.412(5) applied to enforcement proceedings as well as license and permit proceedings. Subsection 403.412(5) provides, in pertinent part, that:

> In any administrative, licensing, or other proceedings authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction . . . a citizen of the state shall have standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state. (emphasis added).

48. In Morgan, the appellant argued that "other proceedings" should be interpreted to include enforcement proceedings in addition to the listed administrative and licensing proceedings. In its opinion, the court relied on the plain language of subsection 403.412(5) to determine that intervention is limited to "proceedings in which the challenged activities, conduct, or products are sought to be 'permitted or

licensed,'" and therefore was not intended to allow for a challenge to an enforcement proceeding. Id. at 653.

49. Consistent with subsection 403.412(5) as construed in Morgan, subsection 403.412(6) requires that the "permit, license, or authorization" being challenged be one requiring an "application." By requiring that the activity be subject to an application, the legislature has expressed, in language that is clear and unambiguous, that standing to initiate a hearing is limited to licensing proceedings.

50. The proposed agency action in this case, which is an enforcement proceeding, involved no application for a permit, license, or authorization that was filed or acted upon by the DEP. Therefore, subsection 403.412(6) does not apply to this proceeding.

51. Section 403.412(2) does establish a means by which a citizen can participate in an enforcement proceeding, and provides, in pertinent part, that:

> . . . a citizen of the state may maintain an action for injunctive relief against:
>
> 1. Any governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations;
>
> 2. Any person, natural or corporate, or governmental agency or authority to enjoin

> such persons, agencies, or authorities from violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state.

Thus, Petitioners are not foreclosed from asserting their interests in proceedings in which the DEP has taken enforcement action. They are, however, foreclosed from asserting their interests in this proceeding under subsection 403.412(6).

52. Based on the findings of fact and conclusions of law set forth herein, the Conservation Alliance and Indian Riverkeeper failed to prove that they have standing under subsection 403.412(6) to initiate a hearing to challenge the enforcement Settlement Agreement that is the subject of the notice of proposed agency action.

Conclusions

53. The undersigned concludes that Petitioners, Conservation Alliance of St. Lucie County, Inc. and Treasure Coast Environmental Defense Fund, Inc., a/k/a Indian Riverkeeper, Inc., failed to prove that they are substantially affected by the entry of the Settlement Agreement in OGC File No. 07-0177.

54. The undersigned concludes that Petitioners, Conservation Alliance of St. Lucie County, Inc. and Treasure Coast Environmental Defense Fund, Inc., a/k/a Indian Riverkeeper, Inc., failed to prove that they have standing to

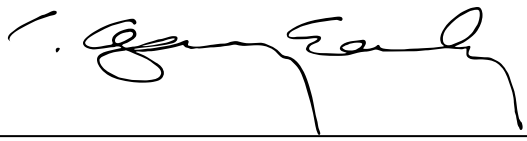
challenge the entry of the Settlement Agreement in OGC File No. 07-0177 pursuant to subsection 403.412(6), Florida Statutes.

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 Administrative Proceedings.

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/] Although the Petition was electronically filed with the DEP on August 12, 2010, a "hard copy" was filed with the DEP Office of General Counsel on August 16, 2012, and date-stamped with that date. August 16, 2010 was beyond the 45-day period for challenging the Settlement Agreement. The parties did not dispute the date of the electronic filing. Respondents, believing that electronic filing was not allowed by the DEP,

moved to dismiss the Petition as being untimely. The motion was denied by separate Order on May 20, 2013. Thus, the timeliness of the Petition is no longer at issue.

[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.

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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.