FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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RICK SCOTT
GOVERNOR

HERSCHEL T. VINYARD JR.
SECRETARY

August 21, 2013

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

Re: Conservation Alliance of St. Lucie County, Inc., et al vs. Allied Universal Corporation, Chem-Tex Supply Corporation and DEP
DOAH Case No.: 10-3807
OGC Case No.: 07-0177

Dear Clerk:

Attached for filing are the following documents:

1. Agency Final Order
2. Petitioners' Exceptions to Recommended Order
3. Respondent Chem-Tex Supply Corporation's and Respondent Allied Universal Corporation's Response to Exceptions
4. 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 TREASURE COAST ENVIRONMENTAL DEFENSE FUND, INC., a/k/a INDIAN RIVERKEEPER, INC.,	)	
Petitioners,	)	
vs.	)	**OGC CASE NO. 07-0177**
	)	**DOAH CASE NO. 10-3807**
ALLIED UNIVERSAL CORPORATION, CHEM-TEX SUPPLY CORPORATION and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

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") in the above captioned administrative proceeding to the Department of Environmental Protection ("DEP" or "Department"). A copy of the ROD is attached hereto as Exhibit A. The ROD reflects that copies were sent to counsel for the 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"). Copies were also sent to counsel for the Respondents, Allied Universal Corporation and Chem-Tex Supply Corporation ("Respondents"), and the Department. On June 10, 2013, the Petitioners filed Exceptions to Recommended Order and on June 20, 2013, the Department and the Respondents separately filed Responses to Petitioners'

Exceptions to Recommended Order. This matter is now on administrative review before the Secretary of the Department for final agency action.

BACKGROUND

The DEP took enforcement in response to contamination of soil and groundwater at a bleach-manufacturing and chlorine-repackaging facility ("Facility") owned and operated by the Respondents. The enforcement action was settled. The Settlement Agreement called for, among other things, the performance of remedial measures and payment of a monetary penalty by the Respondents. The Settlement Agreement was executed by the DEP and the Respondents on June 21, 2010. In order to comply with the Settlement Agreement, notice was published in the St. Lucie News Tribune on June 28, 2010. The Petitioners electronically filed their Petition for Formal Administrative Proceedings ("Petition") on August 12, 2010. On August 27, 2010, the Petition was forwarded to the DOAH. After a lengthy abeyance and reassignment of ALJ, the parties 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 the Petitioners lacked standing. A hearing to address those issues was held on January 23, 2013, in Fort Pierce, Florida. After the hearing transcript was filed, the parties filed their proposed orders and the ALJ subsequently entered the Recommended Order of Dismissal.

SUMMARY OF RECOMMENDED ORDER OF DISMISSAL

The ALJ recommended that the Department enter a final order dismissing the Petition. (ROD at page 27). The ALJ concluded that the Petitioners did not prove they were substantially affected by entry of the Settlement Agreement. (ROD ¶ 53). The ALJ

also concluded that the Petitioners were foreclosed from asserting their interests under subsection 403.412(6), Florida Statutes, in a proceeding where the DEP took enforcement action. (ROD ¶¶ 51, 52, 54).

Substantial Interests Standing

The ALJ found that the Petitioners did not prove that they or their members would suffer an injury in fact from alleged deficiencies in the Settlement Agreement regarding the effects of contamination at the Facility. (RO ¶¶ 10-15). The ALJ found that the Petitioners did not prove that any member used any lands within five miles of the Facility, or that any member received service from potable water and irrigation wells located in the immediate vicinity of the facility. (RO ¶¶ 11-14).

The ALJ also found that the Petitioners 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 ¶¶ 19-23). The ALJ determined that a single member was not a "substantial number" of members in the context of the Petitioners' total membership, and was insufficient to support a determination that the Petitioners had standing in this proceeding. (RO ¶¶ 40-43).

Thus, the ALJ concluded that the Petitioners did not prove that a substantial number of their members were substantially affected by the Settlement Agreement as alleged in the Petition, and therefore failed to establish standing under chapter 120, Florida Statutes. (RO ¶¶ 14, 15, 19, 20, 23, 40-43, 53).

Standing under subsection 403.412(6), F.S.

The ALJ found that the parties stipulated to the elements that would be necessary to demonstrate standing under subsection 403.412(6), Florida Statutes, as to

both Petitioners, 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. (RO ¶ 46). The ALJ concluded, however, that since 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, subsection 403.412(6) does not provide a basis for the initiation of a hearing to challenge the Settlement Agreement. (RO ¶¶ 44, 45, 50).

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). 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). 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).

RULINGS ON EXCEPTIONS

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.* A party that does not file 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, however, is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, 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).

PETITIONERS' EXCEPTION

Exception No. 1 – Conclusions of Law 44-52 and 54

The Petitioners take exception to Conclusions of Law 44-52 and 54, where the ALJ concluded that the Petitioners did not establish standing under subsection 403.412(6), Florida Statutes. The statute provides:

> 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).

§ 403.412(6) Fla. Stat. (2012).

The Petitioners argue that the Settlement Agreement "falls squarely within boundaries of standing laid by subsection 403.412(6)." The Petitioners argue that the Settlement Agreement is authorization within the meaning of the statute. *See* Petitioners' Exception at pages 2 and 4.

Contrary to the Petitioners' argument the instant proceeding involved negotiated resolution of an enforcement action by a Settlement Agreement. *See* Joint Exhibit 6. In addition, under the statute, the date on which an "application" for an authorization was filed must be identified in order to determine if the Florida not for profit corporation "was formed at least 1 year prior." § 403.412(6) Fla. Stat. (2012). The competent substantial record evidence reflects that the Department issued a Warning Letter to Allied that led to the Settlement Agreement and not that Allied filed an "application" for an authorization. *See* Joint Exhibit 6 at paragraph 6. The plain language of the statute

does not support the Petitioners' argument. It is well established that when the language of a statute is clear and unambiguous and conveys a clear and definite meaning, the statute must be given its plain and obvious meaning. *See, e.g., GTC, Inc. v. Edgar*, 967 So.2d 781, 785 (Fla. 2007).

The Petitioners also contend that the ALJ erred in relying on *Morgan v. Department of Environmental Protection*, 99 So.3d 651 (Fla. 3d DCA 2012). In citing to *Morgan*, the ALJ simply noted that subsection 403.412(5), like subsection 403.412(6), has language limiting its utilization in administrative proceedings. The appellant in *Morgan* argued that "other proceedings"' should be interpreted to include enforcement proceedings in addition to the listed administrative and licensing proceedings in subsection 403.412(5). The district court of appeal, however, relied on the plain language of subsection 403.412(5) to determine that intervention was limited to "proceedings in which the challenged activities, conduct, or products are sought to be permitted or licensed." *Id.* at 653. Similarly, the language in subsection 403.412(6) discussed above does not include enforcement proceedings.

Therefore, based on the foregoing reasons, the Petitioners' exception 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 Petition for Formal Administrative Proceedings challenging the Settlement Agreement in OGC Case No. 07-0177 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 21st day of August, 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.

Kay Buchanan 8/21/13
CLERK DATE

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Final Order has been sent by electronic mail only to:

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by electronic filing to:

Division of Administrative Hearings
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1230 Apalachee Parkway
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this 21st day of August, 2013.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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