STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Petitioner,	)	
v.	)	**OGC CASE NO. 22-2019**
	)	**DOAH CASE NO. 22-1987**
ADAM NOAH INVESTMENT GROUP, LLC,	)	
Respondent.	)	
	/	

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on March 21, 2023, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above-captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. DEP timely filed exceptions on April 5, 2023. Adam Noah Investment Group, LLC (Adam Noah Group[1] or the Respondent) timely filed responses to DEP's exceptions on April 17, 2023.

This matter is now before the Secretary of the Department for final agency action.

BACKGROUND

On April 29, 2022, the Florida Department of Health (DOH) issued a citation[2] (Citation), seeking to levy fines against the Respondent Adam Noah Group for work performed on an

[1] In the RO, the ALJ identified the Respondent, Adam Noah Investment Group, LLC, as "Seven Star," because it operates the subject property under the name Seven Star Stores.

[2] As of July 1, 2021, DEP took over for DOH as the agency enforcing section 381.0065, Florida Statutes, including enforcement for violations of that statute, other provisions of chapter 381, Florida Statutes, and any rule adopted thereunder. Ch. 2020-150, § 7, Laws of Fla. Although the rules cited in the Citation are to DOH's rules in chapter 64E-6, Florida Administrative Code, these rules were transferred to DEP chapter 62-6, Florida Administrative Code, in 2021.

Onsite Treatment and Disposal System (OSTDS) at 15634 Dr. Martin Luther King Boulevard, Plant City, Florida (the Property). The Citation charged that the Respondent violated section 381.0065, Florida Statutes, by installing, repairing, altering, or modifying an OSTDS without a permit. (DEP Ex. No. 1; RO p. 2). The Respondent timely filed a petition to the Citation.

On July 7, 2022, DEP referred the Citation to DOAH for an evidentiary hearing. DOAH assigned the case as DOAH Case No. 22-1987.

DEP filed a request for admissions to Adam Noah Group on July 29, 2022. On October 17, 2022, Adam Noah Group untimely filed its answer to DEP's request for admissions. On October 26, 2022, DEP filed a motion to compel discovery, requesting the ALJ to compel Adam Noah Group to provide more complete answers to request nos. 9 through 15 of DEP's request for admissions, which the ALJ granted. On December 9, 2022, the ALJ issued an Order to Show Cause why he should not find DEP's admissions for request nos. 9 through 15 deemed admitted as factual findings in the proceeding. The Order to Show Cause directed Adam Noah Group by December 16, 2022, to provide more complete written responses to DEP's request nos. 9 through 15. On December 16, 2022, Adam Noah Group timely filed amended answers to DEP's request for admissions nos. 9 through 15.

The ALJ held the final hearing on December 21, 2022, by Zoom. (RO p. 1). At the commencement of the hearing, DEP made an ore tenus motion for the ALJ to deem the Respondent's admissions to request nos. 9 through 15 as admitted. (T. Vol. I, p. 14). The ALJ concluded that the case law regarding admissions is kind of a gray area. Moreover, he ruled that if the subject matter is clearly something that's disputed, then courts are reluctant to make factual findings based on a paperwork admission. The ALJ then held that he would base his factual findings on what he heard during the hearing. (ALJ Culpepper's evidentiary ruling, T. Vol. I, pp.

15-16). At no time did the ALJ deem that any of the admissions be admitted for being answered untimely as authorized by rule 1.370 of the Florida Rules of Civil Procedure, nor did Adam Noah Group bind itself to any of the admissions by its pre-hearing stipulation.

During the hearing, DEP presented the testimony of Israel Midence and Kevin Worley. The Respondent presented the testimony of Yahya Chaudhry and David Logue. DEP Exhibits 1 through 7[3], 10, 11, 14 through 17, and 21 were admitted into evidence. (RO p. 2). The Respondent did not offer, nor admit, any exhibits into evidence. (Hearing transcript in its entirety).

A two-volume transcript of the final hearing was filed with DOAH on January 5, 2023. (RO p. 2). On January 10, 2023, the parties filed a joint motion for a 20-day extension of time to file their proposed recommended orders (PROs), which the ALJ granted. (RO pp. 2-3).[4] Both parties submitted Proposed Recommended Orders, which were duly considered by the ALJ in preparing his RO. (RO p. 3).

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department issue a final order dismissing the Citation for Violation against Respondent Adam Noah Group. In doing so, the ALJ concluded that DEP did not prove by clear and convincing evidence that the Respondent Adam Noah Group illegally installed or repaired the septic tank drainfield on its Property. (RO ¶ 62). Instead, the ALJ found that the Respondent's witnesses credibly testified that the work they conducted did

[3] DEP's Exhibit Nos. 2 and 6 were admitted into evidence; however, any hearsay within these exhibits was not admitted. (T. Vol. I, pp. 39-41; T. Vol. I, pp. 72-78).

[4] The ALJ ruled that "by requesting a deadline for filing post-hearing submissions beyond ten days after the final hearing, the 30-day time period for filing the Recommended Order was waived." (RO p. 3, footnote 3). *See* Fla. Admin. Code R. 28.106.216(2) (2022).

not inappropriately contact or impact the septic system drainfield; and thus, concluded the Respondent did not need a septic system permit. (RO ¶ 63).

STANDARDS OF REVIEW FOR 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 the 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. (2022); *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62 (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 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 Cnty. School Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there also may be competent substantial evidence supporting a contrary finding. *See, e.g.*, *Arand Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So. 2d 622, 623 (Fla. 1st DCA 1986).

The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g., Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997).

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, 1012 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cnty.*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001). An agency has the primary responsibility to interpret statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. Emp. Relations Comm'n v. Dade Cnty. Police Benevolent Ass'n*, 467 So. 2d 987, 989 (Fla. 1985); *Fla. Public Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

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 & Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). However, the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" to modify or overturn what it may view as an unfavorable

finding of fact. *See, e.g., Stokes v. State, Bd. of Pro. Eng'rs*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996). The Department is charged with enforcing and interpreting chapter 381 of the Florida Statutes pertaining to onsite sewage treatment and disposal systems. As a result, DEP has substantive jurisdiction over interpretation of chapter 381, Florida Statutes, and the Department's rules adopted to implement this statute.

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 Pro. Regulation*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985). 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

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); *Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or

at least waived any objection to, those findings of fact." *Envtl. Coal. of Fla., Inc. v. Broward Cnty.*, 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). However, 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, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2022); *Barfield,* 805 So. 2d at 1012; *Fla. Pub. Emp. Council,* 646 So. 2d at 816.

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. (2022). The agency need not rule on an exception 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.*

RULINGS ON DEP'S EXCEPTIONS

DEP's Exception to Paragraph No. 23

DEP takes exception to paragraph no. 23 of the RO, except for the first sentence, which paragraph provides in its entirety:

> 23. During his site visit, Mr. Worley used a metal probing rod to locate the pipes in the drainfield. His goal was to determine how much dirt and rock material had been placed on top of the pipes. Mr. Worley stated that, when he drove his probing rod down into the mound, he hit the top of the "mineral aggregate" about 20 inches below the surface. Based on this discovery, Mr. Worley concluded that someone had added a second layer of material onto the top of the existing drainfield without the required DOH authorization.

RO ¶ 23.

DEP contends that paragraph no. 23, except for the first sentence, is not supported by competent substantial evidence. Contrary to DEP's exception, the ALJ's findings of fact in

paragraph no. 23 of the RO are supported by competent substantial evidence, including inferences drawn by the ALJ from the totality of the evidence presented at the final hearing. (Worley, T. Vol. II, pp. 205-09).

Based on the foregoing reasons, DEP's exception to paragraph no. 23 is denied.

DEP's Exception to Paragraph No. 41

DEP takes exception to paragraph no. 41 of the RO, which provides in its entirety:

> 41. Mr. Logue's testimony regarding the work he performed on the Seven Star property is credible and credited. Undoubtedly (and admittedly) Mr. Logue did some digging and spread some dirt and sod on the grassy strip of land in the vicinity of the Seven Star Sewage system and drainfield. However, Mr. Logue convincingly testified that he worked "around," but not in, the drainfield on the Seven Star property. Accordingly, the evidence and testimony in the record does not establish that his work altered, installed, modified, repaired, or replaced the existing drainfield on the property, which would require a permit under the applicable law.

RO ¶ 41.

DEP takes exception to the paragraph's finding that Mr. Logue testified he worked "around" the Property's drainfield and not "in" the Property's drainfield. Moreover, DEP takes exception to the finding that "the evidence and testimony in the record does not establish that his work altered, installed, modified, repaired, or replaced the existing drainfield on the property, which would require a permit under the applicable law." (RO ¶ 41).

DEP contends that paragraph no. 41 is not supported by competent substantial evidence, because Adam Noah Group's answer to DEP's request for admissions established that the Respondent worked in the septic system, and thus, committed the violation of altering, installing, modifying, repairing, or replacing a septic system. (DEP's Exceptions at p. 4).

However, DEP acknowledged that the ALJ made an evidentiary ruling to disregard the admissions based on the ALJ's interpretation of the caselaw. (*See* DEP's Exceptions at p. 4; and ALJ Culpepper's evidentiary ruling, T. Vol. I, pp. 14-16). The ALJ noted that because the

hearing is a de novo hearing, he will base his factual findings on the testimony at the hearing. (*See* ALJ Culpepper's ruling, T. Vol. I., pp. 14-15). The Department does not have jurisdiction to reject the ALJ's evidentiary rulings. An ALJ's rulings on evidence are not matters over which the agency has "substantive jurisdiction." *See Martuccio*, 622 So. 2d at 609; *Heifetz*, 475 So. 2d at 1281-82. Instead, such 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.

The Uniform Rules of Procedure that apply to DOAH proceedings provide that "[a]fter commencement of a proceeding, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure." Fla. Admin. Code R. 28-106.206 (2022). Thus, the Florida Rules of Civil Procedure apply to discovery in this DOAH hearing. Rule 1.370 (Requests for Admission) provides both civil court and DOAH judges with broad discretion to authorize a party to withdraw or amend its admissions. *See* Fla. R. Civil P. 1.370(b) (2022).

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,* 805 So. 2d at 1012; *L.B. Bryan*, 746 So. 2d at 1197. However, the Department does not have subject matter jurisdiction to interpret the Florida Rules of Civil Procedures or its caselaw.

Lastly, paragraph no. 41 of the RO is supported by competent substantial evidence, including inferences drawn by the ALJ from the totality of the evidence presented at the final hearing. (Logue, T. Vol. II, pp. 175-78, 182-86; 189-96). Consequently, the Department may not reject the findings in paragraph no. 41.

Based on the foregoing reasons, DEP's exception to paragraph no. 41 is denied.

DEP's Exception to Paragraph No. 42

DEP takes exception to the ultimate findings of fact in paragraph no. 42 of the RO, which provides in its entirety:

> 42. Therefore, the Department did not demonstrate that Seven Star was required to obtain a permit prior to instructing Mr. Logue to work on its property. Consequently, the Department failed to prove, by clear and convincing evidence, that Seven Star violated section 381.0065 or rule 62-6.003.

RO ¶ 42.

DEP acknowledges that it takes exception to paragraph no. 42 of the RO based on the ALJ's evidentiary ruling regarding DEP's request for admissions that formed the foundation of paragraph no. 41 of the RO. DEP takes exception to paragraph no. 42 of the RO for essentially the same reasons articulated in its exception to paragraph no. 41.

As explained above in response to DEP's exception to paragraph 41 of the RO, the Department does not have jurisdiction to reject the ALJ's rulings on the admissibility of evidence, or his interpretation of the Florida Rules of Civil Procedure. An ALJ's evidentiary rulings and interpretations of the Florida Rules of Civil Procedure are not matters over which the agency has "substantive jurisdiction." *See Martuccio*, 622 So. 2d at 609; *Heifetz*, 475 So. 2d at 1281-82. Instead, rulings and interpretations of the rules of civil procedure 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.

Because DEP based its exception to paragraph no. 42 on matters over which the Department does not have substantive jurisdiction, the Department does not have the authority to reject paragraph no. 42. Moreover, paragraph no. 42 of the RO is supported by competent substantial evidence, including inferences drawn by the ALJ from the totality of the evidence

presented at the final hearing. (Chaudhry, T. Vol. I, pp. 143-44, 149-50; 155, 163, 169-72; Logue, T. Vol. II, pp. 175-78, 182-86; 189-96).

Based on the foregoing reasons, DEP's exception to paragraph no. 42 is denied.

DEP's Exception to Paragraph No. 55

DEP takes exception to the ALJ's statement in paragraph no. 55 of the RO that rule 64E-6.003 was transferred, in toto, to rule 62-6.003 on July 16, 2013. DEP contends the rule was transferred in 2021, and not 2013. A review of chapters 64E-6 and 62-6, Florida Administrative Code, supports DEP's exception to paragraph no. 55 of the RO that chapter 64E-6, which contains rule 64E-6.003, was not transferred to DEP in 2013. The Department concludes that its conclusion of law is more reasonable than that of the ALJ. *See* § 120.57(1)(l), Fla. Stat. (2022). However, this technical error does not affect the ALJ's other findings of fact or conclusions of law in the RO attached hereto.

Based on the foregoing reasons, DEP's exception to paragraph no. 55 is granted.

DEP's Exception to Paragraph No. 56

DEP takes exception to paragraph no. 56 of the RO alleging that an incorrect rule citation in DEP's enforcement Citation is not a basis to invalidate the Citation. Upon review of the exception and the applicable caselaw, the Department concurs with DEP's legal analysis.

The Department concurs that the incorrect reference to a statute or rule in an enforcement document, complaint, or other document required to bring a cause of action is not grounds to invalidate the document or complaint unless the mistake causes prejudice. *See Scharrer v. Dep't of Prof'l Regulation*, 536 So. 2d 320, 320 (Fla. 3rd DCA 1988), *review dismissed*, 542 So. 2d 1334 (Fla. 1989) (affirming a real estate license suspension concluding that citing the incorrect subsection was harmless error that was only typographical and did not cause any harm to the

Respondent because it was obvious what was being charged); *see also Pin-Pon Corp. v. Landmark Am. Ins. Co.*, 500 F. Supp. 3d 1336, 1345 (S.D. Fla. 2020) (holding that a civil remedy notice that did not meet the specificity requirements of section 624.155, Florida Statutes, should not be dismissed, because the error was technical, the party substantially complied, the notice met the purpose of the statute, and the opposing party was not prejudiced by the error).

Although the Citation issued in this case cited a violation of Florida Administrative Code Rule 64E-6.003(1), this rule was transferred to the Department of Environmental Protection's rule chapter 62-6 in 2021 based on the statutory directive in Chapter 2020-150, Section 7 of the Laws of Florida. *See* RO p. 2, footnote 2.

Adam Noah Group was put on adequate notice of the violation being brought, not confused by the technical error in the rule citation, and not prejudiced by the technical error. The history notes for rule 64E-6.003 specify that it was transferred to rule 62-6.003, Florida Administrative Code. Moreover, the unilateral pre-hearing stipulations for both parties reference chapter 62-6, Florida Administrative Code, and both stipulations list the correct language for the violation. The Department concurs with DEP's conclusion that it was improper to rule the enforcement Citation invalid based on the Citation's reference to rule 64E-6.003(1), Florida Administrative Code. *See* Fla. Admin. Code R. 62-6.003 (2022), and RO p. 2, footnote 2. The Department concludes that this rule citation was a technical error and that the Department's conclusion of law is more reasonable than that of the ALJ. *See* § 120.57(1)(l), Fla. Stat. (2022).

Based on the foregoing reasons, DEP's exception to paragraph no. 56 is granted.

DEP's Exception to Paragraph No 61.

DEP takes exception to paragraph no. 61 of the RO, which provides in its entirety:

> 61. Mr. Worley urged that he contacted rock fill when he pressed his probing rod into the earth at various locations in the grass strip. However, the evidence does not

unequivocally support Mr. Worley's contention that the material he encountered beneath the ground was recently placed there by Mr. Logue.

RO ¶ 61.

The Department concludes that paragraph no. 61 of the RO is a mixed statement of law and fact. DEP takes exception to paragraph no. 61 of the RO on the basis that it is predicated on an incorrect finding of fact in paragraph no. 23 of the RO.

However, as explained above, paragraph no. 23 is supported by competent substantial evidence, including inferences drawn by the ALJ from the totality of the evidence presented at the final hearing. (Midence, T. Vol. I, p. 43, lines 1-2; Worley, T. Vol. II, pp. 204-05, 208).

Based on the foregoing reasons, DEP's exception to paragraph no. 61 is denied.

DEP's Exception to Paragraph Nos. 57, 59, and 62

DEP takes exception to paragraph nos. 57 and 62 of the RO, alleging they are predicated on an incorrect finding of fact in paragraph no. 41 of the RO that Mr. Logue, the Respondent's contractor, worked "around," but not "in" the Property's drainfield. *See* RO ¶ 41.

DEP takes exception to the ALJ's conclusion in paragraph no. 57 of the RO that DEP "did not show, by clear and convincing evidence, sufficient grounds to discipline Seven Star [also known as the Respondent, Adam Noah Group] based on its alleged failure to obtain a permit to install, repair, alter, modify, or replace the drainfield on its property." (RO ¶ 57).

DEP also takes exception to the ALJ's conclusion in paragraph no. 62 of the RO that "the evidence and testimony the Department presented at the final hearing was not sufficiently persuasive to conclude, by clear and convincing evidence, that Mr. Logue illegally 'installed' or 'repaired' the drainfield" on the subject Property. (RO ¶ 62).

DEP alleged that Adam Noah Group's response to DEP's "request for admissions, as explained in the exception for the Finding of Fact in Paragraph 41, conclusively established that

the person hired by Respondent worked on the septic system and that the work involved the removal of roots in the septic system." (emphasis added) (DEP's Exceptions, p. 10).

However, DEP acknowledged in its exception to paragraph no. 41 of the RO that the ALJ made an evidentiary ruling to disregard DEP's request for admissions and Adam Noah Group's response based on the ALJ's interpretation of the caselaw. (*See* DEP's Exceptions at p. 4; and ALJ Culpepper's evidentiary ruling, T. Vol. I, pp. 14-16).

As explained above in response to DEP's exception to paragraph 41 of the RO, the Department does not have jurisdiction to reject the ALJ's rulings on the admissibility of evidence, or his interpretation of the Florida Rules of Civil Procedure. *See* the Department's ruling on DEP's exception to paragraph 41 above, which is incorporated herein. Instead, rulings and interpretations of the rules of civil procedure 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.

DEP also takes exception to paragraph 59 of the RO but does not provide any explanation for why paragraph 59 should be rejected. Moreover, paragraph 59 merely identifies several questions that the ALJ concludes have not been resolved by DEP's evidence. Paragraph 59 of the RO provides, in its entirety:

> 59. Further, the evidence in the record does not satisfactorily resolve a number of questions, including: 1) If the Department believed that Mr. Logue's removal of tree roots and stumps improperly disturbed the drainfield, where exactly within the drainfield did he dig, and did he actually extract roots from the drainfield product itself; 2) If the Department did not believe that Mr. Logue dug in the drainfield area for the purpose of removing roots, what activity did Mr. Logue really engage in, and how did this activity interact with the drainfield; and 3) If Mr. Logue did, in fact, spread more 'mineral aggregate' on top of the drainfield, what material did he add, and where specifically did he place this product in relation to the existing drainfield?

RO ¶ 59.

Paragraph no. 59 merely lists a series of questions the ALJ concluded the record did not satisfactorily resolve. DEP's exception to this paragraph failed to provide any explanation to reject paragraph no. 59 of the RO as required by section 120.57(1)(k) of the Florida Statutes. *See* § 120.57(1)(k), Fla. Stat. (2022). Therefore, DEP may not grant this exception.

Based on the foregoing reasons, DEP's exceptions to paragraph nos. 57, 59, and 62 are denied.

CONCLUSION

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the Recommended Order, and being otherwise duly advised, it is

ORDERED that:

A. The Recommended Order (Exhibit A) is adopted and incorporated by reference, except as modified by the above rulings on Exceptions.

B. DEP's Citation against Respondent Adam Noah Investment Group, LLC, 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 the filing of a Notice of Appeal pursuant to Rule 9.110, 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 16th day of June 2023 in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

SHAWN HAMILTON
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.

Deputy Clerk — CLERK

6/16/23
DATE

CERTIFICATE OF SERVICE

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

Daniel M. Coton, Esquire Trinkle Redman, P.A. 121 North Collins Street Plant City, Florida 33563 dcoton@trinkle-law.com bsutherland@trinkle-law.com djones@trinkle-law.com	John Ryen Morgan-Ring, Esquire Staci R. Kichler, Esquire Department of Environmental Protection 3900 Commonwealth Blvd., M.S. 35 Tallahassee, FL 32399-3000 Ryen.MorganRing@FloridaDEP.gov

this 16th day of June 2023.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Stacey D. Cowley

STACEY D. COWLEY
Administrative Law Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
email Stacey.Cowley@FloridaDEP.gov

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioner,

Case No. 22-1987

vs.

ADAM NOAH INVESTMENT GROUP, LLC,

Respondent.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2022),[1] on December 21, 2022, by Zoom video conference, from Tallahassee, Florida.

APPEARANCES

For Petitioner: John Ryen Morgan-Ring, Esquire
Staci R. Kichler, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Stop 35
Tallahassee, Florida 32399-3000

For Respondent: Daniel M. Coton, Esquire
Trinkle Redman, P.A.
121 North Collins Street
Plant City, Florida 33563

STATEMENT OF THE ISSUE

Whether grounds exist to sanction Respondent for performing work on a septic system without a permit.

[1] All statutory references are to Florida Statutes (2022), unless otherwise noted.

PRELIMINARY STATEMENT

On April 29, 2022, the Department of Health ("DOH") issued to Respondent, Adam Noah Investment Group, LLC ("Seven Star"), a Citation for Violation – Onsite Sewage Program/Sanitary Nuisance (the "Citation").[2] The Citation alleges that Seven Star conducted unpermitted drainfield installation or repair involving the sewage system on its property.

On May 6, 2022, Seven Star timely filed a request for administrative hearing challenging the Citation.

On July 7, 2022, the Department referred this matter to the Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge to conduct a chapter 120 evidentiary hearing.

The final hearing was held on December 21, 2022. At the final hearing, the Department called Israel Midence and Kevin Worley as witnesses. Seven Star offered the testimony of Yahya Chaudhry and David Logue. Department Exhibits 1 through 7, 10, 11, 14 through 17, and 21 were admitted into evidence.

A two-volume Transcript of the final hearing was filed with DOAH on January 5, 2023. At the close of the hearing, the parties were advised of a ten-day timeframe to file post-hearing submittals. After the final hearing, the

---

[2] On June 30, 2021, DOH and the Department of Environmental Protection (the "Department") entered into an interagency agreement transferring the onsite sewage program from DOH to the Department. This transfer gave the Department authority over and the ability to enforce the rules of the onsite sewage program. At the time the Citation was issued, however, the transition had not yet been completed, and program personnel, as well as the actions they took, remained attached to DOH. As a result, while the Citation shows that it was prepared by DOH, the Citation is being pursued by the Department.

parties requested a 20-day extension of the filing deadline, which was granted.[3] Both parties timely submitted Proposed Recommended Orders, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. This proceeding involves a challenge to the Citation issued by the Department for an alleged violation of section 381.0065, Florida Statutes, and Florida Administrative Code Chapter 62-6, entitled "Standards for Onsite Sewage Treatment and Disposal Systems" ("OSTDS").

2. The property at issue is a gas station and convenience store that operates under the name Seven Star Stores. Seven Star is located at 15634 Dr. Martin Luther King Jr. Boulevard, Plant City, Florida.

3. Seven Star relies on an inground septic system installed on its property for sewage and wastewater disposal.

4. The Department is the state agency responsible for regulating the OSTDS program.[4] To discharge this responsibility, the Department administers and enforces the provisions of chapter 381 pertaining to the regulation of OSTDS, as well as the administrative rules promulgated thereunder in chapter 62-6.

5. The Department issued the Citation on April 29, 2022. The Department specifically charged Seven Star with installing, repairing, altering, or modifying its sewage system without first obtaining authorization from the Department in the form of a permit. As the penalty for the unpermitted activity, the Department seeks to impose a fine in the amount of $500, as well as require Seven Star to obtain the appropriate permit from the Department.

---

[3] By requesting a deadline for filing post-hearing submissions beyond ten days after the final hearing, the 30-day time period for filing the Recommended Order was waived. *See* Fla. Admin. Code R. 28-106.216(2).

[4] *But see* footnote 2 above.

6. The Department called Israel Midence to testify on its behalf. Mr. Midence works for DOH as an Environmental Specialist II. Mr. Midence's responsibilities for DOH entail enforcing the OSTDS program. His duties encompass inspecting sewage systems on Florida properties and reviewing and/or approving permit applications for the same.

7. Mr. Midence also investigates complaints regarding sewage systems. One notable area of his job includes keeping vigilant for unauthorized drainfield installations, which he explained might lead to premature failure of a property's sewage system. Mr. Midence estimates that he has inspected more than 5,000 sewage systems while working for the Department and fielded over 500 complaints involving the same.

8. By way of background, Mr. Midence expressed that a conventional septic system basically consists of two components. The first part is a septic tank, which receives the effluent and waste directly from the facility through a drain pipe. The second part is the drainfield,[5] into which treated sewage is pumped from the septic tank.

9. Mr. Midence remarked that all sewage is initially treated in the septic tank. When the sewage reaches a certain level within the tank, the treated waste is discharged into a series of three to four pipes or drainlines that run away from the septic tank in parallel trenches beneath the ground. The pipes must be laid out at least 24 inches above any source of groundwater and are encased on all sides with approximately six inches of "mineral aggregate" (dirt and rocks). The pipes are perforated to allow the treated sewage to seep into the "mineral aggregate." The soil and rocks then act as a filter to eliminate pollutants before they sink into a water source or rise to the

[5] Rule 62-6.002(18) defines a "drainfield" as "a system of open-jointed or perforated piping, approved alternative distribution units, or other treatment facilities designed to distribute effluent for filtration, oxidation and absorption by the soil within the zone of aeration."

surface. Mr. Midence described the "drainfield" as the rectangle area that includes the full length of the pipes, as well as the surrounding "mineral aggregate."

10. Mr. Midence advised that the Department regulates drainfields to ensure that sewage does not harm the environment. In particular, Department approval is needed to ensure that all contaminants that seep into a drainfield remain separated from the water table so as to not pollute groundwater. Therefore, section 381.0065(1) and rule 62-6.003 require a property owner to obtain a permit before conducting any activity that might disturb or infringe upon a drainfield or create a sanitary nuisance.

11. Mr. Midence became involved in this matter after the Department received a complaint alleging possible unpermitted activity at Seven Star. Mr. Midence relayed that on January 10, 2022, Richard Alderman, a local septic tank contractor, contacted the Department, via email, stating that he "got a tip from someone" (possibly a second septic tank contractor) who shared with him that "a crew burying rock and sand to try to fix a drainfield" was seen at the Seven Star gas station. (Mr. Midence relayed that Mr. Alderman's company, Alderman Septic Tank, Inc., is in the business of installing and repairing sewage systems.)

12. The complaint included a photograph of the Seven Star property taken by a (third?) septic tank contractor. The photograph showed two piles of rock fill, a truck attached to a trailer of sod, and an excavator[6] on a grassy strip along the side of the Seven Star property. Mr. Midence stated that the rocks in the picture are typical of those used in drainfield installation and repair work. Mr. Midence explained that this material is the type of "mineral aggregate" that is commonly placed around and on top of drainfield pipes. Mr. Midence declared that the presence of the "mineral aggregate" in the

[6] An excavator is a heavy construction vehicle equipped with a hydraulic arm and scoop that is primarily used for digging.

drainfield area, together with the excavator and the sod, strongly supported the allegation that some kind of activity was taking place involving the property's sewage system.

13. Mr. Midence explained that, generally, when investigating for potentially unlawful work, he first researches property records to learn the type of sewage system that was initially authorized for the property. Thereafter, he conducts a site visit and discusses the matter with the property owner. While onsite, Mr. Midence relayed that he is mindful to note evidence of excavations around the sewage system, as well as the presence of drainfield material or parts.

14. Per his practice, Mr. Midence commenced his investigation by reviewing the Seven Star site plan records to learn the location of its drainfield. Based on his examination, Mr. Midence discovered that the drainfield was originally installed in 2001 and consisted of a septic tank and four drain pipes that ran about 16 inches below the surface. He further calculated that the drainfield was approximately five feet wide and was encased in about five inches of rock and dirt fill. Finally, based on a hand-drawn, "shaded" section of the site plan, Mr. Midence determined that the drainfield was situated within a roughly 18 by 50-foot grass strip along the eastern edge of the Seven Star property.

15. Mr. Midence also checked whether DOH had issued a permit for any repair work on the Seven Star sewage system. He found none.

16. Next, on January 12, 2022, Mr. Midence visited the property. While there, he stated that he located the drainfield within the grass strip. In addition, at one end of the drainfield area, Mr. Midence discovered a small earthen mound partially covered in sod. The mound was approximately 20-30 feet long and about 20 inches taller than the surrounding landscape. He also found evidence of dirt and rock fill spread across the grass, as well as the presence of machine tracks. Based on these findings, Mr. Midence believed that Seven Star (or someone at its direction) had placed additional "drainfield

product" directly on top of the existing drainfield. Mr. Midence then concluded that the mound was evidence of an attempt to add a new drainfield on the property or repair the old drainfield. Mr. Midence asserted that without a permit, such action constitutes illegal "human interference" with the sewage system.

17. At that point, Mr. Midence determined that a citation should be issued to Seven Star due to unauthorized drainfield installation or repair. Mr. Midence expressed that DOH requires permits before any work may be conducted in the septic tank area, such as adding "material aggregate" on top of a preexisting drainfield. (In response to Seven Star's explanation for the work (set forth below), Mr. Midence further voiced that any steps taken to remove roots from the "material aggregate" covering the pipes also requires a repair permit.)

18. Mr. Midence prepared the Citation, and issued it to Seven Star on April 29, 2022. In the Citation, Mr. Midence identified the "specific ... provisions of law and/or rule allegedly violated" as "FAC 64E-6.003(1)." Mr. Midence further described the violation as:

> System construction permit – No portion of an onsite sewage treatment and disposal system shall be installed, repaired, altered, modified, abandoned or replaced until a construction permit had been issued on Form 4016, 08/09.

In addition, Mr. Midence required Seven Star to apply for the appropriate repair permit from the Department.

19. During his testimony, Mr. Midence acknowledged that he did not personally observe any work done in the drainfield area. Neither did he dig up the sod, soil, or rocks in the earthen mound to confirm whether the original soil and rock fill covering the pipes had been disturbed by the recent work. Mr. Midence stated that all work in the area had been completed by his site visit, except for some additional sod that was to be laid on the mound. Mr. Midence further conceded that in estimating the size of the Seven Star

drainfield, he included approximately five feet of "buffer" space on either side of the pipes. Finally, Mr. Midence disclosed that he was not aware of any failure of the Seven Star sewage system or health issues since the work on the property had been completed in January 2022.

20. To expound on the basis for the Citation, the Department offered the testimony of Kevin Worley. Mr. Worley also works for DOH as an Environmental Specialist II. Mr. Worley represented that, as part of his responsibilities, he too has conducted over 5,000 sewage system inspections. He also reviews permits for repairs.

21. Mr. Worley relayed that he became involved in this issue when Mr. Midence requested that he inspect and photograph the Seven Star property. Mr. Worley conducted his follow up site visit in September 2022, approximately eight months after the installation or repair work on the Seven Star sewage system was allegedly conducted.

22. Mr. Worley testified that, based on his observation, he believes that someone worked on the drainfield. Mr. Worley contended that the topography of the section of the property where the septic tank and the drainfield were located had changed between January and September 2022. Mr. Worley recalled from his personal familiarity with the area from driving by the convenience store in the past, that the grassy strip had been flat in January 2022. During his September inspection, however, he discovered a low mound of earth covered with grass and hayseed.

23. During his site visit, Mr. Worley used a metal probing rod to locate the pipes in the drainfield. His goal was to determine how much dirt and rock material had been placed on top of the pipes. Mr. Worley stated that, when he drove his probing rod down into the mound, he hit the top of the "mineral aggregate" about 20 inches below the surface. Based on this discovery, Mr. Worley concluded that someone had added a second layer of material onto the top of the existing drainfield without the required DOH authorization.

24. Mr. Worley echoed Mr. Midence's comments that pulling tree roots out of drainfield material is "disturbing" the drainfield. Therefore, he declared that if Seven Star did arrange for someone to remove tree roots from the drainfield area, it was required to obtain a permit from the Department.

25. In response to questioning, Mr. Worley admitted that he did not dig up the grass, gravel, or soil to confirm whether someone had, in fact, actually removed tree roots from the "mineral aggregate" or otherwise disturbed the drainfield area. Mr. Worley further conceded that a permit would not be necessary if the work Seven Star performed did not impact the drainfield.

26. In challenging the Citation, Seven Star denies that anyone at its direction accessed, added to, or disturbed the drainfield on its property. On the contrary, Seven Star asserts that it hired a contractor to specifically remove tree roots from the area "around," but not in, the drainfield. Seven Star maintains that the work the contractor performed did not require a permit.

27. Yahya Chaudhry testified on behalf of Seven Star. Mr. Chaudhry owns Seven Star, as well the property on which it is located.

28. Initially, Mr. Chaudhry recounted that in December 2021, he learned that Seven Star was experiencing a problem with its plumbing.
Mr. Chaudhry relayed that the convenience store tenant informed him that the sink in the building's kitchen was draining very slowly.

29. To fix the sink, on or about January 6, 2022, Mr. Chaudhry hired a plumber named David Logue to assess the problem. Mr. Chaudhry recounted that, after examining the sink, Mr. Logue informed him that tree roots might be obstructing the drainage pipes. Thereafter, Mr. Chaudhry asked
Mr. Logue to clean up the root problem.

30. Expanding on his testimony, Mr. Chaudhry shared that several sizable trees used to line the grass strip where the building's septic tank is located. At some point in the past, he decided to cut down the trees to

improve rainwater drainage through the area. The tree stumps and roots, however, remained in the ground.

31. Regarding Mr. Logue's efforts to remove the roots, Mr. Chaudhry stated that he did not observe Mr. Logue's work near the septic tank. Neither did he watch Mr. Logue cover the area with gravel and grass after he finished his job. Mr. Chaudhry commented that Mr. Logue explained that the material was needed to fill in the spots where he pulled out the tree stumps. Mr. Chaudhry insisted, however, that any and all work done in the vicinity of the septic tank and the drainfield was limited to the cutting and removal of tree roots. Mr. Chaudhry elaborated that there is "a lot of land" on that side of the property-much more land than the drainfield area.

32. Mr. Chaudhry vehemently denied that he hired or instructed Mr. Logue (or anyone) to work on or access the septic system or drainfield. He further denied that Mr. Logue cut or removed roots from, or performed any work on, the drainfield. Mr. Chaudhry insisted that none of Mr. Logue's activities involved replacing or installing a new drainfield.

33. Mr. Chaudhry did not dispute that Seven Star did not obtain a permit prior to hiring Mr. Logue. However, he maintained that the most Mr. Logue did on his property was remove roots and old tree stumps. Therefore, he did not need to obtain a permit from the Department.

34. David Logue also testified for Seven Star. Mr. Logue is the owner of David Logue Plumbing. Mr. Logue admitted to performing the work that led to the Citation the Department issued to Seven Star. As with Mr. Chaudhry, Mr. Logue insisted that none of his work on the property involved or affected the sewage system or the drainfield.

35. Initially, Mr. Logue explained that Mr. Chaudhry hired him to investigate a possible plumbing problem at Seven Star. When Mr. Logue examined the sink in the convenience store, he noticed that the sink seemed clogged, but he did not believe that the pipes beneath it were failing.

36. After reporting this news to Mr. Chaudhry, Mr. Logue suggested that Mr. Chaudhry consider clearing several tree stumps on the east side of the property. Mr. Logue explained that this step might prevent future problems from roots intruding into the plumbing pipes or penetrating the drainfield.

37. In describing his work, Mr. Logue stated that he operated an excavator to extirpate the tree stumps. Afterwards, he used dirt and rocks to backfill the holes left by the now-removed stumps and roots. Mr. Logue stated that he brought one truckload each of dirt and rock (the piles Mr. Midence viewed in the photograph) to the property for this purpose. Mr. Logue added that, after filling the holes, he found that he had more material than he needed. Therefore, he pushed the excess rocks and soil into a small mound in the area. He then covered the mound with the sod he brought.

38. During the hearing, Mr. Logue produced an invoice from his work at Seven Star. On his invoice, Mr. Logue described his work as, "Dug around drain field and cleared roots from system and put original dirt back in ditches around drain field." Mr. Logue declared that the only work he performed in the area was "around" the drainfield, just as he wrote. Mr. Logue expressed that he never intended to, nor did he, take any action to alter the drainfield itself.

39. Mr. Logue vigorously denied that he dug up, exposed, installed, interfered with, or performed any activities in or on the drainfield. As with Mr. Chaudhry, Mr. Logue did not believe that a permit was necessary for his "minor maintenance" because he did not conduct any repair work on the sewage system itself.

40. Mr. Logue relayed that he is familiar with septic system drainfields. He represented that he has installed drainfields in the past. He described drainfields as the area where all the "greywater" goes, which then soaks into the ground. Mr. Logue further urged that he was fully aware that he was not to conduct any work that might disrupt or interfere with the drainfield on the

Seven Star property. Therefore, he maintained that he determined the general area of the drainfield before he began his work, and he tried to avoid it as he extracted the stumps and roots.

41. Mr. Logue's testimony regarding the work he performed on the Seven Star property is credible and credited. Undoubtedly (and admittedly) Mr. Logue did some digging and spread some dirt and sod on the grassy strip of land in the vicinity of the Seven Star sewage system and drainfield. However, Mr. Logue convincingly testified that he worked "around," but not in, the drainfield on the Seven Star property. Accordingly, the evidence and testimony in the record does not establish that his work altered, installed, modified, repaired, or replaced the existing drainfield on the property, which would require a permit under the applicable law.

42. Therefore, the Department did not demonstrate that Seven Star was required to obtain a permit prior to instructing Mr. Logue to work on its property. Consequently, the Department failed to prove, by clear and convincing evidence, that Seven Star violated section 381.0065 or rule 62-6.003.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 120.569 and 120.57(1).

44. The Department initiated this action against Seven Star seeking to impose an administrative fine for actions that constitute installing, repairing, altering, or modifying an OSTDS (the drainfield) without a permit in violation of rule 62-6.003(1).

45. Under section 381.0011, DOH is given the statutory responsibility to administer and enforce laws and rules related to sanitation. Further, in accordance with section 381.0065(1)(b), the Department:

> shall issue permits for the construction, installation, modification, abandonment, or repair of onsite sewage treatment and disposal systems under conditions as described in this section and rules adopted under this section. It is further the intent of the Legislature that the installation and use of onsite sewage treatment and disposal systems not adversely affect the public health or significantly degrade the groundwater or surface water.

46. Section 381.0065(2)(*l*) states that an "onsite sewage treatment and disposal system" means:

> a system that contains a standard subsurface, filled, or mound drainfield system; ... [or] a septic tank; ... that is installed or proposed to be installed beyond the building sewer on land of the owner or on other land to which the owner has the legal right to install a system. The term includes any item placed within, or intended to be used as a part of or in conjunction with, the system.

47. Section 381.0065(4), entitled "Permits; Installation; Conditions," states:

> A person may not construct, repair, modify, abandon, or operate an onsite sewage treatment and disposal system without first obtaining a permit approved by the [Department of Environmental Protection].

48. Section 381.0065(5)(b), entitled "Enforcement; Right of Entry; Citations," states:

> 1. The department may issue citations that may contain an order of correction or an order to pay a fine, or both, for violations of ss. 381.0065-381.0067 ... the rules adopted by the department, when a violation of these sections or rules is enforceable by an administrative or civil remedy, or when a violation of these sections or rules is a misdemeanor of the second degree.

2. A citation must be in writing and must describe the particular nature of the violation, including specific reference to the provisions of law or rule allegedly violated.

3. The fines imposed by a citation issued by the department may not exceed $500 for each violation. Each day the violation exists constitutes a separate violation for which a citation may be issued.

* * *

5. The department may reduce or waive the fine imposed by the citation. In determining whether to reduce or waive the fine, the department must consider the gravity of the violation, the person's attempts at correcting the violation, and the person's history of previous violations.

49. Section 381.0061, entitled "Administrative fines," further states:

(1) In addition to any administrative action authorized by chapter 120 or by other law, the department may impose a fine, which may not exceed $500 for each violation, for a violation of s. 381.006(15), s. 381.0065, s. 381.0066, s. 381.0072, or part III of chapter 489, for a violation of any rule adopted under this chapter, or for a violation of chapter 386. Notice of intent to impose such fine shall be given by the department to the alleged violator. Each day that a violation continues may constitute a separate violation.

(2) In determining the amount of fine to be imposed, if any, for a violation, the following factors shall be considered:

(a) The gravity of the violation, including the probability that death or serious physical or emotional harm to any person will result or has resulted, the severity of the actual or potential harm, and the extent to which the provisions of the applicable statutes or rules were violated.

(b) Actions taken by the owner or operator to correct violations.

(c) Any previous violations.

50. Pursuant to its authority under section 381.0065(3)(a), the Department adopted chapter 62-6 to administer the "onsite sewage treatment and disposal system" program. Rule 62-6.003 provides, in pertinent part:

> (1) System Construction Permit – No portion of an onsite sewage treatment and disposal system shall be installed, repaired, altered, modified, abandoned or replaced until a construction permit has been issued on Form DEP 4016, 08/09, Construction Permit, herein incorporated by reference.
>
> * * *
>
> (3) Repair Inspections – A system repair shall be inspected by the Department or a master septic tank contractor to determine compliance with construction permit standards prior to final covering of the system.

51. Rule 62-6.002(47) defines "repair" to mean, in pertinent part:

> [R]eplacement of or modifications or additions to a failing system which are necessary to allow the system to function in accordance with its design or must be made to eliminate a public health or pollution hazard. ... The use of any treatment method that is intended to improve the functioning of any part of the system, or to prolong or sustain the length of time the system functions, shall be considered a repair.

52. Rule 62-6.015, entitled "Permitting and Construction of Repairs," provides:

> All repairs made to a failing onsite sewage treatment and disposal system shall be made only with prior knowledge and written approval from the Department having jurisdiction over the

> system. Approval shall be granted only if all of the following conditions are met:
>
> (1) Any property owner or lessee who has an onsite sewage treatment and disposal system which is improperly constructed or maintained, or which fails to function in a safe or sanitary manner shall request from the Department, either directly or through their agent, a permit to repair the system prior to initiating repair of the system.

53. The Department's intended action to impose an administrative fine on Seven Star is penal in nature. Accordingly, the Department bears the burden of proof to demonstrate the grounds for doing so by clear and convincing evidence. *Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996); and *Chappell Sch., LLC v. Dep't of Child. & Fams.*, 332 So. 3d 1060, 1063 (Fla. 1st DCA 2021); *see also Fla. Dep't of Child. & Fams. v. Davis Fam. Day Care Home*, 160 So. 3d 854, 856 (Fla. 2015) ("an agency must prove its reasons for revoking a professional license by clear and convincing evidence because such a proceeding is penal in nature and implicates significant property rights.").

54. Clear and convincing evidence is a heightened standard that "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" Clear and convincing evidence is defined as an intermediate burden of proof that:

> [R]equires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

S. Fla. Water Mgmt. v. RLI Live Oak, LLC, 139 So. 3d 869, 872-73 (Fla. 2014) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

I. Error Within the Citation:

55. Initially, the undersigned notes that the Citation contains a material error, which arguably renders the Citation invalid and unenforceable. Section 381.0065(5)(b)2. requires a citation to "describe the particular nature of the violation, including specific reference to the provisions of law or rule allegedly violated." The Citation in this case refers to "FAC 64E-6.003(1)" as the "law and/or rule" Seven Star allegedly violated. However, on April 29, 2022, the date Mr. Midence issued the Citation, rule 64E-6.003 did not exist. A review of the administrative history of rule 64E-6.003 shows that on July 16, 2013, the rule was transferred, in toto, to rule 62-6.003. Rule 62-6.003, which went into effect on that same date, is now the operative rule governing permits issued for the installation, repair, alteration, modification, abandonment, or replacement of onsite sewage treatment and disposal systems.

56. Consequently, the specific administrative rule Seven Star allegedly violated in January 2022 was rule 62-6.003(1), not rule 64E-6.003(1) as charged. However, nowhere in the Citation is rule 62-6.003(1) listed as the basis for the Department's complaint that Seven Star installed or repaired its sewage system or drainfield without obtaining the appropriate permit. As a result, the Citation fails to comply with the enforcement provisions of section 381.0065.

II. Merits of the Citation:

57. Turning to the facts found in this matter, based on the competent substantial evidence produced during the final hearing, the Department did not show, by clear and convincing evidence, sufficient grounds to discipline Seven Star based on its alleged failure to obtain a permit to install, repair, alter, modify, or replace the drainfield on its property. The Department's case rests primarily on the conclusions of two witnesses who visited the location after the work in question had been completed. Although neither individual (Mr. Midence and Mr. Worley) personally observed Mr. Logue's actions, both felt confident that the condition of the ground manifested evidence of an

improper installation or repair of the drainfield. However, the undersigned finds areas of ambiguity in both accounts which create some "hesitancy" in concluding that Seven Star violated the applicable statute and rule.

58. Both Department witnesses testified with certitude. However, the evidence and testimony presented during the hearing does not clearly establish several pertinent points. Initially, the undersigned notes that, while Mr. Midence resolutely asserted that Mr. Logue's activity was illegal, his initial supposition was based on a hearsay (within hearsay) description from a third-party complaint, as well as images in a photograph whose origin was never firmly articulated.

59. Further, the evidence in the record does not satisfactorily resolve a number of questions, including: 1) If the Department believed that Mr. Logue's removal of tree roots and stumps improperly disturbed the drainfield, where exactly within the drainfield did he dig, and did he actually extract roots from the drainfield product itself; 2) If the Department did not believe that Mr. Logue dug in the drainfield area for the purpose of removing roots, what activity did Mr. Logue really engage in, and how did this activity interact with the drainfield; and 3) If Mr. Logue did, in fact, spread more "mineral aggregate" on top of the drainfield, what material did he add, and where specifically did he place this product in relation to the existing drainfield?[7]

60. Next, and most crucially, the Department did not effectively demarcate the specific location of the drainfield within the grass strip on the Seven Star property. Consequently, without knowing the exact position of the drainfield, the evidence in the record is insufficient to conclude that any dirt or rocks that Mr. Logue (allegedly) brought to the property were piled on top of, or added to, the existing drainfield. For the same reason, the evidence is

[7] In the photographs the Department offered into evidence, the "mound" appears much too small to contain two piles of rocks and dirt. In any event, no witness directly observed how or where (or if) Mr. Logue dumped, buried, or spread any material in the vicinity of the drainfield.

inadequate to confirm that the mound Mr. Logue (allegedly) built in the grass somehow interferes with or impinges upon the drainfield or the OSTDS.

61. Mr. Worley urged that he contacted rock fill when he pressed his probing rod into the earth at various locations in the grass strip. However, the evidence does not unequivocally support Mr. Worley's contention that the material he encountered beneath the ground was recently placed there by Mr. Logue.

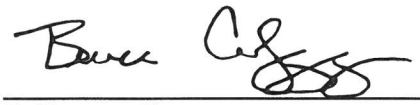
62. Consequently, the evidence and testimony the Department presented at the final hearing was not sufficiently persuasive to conclude, by clear and convincing evidence, that Mr. Logue illegally "installed" or "repaired" the drainfield on the Seven Star Property. Therefore, the Department did not meet its burden of proving that Seven Star should be sanctioned for working on its sewage system without a permit.

63. Conversely, both Seven Star witnesses credibly testified that the work Mr. Logue conducted did not inappropriately contact or impact the drainfield. Mr. Chaudhry effectively explained that Mr. Logue's presence on the Seven Star property was for the sole purpose of removing tree roots from the area "around," but not in, the drainfield. For his part, Mr. Logue convincingly and unambiguously testified that the work he conducted on the grass strip did not alter, modify, repair, or replace the existing drainfield.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Environmental Protection enter a final order dismissing the Citation for Violation against Respondent, Adam Noah Investment Group, LLC.

DONE AND ENTERED this 21st day of March, 2023, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of March, 2023.

COPIES FURNISHED:

Staci Kichler, Esquire
(eServed)

John Ryen Morgan-Ring, Esquire
(eServed)

Daniel M. Coton, Esquire
(eServed)

Lea Crandall, Agency Clerk
(eServed)

Shawn Hamilton, Secretary
(eServed)

Justin G. Wolfe, General Counsel
(eServed)

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.