STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE THE MANATEE CLUB, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-3482
	)	
JOSEPH B. WHITLEY, DIANE P. WHITLEY, and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
_____	)	

RECOMMENDED ORDER

Administrative Law Judge ("ALJ") Daniel Manry conducted the administrative hearing of this case on January 24, 2001, in Viera, Florida.

APPEARANCES

For Petitioner: Scott M. Price, Esquire
J.A. Jurgens, P.A.
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Longwood, Florida 32779
and
Robert Goodwin, Esquire
Save the Manatee Club, in pro per

For Respondents Joseph and Diane Whitley: William E. "Ted" Guy, Esquire
John S. Yudin, Esquire
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Stuart, Florida 34995-3386

For Respondent Department of Environmental Protection:	M.B. Adelson IV, Esquire Andrew J. Baumann, Esquire Department of Environmental Protection 3900 Commonwealth Boulevard Mail Station 35 Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUES

The issues in this proceeding are whether the petition for administrative hearing is barred by Sections 373.427(2)(c) and 120.569(2)(c), Florida Statutes (2000), or must be accepted by the agency pursuant to the judicial doctrine of equitable tolling. (All chapter and section references are to Florida Statutes (2000).)

PRELIMINARY STATEMENT

On July 24, 2000, Respondent, Department of Environmental Protection ("DEP"), issued to Respondents, Joseph and Diane Whitley ("Whitley"), a Consolidated Notice of Intent to Issue Environmental Resource Permit and Grant a Lease to Use Sovereign Submerged Lands (the "Notice of Intent"). On August 14, 2000, Petitioner filed a Petition for Formal Administrative Hearing to contest the Notice of Intent (the "Petition").

DEP forwarded the Petition to the Division of Administrative Hearings ("DOAH") on August 18, 2000. On September 7, 2000, Whitley filed a Motion to Dismiss alleging that the Petition was untimely. Neither Petitioner nor DEP responded to the Motion. On September 20, 2000, the ALJ issued

a Recommended Order of Dismissal that adopted by reference the factual and legal matters set forth in the Motion to Dismiss.

Petitioner and DEP timely filed exceptions to the Recommended Order of Dismissal. In the exceptions, Petitioner and DEP raised factual and legal matters that neither party had raised in response to the Motion to Dismiss nor had otherwise submitted to the ALJ. On October 30, 2000, DEP remanded the case to DOAH. The Order of Remand (the "remand") requested the ALJ to make a factual inquiry and determine whether the Petition was timely filed in light of the circumstances that occurred between the time DEP issued the Notice of Intent on July 24, 2000, and the time DEP referred the matter to DOAH on August 18, 2000.

Whitley filed motions and supporting legal memoranda, arguing that the ALJ should refuse the remand. Petitioner and DEP filed responsive motions and legal memoranda in support of the remand. On January 24, 2001, the ALJ conducted an evidentiary hearing in Viera, Florida, to resolve the factual issues raised by the parties in the several motions supporting and opposing the remand.

At the hearing, Petitioner submitted Exhibits 1-4 for admission in evidence. Whitley presented the testimony of one witness. The parties entered into joint stipulations concerning

the remaining issues of fact and entered legal argument on the record concerning the relevant issues of law.

The identity of the witnesses and exhibits, attendant rulings, if any, and the stipulations of fact by the parties are set forth in the Transcript of the hearing filed on February 20, 2001. Pursuant to the agreement of the parties, the parties filed their respective Proposed Recommended Orders ("PROs") on March 7, 2001.

The ALJ requested that discussions in the PROs include a discussion of certain issues. Those issues are whether: the ALJ has legal authority to refuse the remand; the 14-day time limit in Section 373.427(2)(c) for filing the Petition is properly interpreted as a procedural or substantive requirement; the legislative change embodied in Section 120.569(2)(c) requires dismissal of an untimely petition; relevant case law applies the so-called Machules doctrine of equitable tolling differently, depending on whether an agency is merely a facilitating party in a proceeding or is an adversarial party and a real party in interest; and the Machules doctrine prohibits dismissal of the Petition based on the facts in this case.

FINDINGS OF FACT

1. In January of 2000, Whitley applied to DEP for permits to repair hurricane damage to a marina facility (the "Whitley Marina"). The Whitley Marina is located within sovereign

submerged lands in Brevard County on the west side of the Indian River in Cocoa, Florida.

2. On July 24, 2000, DEP issued the Notice of Intent from DEP's Central District office in Orlando, Florida. The permit number is 05-126125-002.

3. The Notice of Intent expressly provided that petitions for an administrative hearing must be filed within 14 days of receipt of the Notice of Intent. Petitioner received the Notice of Intent on July 26, 2000.

4. Counting July 27, 2000, as the first day of the 14-day time limit prescribed in the Notice of Intent, the Notice of Intent required Petitioner to file the Petition no later than August 9, 2000. Petitioner filed the Petition on August 14, 2000, which was 19 days after Petitioner received the Notice of Intent and five days after the expiration of the 14-day time limit prescribed in the Notice of Intent.

5. The 14-day time limit in the Notice of Intent was based on the 14-day time limit prescribed in Section 373.427(2)(c). Unlike the Notice of Intent, however, Section 373.427(2)(c) does not state that the 14-day time limit begins to run on the date that the Notice of Intent is received. Rather, Section 373.427(2)(c) provides, in relevant part:

> Any petition for an administrative hearing pursuant to ss. 120.569 and 120.57 must be filed within 14 days of <u>the notice of</u>

> consolidated intent to grant or deny.
> (emphasis supplied)

6. The literal terms of Section 373.427(2)(c) required the Petition to be filed within 14 days of the Notice of Intent issued on July 24, 2000. Counting July 25, 2000, as the first day of the 14-day time limit prescribed in Section 73.427(2)(c), Section 373.427(2)(c) required the Petition to be filed no later than August 7, 2000. Petitioner filed the Petition August 14, 2000. August 14, 2000, was 21 days after the date of the Notice of Intent on July 24, 2000, and seven days after the expiration of the 14-day time limit.

7. The Notice of Intent also incorporated by reference Florida Administrative Code Rules 28-106.111(2) and 62-110.106(3)(a) and (4). (Unless otherwise stated, all references to rules are to rules promulgated in the Florida Administrative Code in effect on the date of this Recommended Order.) Apart from the issue discussed in paragraphs 5 and 6, the two rules referred to in the Notice of Intent do not prescribe time limits that modify, enlarge, or contravene the 14-day time limit prescribed in the Notice of Intent and Section 373.427.

8. Rule 28-106.111(2), in relevant part, provides:

> Unless otherwise provided by law, persons seeking a hearing on an agency decision . . . shall file a petition for hearing with the agency within 21 days of receipt of written notice of the decision. (emphasis supplied)

9. The 21-day time limit prescribed in Rule 28-106.111(2) is expressly limited to requests for an administrative hearing for which a time limit is not "otherwise provided by law." The time limit applicable to the Petition is otherwise provided by law in Section 373.427(2)(c) as 14 days rather than the 21 days prescribed in Rule 28-106.111(2). Rule 28-106.111(2) makes the 21-day time limit expressly inapplicable to the Petition filed in this proceeding, and there is no conflict between the 21-day time limit in the Rule and the 14-day statutory time limit in Section 373.427(2)(c).

10. The Notice of Intent also referred to Rule 62-110.106(3)(a). Rule 62-110.l06(3)(a) prescribes four different time limits for petitions to contest four different types of agency action. Subparagraphs 1-3 in the rule pertain, respectively, to permits governed by Chapter 403, hazardous waste facility permits, and notices of violations. None of the three types of agency action governed by subparagraphs 1-3 are proposed in this proceeding. Therefore, the time limits in subparagraphs 1-3 are inapplicable to the Petition.

11. Subparagraph 4 of Rule 62-110.106(3)(a) prescribes a 21-day time limit for filing petitions to challenge agency action for permits "under statutes other than . . . section 373.427." (emphasis supplied) Like Rule 28-106.111(2), Rule

62-110.106(3) makes its 21-day time limit expressly inapplicable to the Petition because the Petition contests a proposed permit that is governed by Section 373.427.

12. Notwithstanding the 14-day time limit prescribed in Section 373.427(2)(c) and the express inapplicability of the 21-day time limits in Rules 28-106.111(2) and 62-110.106(3)(a)4, the respective attorneys for Petitioner and DEP incorrectly concluded that Petitioner had 21 days to file the Petition. On July 31, 2000, attorneys in DEP's Office of General Counsel received by facsimile a letter from a staff attorney for Petitioner. In relevant part, the letter stated:

> Page 6 of the . . . [Notice of Intent] indicates that "in accordance with rules 28-106.111(2) and 62-10.106(3)(a)(4), petitions for an administrative hearing must be filed within 14 days of receipt of this written notice."
>
> I have reviewed each of the rules cited, and each provides a period of 21 days within which to file a petition requesting an administrative hearing. Please confirm that pursuant to Fla. Admin. Code R.28-106(2) and 62-110.106(3)(a)(4), this organization has 21 days from receipt of the Department's notice of its intended action within which to file a petition requesting an administrative hearing. . . . (emphasis not supplied)

13. The first paragraph in the letter dated July 31, 2000, was correct. It correctly quoted the Notice of Intent, and the Notice of Intent correctly stated that the applicable time limit

for filing the Petition was 14 days. The Notice of Intent also correctly stated that the 14-day time limit was in accordance with Rules 28-106.111(2) and 62-110.106(3)(a)4 because the 21-day time limits prescribed in the two rules do not apply to permits for which time limits are otherwise provided by law in Section 373.427(2)(c).

14. The second paragraph in the letter from Petitioner was a mistake of law. The second paragraph incorrectly concluded as a matter of law that Rules 28-106.111(2) and 62-110.106(3)(a)4 prescribe 21-day time limits for permits governed by Section 373.427. Although the two rules each prescribe a 21-day time limit, the 21-day time limit in Rule 28-106.111(2) is expressly limited to permits for which a time limit is not otherwise provided by law, and the 21-day time limit in Rule 62-110.106(3)(a) is expressly limited to permits other than those governed by Section 373.427.

15. On August 1, 2000, the staff attorney for Petitioner received a facsimile from DEP that joined in the mistake of law. In a hand-written note, counsel for DEP stated in relevant part:

> Thank you for your fax/letter of July 31, 2000 regarding the Whitley permit. . . . Your reading of the rules is correct - the time to file a petition should have reflected 21 days, not 14. I have notified Central District staff, who will notify the Whitleys of this error. Thank you for calling this to our attention. (emphasis not supplied)

16. DEP replicated the mistake of law originated by Petitioner. DEP's interpretation of its own statutes and rules was incorrect for reasons previously stated and not repeated here.

17. Petitioner relied on its own mistake of law and that of DEP and filed the Petition within 21 days of the receipt of the Notice of Intent. However, Petitioner filed the Petition seven days after the expiration of the 14-day time limit prescribed in Section 373.427(2)(c) and five days after expiration of the 14-day time limit prescribed in the Notice of Intent. (Compare paragraphs 3 and 4 with paragraphs 5 and 6, supra.)

18. Petitioner's facsimile to DEP on July 31, 2000, was not a request for hearing. The facsimile did not request an administrative hearing but merely inquired into the time for filing such a request.

19. The facsimile on July 31, 2000, was not a petition for administrative hearing. Rule 62-110.106(3)(a) requires a petition for an administrative hearing to be in the form required by Rules 28-106.201 or 28-106.301. The facsimile on July 31, 2000, failed to satisfy the requirements of either rule.

20. The Notice of Intent also referred to Rule 62-110.106(4). That rule authorizes DEP to grant a request for extension of the 21-day time limit prescribed in the rule. The facsimile on July 31, 2000, did not request an extension of the 21-day time limit prescribed in Rule 62-110.106(3)(a).

21. Even if the facsimile were construed as having the effect of a request for extension of the 14-day time limit prescribed in Section 373.427(2)(c), DEP had no authority to grant such a request. Rule 62-110.106(4) authorizes DEP to grant a request to extend the 21-day time limit in the rule but does not authorize DEP to grant a request to extend the 14-day statutory time limit in Section 373.427(2)(c). As a state agency, neither DEP nor DOAH can enlarge, modify, or contravene the specific provisions of a statute, including the provisions in Section 373.427(2)(c) that prescribe a 14-day time limit for filing the Petition. Nor can a state agency interpret Rule 62-110.106(4) in a manner that enlarges, modifies, or contravenes the time limit in Section 373.427(2)(c). Sections 120.52(8)(c), 120.56, 120.57(1)(e), and 120.68(7)(d) and (e).

22. The authority in Rule 62-110.106(4) to grant an extension of time is expressly limited in scope to a time limit that is prescribed by an order or rule of an agency or a time limit that is established in any notice given under such a rule. The 14-day time limit at issue in this case is prescribed by

statute, rather than by an order or rule of DEP, and DEP issued the 14-day time limit in the Notice of Intent pursuant to the statutory authority in Section 373.427(2)(c) rather than the Rules that prescribe a 21-day time limit.

23. Rule 28-106.111(3) authorizes DEP to grant a request to extend the 21-day time limit in Rule 28-106.111(2). Even if Rule 28-106.111(3) were deemed to authorize an extension of the 14-day time limit prescribed in Section 373.427(2)(c), the Notice of Intent referred to Rule 28-106.111(2) rather than to Rule 28-106.111(3). Moreover, the facsimile on July 31, 2000, failed to comply with the prerequisites in Rule 28-106.111(3) for an extension of time. The facsimile failed to satisfy the requirement in Rule 28-106.111(3) that a request for extension of time:

> . . . contain a certificate that the moving party has consulted with all other parties . . . concerning the extension and that the agency and any other parties agree to said extension.

Petitioner did not consult with Whitley about an extension of time prior to sending the facsimile on July 31, 2000.

24. Petitioner's noncompliance with the 14-day time limit in Section 373.427(2)(c) is not a minor infraction. Enforcement of the delay caused by Petitioner's noncompliance would have the effect of enlarging or modifying the 14-day statutory time limit by five to seven days, or approximately 36 to 50 percent.

25. Enforcement of the delay caused by Petitioner's noncompliance with the 14-day time limit in Section 373.427(2)(c) would prejudice Whitley. It would effectively deny Whitley the right to a defense based on a statutory bar to untimely petitions that the legislature authorized in Section 373.427(2)(c). See also Section 120.569(2)(c)(requiring dismissal of untimely petitions) and relevant discussion in paragraphs 43-48, infra.

26. Whitley did not mislead or lull Petitioner into noncompliance with the 14-day statutory time limit in Section 373.427(2)(c). DEP misled or lulled Petitioner into noncompliance.

27. DEP is a nominal, or facilitating, party in this proceeding rather than an adversarial party with a stake in the outcome of the proceeding. Petitioner and Whitley are the adversarial parties in this proceeding whose substantial interests will be affected by the outcome of the proceeding. Petitioner's adversary in this proceeding did not mislead or lull Petitioner into noncompliance with the 14-day time limit prescribed in Section 373.427(2)(c).

28. The remaining Findings of Fact are based solely on the factual stipulations between the parties. Whitley and DEP had actual knowledge that Petitioner intended to request an administrative hearing to challenge the Notice of Intent.

Whitley knew in June of 2000 that Petitioner opposed the proposed permit. DEP knew of Petitioner's intent to request an administrative hearing when DEP received the facsimile from Petitioner on July 31, 2000.

29. The facsimile from Petitioner on July 31, 2000, and the response from DEP on August 1, 2000, were not forwarded to DOAH and were not part of the record before the ALJ when the ALJ issued the original Recommended Order of Dismissal. However, both documents were part of the record when DEP considered the Recommended Order of Dismissal and issued the remand.

30. Prior to referring the matter to DOAH, DEP determined that the matters contained in the facsimile and response from DEP were sufficient to initiate a proceeding conducted pursuant to Sections 120.569 and 120.57(1). No trick, deception, or deceptive practice was utilized to prevent Petitioner from responding to the Motion to Dismiss that Whitley filed after DEP referred the matter to DOAH.

CONCLUSIONS OF LAW

31. DOAH has jurisdiction over the subject matter and parties in this proceeding. The parties received adequate notice of the administrative hearing.

32. Although Florida courts have recognized that state agencies have no statutory authority to remand a case to DOAH, courts have generally approved of such remands and recognized

that it is within the discretion of an ALJ to accept or refuse the remand. Shaker Lakes Apartments Company v. Dolinger, 714 So. 2d 1040, 1041-1042 (Fla. 1st DCA 1998); Department of Environmental Protection v. Department of Management Services, Division of Administrative Hearings, 667 So. 2d 369, 370-371 (Fla. App. 1st DCA, 1995), Collier Development Corporation v. Department of Environmental Regulation, 592 So. 2d 1107, 1109 (Fla. 2d DCA 1991); Manasota-88, Inc. v. Tremor, 545 So. 2d 439, 441-442 (Fla. 2d DCA 1989); Miller v. State DER, 504 So. 2d 1325 (1st DCA, 1987); Humana, Inc. v. Department of Health and Rehabilitative Services, 492 So. 2d 388, 393 (Fla. 4th DCA 1986); Cohn v. Dept. of Professional Regulation, 477 So. 2d 1039, 1047 (Fla. 3d DCA, 1985); Henderson Signs v. Florida Department of Transportation, 397 So. 2d 769, 772 (Fla. 1st DCA 1981); and Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 786 (Fla. 1st DCA 1981). No statutory authority specifically requires the ALJ to refuse the Order of Remand from DEP, and the remand does not enlarge, modify, or contravene applicable statutes.

33. DEP is not barred from basing its remand on facts not in evidence before the ALJ when the ALJ issued the Recommended Order of Dismissal. Like other proceedings conducted pursuant to Section 120.57(1), a remand requires the ALJ to conduct a de novo hearing for the limited purposes stated in the remand.

Section 120.57(1)(e) and (i). In the de novo hearing, all parties have a right to cross-examine the evidence relied on by DEP as a basis for the remand. Board of Medicine v. Mata, 561 So. 2d 364, 365-367 (Fla. 1st DCA 1990).

34. Prior to referring the initial proceeding to DOAH on August 18, 2000, DEP determined that the Petition was filed in a timely manner within the meaning of Section 373.427(2)(c). None of the parties cited any legal authority to support the notion that DEP's determination of timeliness is binding or enjoys a presumption of correctness. An administrative proceeding authorized in Section 120.57(1) is a de novo proceeding that is conducted to formulate proposed agency action rather than to review final agency action already taken. Section 120.57(1)(i); McDonald v. Department of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

35. Florida courts require state agencies to provide persons whose substantial interests are affected by proposed agency action with a clear point of entry for judicial review. That review begins with an administrative proceeding authorized in Chapter 120. Sections 120.569 and 120.57(1).

36. The clear point of entry doctrine was first enunciated in Capeletti Brothers, Inc. v. State, Department of Transportation, 362 So. 2d 346, 348 (Fla. 1st DCA 1978), cert. denied, 368 So. 2d 1374 (Fla. 1979). Since 1979, the doctrine

has been followed by Florida courts. See, e.g., Environmental Resource Associates of Florida, Inc., v. Department of General Services, 624 So. 2d 330, 332-333 (Fla. 1st DCA 1993) (concurring opinion of Judge Ervin); Florida League of Cities, Inc. v. Administration Commission, 586 So. 2d 397, 413 (Fla. 1st DCA 1991). See also Southeast Grove Management, Inc. v. McKinness, 578 So. 2d 883 (Fla. 1st DCA 1991); Capital Copy, Inc. v. University of Florida, 526 So. 2d 988 (Fla. 1st DCA 1988); Lamar Advertising Company v. Department of Transportation, 523 So. 2d 712 (Fla. 1st DCA 1988); City of St. Cloud v. Department of Environmental Regulation, 490 So. 2d 1356 (Fla. 5th DCA 1986); Henry v. Department of Administration, Division of Retirement, 431 So. 2d 677 (Fla. 1st DCA 1983). See also Shirley S., "In Search of a Clear Point of Entry," 68 Fla. B.J. 61 (May 1994).

37. An agency provides a clear point of entry to a person who has standing to challenge proposed agency action by satisfying several fundamental due process requirements. First, the agency must notify the person of the proposed agency action. In addition, the notice must inform the person of the right to request an administrative hearing pursuant to Section 120.57 and inform the person of the time limits within which the person must file a request for hearing. Section 120.569(1). If the person fails to file a request for hearing within the time

prescribed in the clear point of entry, the person waives the right to request a hearing. See, e.g., Environmental Resource, 624 So. 2d at 331-332 (citing Capeletti Brothers, 368 So. 2d at 348).

38. The evidence in this case shows that DEP satisfied the requirements of the clear point of entry doctrine. On July 26, 2000, DEP provided Petitioner with written notice in the Notice of Intent that Petitioner had 14 days to file a petition for administrative hearing. DEP provided Petitioner with adequate and sufficient notice of the 14-day time limit prescribed in Section 373.427(2)(c), and the notice of the 14-day time limit was consistent with Rules 28-106.111(2) and 62-110.106(3)(a)4.

39. Neither DEP nor the ALJ sitting for the agency head can modify, enlarge, or contravene the 14-day time limit in Section 373.427(2)(c) on Petitioner's clear point of entry. Nor can DEP or the ALJ construe Rules 28-106.111(2) and 62-110.106(3)(a)4 in a manner that modifies, enlarges, or contravenes the 14-day time limit established by the legislature in Section 373.427(2)(c). A state agency is prohibited by statute and case law from such statutory amendment whether the amendment is attempted by rule or by the exercise of agency discretion. Sections 120.52(8)(c), 120.57(1)(e), and 120.68(e)1; DeMario v. Franklin Mortgage & Investment Co., Inc., 648 So. 2d 210, 213-214 (Fla. 4th DCA 1994), rev. denied, 659

So. 2d 1086 (Fla. 1995)(agency lacks authority to impose time requirement not found in statute); Department of Health and Rehabilitative Services v. Johnson and Johnson Home Health Care, Inc., 447 So. 2d 361, 363 (Fla. 1st DCA 1984)(agency action that ignores some statutory criteria and emphasizes others is arbitrary and capricious); Booker Creek Preservation, Inc. v. Southwest Florida Water Management District, 534 So. 2d 419, 423 (Fla. 5th DCA 1988)(agency cannot vary impact of statute by creating waivers or exemptions) reh. denied. Where an agency rule conflicts with a statute, the statute prevails. Hughes v. Variety Children's Hospital, 710 So. 2d 683, 686 (Fla. 3d DCA 1998); Johnson v. Department of Highway Safety & Motor Vehicles, Division of Driver's Licenses, 709 So. 2d 623, 624 (Fla. 4th DCA 1998); Willette v. Air Products, 700 So. 2d 397, 401 (Fla. 1st DCA 1997), reh'g denied; Florida Department of Revenue v. A. Duda & Sons, Inc., 608 So. 2d 881, 884 (Fla. 5th DCA 1992), reh'g denied; Department of Natural Resources v. Wingfield Development Company, 581 So. 2d 193, 197 (Fla. 1st DCA 1991) reh. denied. See also Capeletti Brothers, Inc. v. Department of Transportation, 499 So. 2d 855, 857 (Fla. 1st DCA 1987)(rule cannot expand statutory coverage) rev. denied, 509 So. 2d 1117.

40. The express terms of Rules 28-106.111(2) and 62-110.106(3)(a)4 clearly state that neither rule purports to establish a time limit for petitions contesting a permit under

Section 373.427. Rules 28-106.111(2) and 62-110.106(3)(a)4 are valid existing rules. DEP cannot deviate from a valid existing rule. Section 120.68(7)(e)2. An agency's deviation from a valid existing rule is invalid and unenforceable. Federation of Mobile Home Owners of Florida, Inc. v. Florida Manufactured Housing Association, Inc., 683 So. 2d 586, 591-592 (Fla. 1st DCA 1996); Gadsden State Bank v. Lewis, 348 So. 2d 343, 346-347 (Fla. 1st DCA 1977); Price Wise Buying Group v. Nuzum, 343 So. 2d 115, 116 (Fla. 1st DCA 1977).

41. Petitioner's noncompliance with the 14-day time limit prescribed in Section 373.427(2)(c) is not a jurisdictional bar. Florida courts holding that noncompliance with a statutory time limit is a jurisdictional bar generally do so on the basis of express statutory language. Relying on language in Section 194.171(6), for example, the Florida Supreme Court held that the 60-day filing requirement in Section 194.171(2) is a "jurisdictional statute of nonclaim." Markham v. Neptune Hollywood Beach Club, 527 So. 2d 814, 815 (Fla. 1988). Accord Wal-Mart Stores, Inc. v. Day, 742 So. 2d 408, 409 (Fla. 5th DCA 1999); Palmer Trinity Private School, Inc. v. Robbins, 681 So. 2d 809 (Fla. 3d DCA 1996); Hall v. Leesburg Regional Medical Center, 651 So. 2d 231 (Fla. 5th DCA 1995); Walker v. Garrison, 610 So. 2d 716 (Fla. 4th DCA 1992); Markham v. Moriarty, 575 So. 2d 1307 (Fla. 4th DCA 1991), cert. denied, 502 U.S. 968, 112 S.

Ct. 440 (1991); Gulfside Interval Vacations, Inc. v. Schultz, 479 So. 2d 776 (Fla. 2d DCA 1985), rev. denied, 488 So. 2d 830 (Fla. 1986). See also Davis v. Macedonia Housing Authority, 641 So. 2d 131, 132 (Fla. 1st DCA 1994)(the 60-day filing requirement in Section 194.171(2) is a jurisdictional bar to an action to contest loss of tax exemption for 1990). Cf. Pogge v. Department of Revenue, 703 So. 2d 523, 525-526 (Fla. 1st DCA 1997)(the 60-day filing requirement in Section 72.011(2) is a jurisdictional bar to an action contesting the assessment of taxes but was not a jurisdictional bar to an action for a refund of taxes prior to 1991 when the legislature amended former Section 72.011(6) to delete express language that Section 72.011 was inapplicable to refunds); Mikos v. Parker, 571 So. 2d 8, 9 (Fla. 2d DCA 1990)(the 60-day filing requirement in Section 194.171 was not a jurisdictional bar to a claim for refund of taxes assessed in 1989). Compare City of Fernandina Beach v. Page, 682 So. 2d 573 (Fla. 1st DCA 1996); Joyner v. Roberts, 642 So. 2d 826 (Fla. 1st DCA 1994); and Chihocky v. Crapo, 632 So. 2d 230 (Fla. 1st DCA 1994)(the failure to strictly comply with statutory notice procedures may toll the running of the 60-day filing requirement in Section 194.171(2)).

42. Section 373.427(2)(c) contains no express provision that makes noncompliance with the 14-day time limit a jurisdictional bar to a petition for administrative hearing.

Rather, Section 373.427(2) expressly provides that it establishes procedural requirements for concurrent review of applications for consolidated permits.

43. Section 120.569(2)(c) requires state agencies, including DEP, to review petitions to determine whether they comply with the standards prescribed in Section 120.54(5)(b)4 and whether they are filed in a timely manner. The statute requires DEP to dismiss a petition for administrative hearing if the petition fails to comply with the requisite standards or is "untimely filed." In relevant part, Section 120.569(2)(c) provides:

> A petition shall be dismissed if it is not in compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. (emphasis supplied)

44. If a petition is untimely, the temporal defect cannot be cured in a timely amended petition. It follows that failure to file a petition within the 14-day time limit prescribed in Section 373.427(2)(c) is a temporal defect that cannot be cured within the meaning of Section 120.569(2)(c).

45. The foregoing analysis of Section 120.569(2)(c) is consistent with legislative intent. The Florida Legislature enacted Section 120.569(2)(c) in 1998. Chapter 98-200, Laws of

Florida, Section 4. The legislative history makes clear that Section 120.569(2)(c) is intended to provide a statutory bar to the subsequent filing of a petition if a subsequent amended petition cannot cure the defect in the original petition. In relevant part, the legislative explanation of the proposed changes contained on page two of CS/HB 1509 provides:

> The bill would create . . . a bar to the continued filing a petition [sic] if the subsequent amended petitions do not cure the identified defect.

46. Noncompliance with either the 14-day time limit in Section 373.427(2)(c) or the requirement in Section 120.569(2)(c) for dismissal of an untimely petition is not a jurisdictional bar to filing a petition for administrative hearing. Rather, noncompliance with time limits in Sections 373.427(2)(c) and 120.569(2)(c) admits a defense analogous to a statute of limitations. Milano v. Moldmaster, Inc., 703 So. 2d 1093, 1094-1095 (Fla. 4th DCA 1997) reh. en banc clarification and certification. Whitley asserted that defense in the Motion to Dismiss that the ALJ granted in the Recommended Order of Dismissal.

47. The conclusion that noncompliance with Sections 373.427(2)(c) and 120.569(2)(c) admits a defense based on a statutory bar is consistent with the approach followed by federal courts. In Espinoza v. Missouri Pacific Railroad Co.,

754 F.2d 1247, 1250 (5th Cir. 1985), for example, the court held that the 90-day filing requirement in 42 U.S.C. Section 2000e-5(f)(1) is not a jurisdictional prerequisite to suit but is a statute of limitations subject to the doctrine of equitable tolling.

48. The Supreme Court has adopted a similar approach. In Irwin v. Department of Veterans Affairs, 498 U.S. 89, 92, 111 S. Ct. 453, 455 (1990), the Court held that the 30-day time limit prescribed in 42 U.S.C. Section 2000e-16(c) is not jurisdictional but creates a "rebuttable presumption of equitable tolling." Irwin, 498 U.S. at 95-96, 111 S. Ct. at 457.

49. Florida courts have applied the doctrine of equitable tolling to excuse an otherwise untimely request for an administrative proceeding when four requirements are satisfied. First, the time limit is not jurisdictional. Cf. Environmental Resource Associates of Florida, Inc. v. State, Department of General Services, 624 So. 2d 330 (Fla. 1st DCA 1993)(Judge Zehmer dissenting, in relevant part, because the 21-day time limit in that case was "not jurisdictional"); Castillo v. Department of Administration, Division of Retirement, 593 So. 2d 1116 (Fla. 2d DCA 1992) (remanding the case for equitable considerations related to the "not jurisdictional" 21-day period for challenging agency action). Second, noncompliance with the

relevant time limit is a minor infraction. Stewart v. Department of Corrections, 561 So. 2d 15 (Fla. 4th DCA 1990)(applying the doctrine to excuse a request for hearing that was one day late); Environmental Resource, 624 So. at 332-333 (Judge Zehmer's dissenting opinion found that the delay was a minor infraction). Third, noncompliance with the applicable time limit does not result in prejudice to the other party. Stewart, 561 So. 2d at 16. Fourth, noncompliance is caused by the affected party's being misled or lulled into inaction, being prevented in some extraordinary way from asserting his or her rights, or having timely asserted his or her rights mistakenly in the wrong forum. Machules v. Department of Administration, 523 So. 2d 1132, 1133-1134 (Fla. 1988). See Burnaman, R., "Equitable Tolling in Florida Administrative Proceedings," 74 Fla. B.J. 60 (February 2000).

50. The first requirement for equitable tolling is satisfied in this case. Neither the 14-day time limit in Section 373.427(2)(c) nor the requirement in Section 120.569(2)(c) for a timely petition is a jurisdictional prerequisite to the Petition filed in this proceeding. Irwin, 498 U.S. at 92, 111 S. Ct. at 455; Milano, 703 So. 2d at 1094-1095.

51. The second requirement for equitable tolling is not satisfied in this case. Petitioner's noncompliance with the 14-

day time limit in Section 373.427(2)(c) was not a minor infraction. Enforcement of the resulting delay would enlarge the statutory 14-day time limit by five to seven days, or approximately 36 to 50 percent. Compare the five-to-seven-day enlargement sought by Petitioner with Vantage Healthcare Corporation v. Agency for Health Care Administration, 687 So. 2d 306, 307 (Fla. 1st DCA 1997) (refusing to allow filing of letters of intent one day late in certificate of need process); and Environmental Resource, 624 So. 2d at 331 (court refused to reverse a final order denying a hearing where the request for hearing was four days late).

52. The third requirement of the doctrine of equitable tolling is not satisfied in this case. The delay sought by Petitioner would prejudice Whitley by denying Whitley a defense based on a statutory bar of any petition that is filed after the 14-day time limit established by the legislature in Section 373.427(2)(c). Such a delay would also deny Whitley the statutory right to dismiss the Petition pursuant to Section 120.569(2)(c).

53. The fourth requirement for the doctrine of equitable tolling is more problematic than the first three. Petitioner clearly showed that its noncompliance with the 14-day time limit in Section 373.427(2)(c) was the result of being misled or lulled into inaction by DEP. However, Petitioner did not show

that its noncompliance was the result of being misled or lulled into inaction by Whitley.

54. The absence of culpability on the part of Whitley and the relative interests of the parties in this proceeding are significant factors that are properly considered in applying the doctrine of equitable tolling. Whitley and Petitioner are the only adversarial parties in this proceeding and the only parties whose substantial interests will be affected by the outcome of the proceeding (the "real parties in interest"). DEP is merely a facilitating party because it has no stake in the outcome of the proceeding.

55. The doctrine of equitable tolling was originally limited to cases in which one party was lulled into inaction or prevented from asserting his or her rights by the acts or omissions of the adversarial party. In Irwin, for example, the Court explained that the doctrine of equitable tolling generally was limited to situations where a complainant was induced or tricked by an adversary's misconduct into allowing a filing deadline to pass. Irwin, 498 U.S. at 96, 111 S. Ct. at 455. Like Irwin, Machules involved a dispute between an employer and employee who were adversarial parties. In Machules, however, the employer was a state agency.

56. The Florida Supreme Court has not limited the doctrine of equitable tolling to cases in which a party is tricked or

induced by the misconduct of an adversary into allowing a time limit to pass. The Florida Supreme Court has expanded the doctrine to reach cases where a party allows a time limit to pass through the party's own inadvertence or mistake of law. In cases cited by the parties in this proceeding, however, courts have limited the Machules doctrine to cases in which the state agency is an adversarial party with a stake in the outcome of the case.

57. In Machules, 523 So. 2d at 1132, a discharged agency employee chose to pursue a claim through union grievance and thereby allowed the time limits for requesting a hearing to lapse. The court held that the employee did not waive the right to a hearing.

58. The state agency and employee in Machules were adversaries and the real parties in interest. Florida appellate courts have generally constrained the doctrine of equitable tolling to cases in which the state agency is an adversary and a real party in interest. See, e.g., Mathis v. Florida Department of Corrections, 726 So. 2d 389 (Fla. 1st DCA 1999), the court applied (state agency was adversary in claim for back pay by agency's employee); Avante, Inc. v. Agency for Health Care Administration, 722 So. 2d 965 (Fla. 1st DCA 1998)(state agency was adversary in action to recover Medicaid payments); Unimed Laboratory, Inc. v. Agency for Health Care Administration, 715

So. 2d 1036 (Fla. 3d DCA 1998)(state agency was adversary in action to recover Medicaid payments); Haynes v. Public Employees Relations Commission, 694 So. 2d 821 (Fla. 4th DCA 1997)(state agency was adversary in employee dismissal action); Phillip v. University of Florida, 680 So. 2d 508 (Fla. 1st DCA 1996)(state agency was adversary in employee dismissal action); Abusalameh v. Department of Business Regulation, 627 So. 2d 560 (Fla. 4th DCA 1993)(state agency was adversary in license revocation proceeding); Environmental Resource, 624 So. 2d at 331 (state agency that was adversary in contract termination case did nothing to cause four-day delay in filing request for hearing); Castillo, 593 So. 2d at 1117 (state agency was adversary in beneficiary's claim for retirement benefits); Department of Environmental Regulation v. Puckett Oil Co., 577 So. 2d 988 (Fla. 1st DCA 1991)(state agency was adversary in action seeking reimbursement of cleanup costs); Stewart, 561 So. 2d 15 (state agency was adversary in employee dismissal action).

59. Florida courts have been less inclined to apply the doctrine of equitable tolling to cases in which a state agency is only a facilitating party rather than an adversary and real party in interest. In Vantage Healthcare, 687 So. 2d at 307, a state agency awarded a certificate of need to an applicant after allowing the applicant to file its letter of intent one day

late. The agency applied the doctrine of equitable tolling to extend the applicable time limit by one day. The court held that the doctrine of equitable tolling does not apply to the certificate of need application process because the application process:

> is not comparable to . . . judicial or quasi-judicial proceedings. We have found no authority extending the doctrine of equitable tolling to facts such as in the present case.

Cf. Perdue v. TJ Palm Associates, Ltd., 755 So. 2d 660 (Fla. 4th DCA, 1999)(refusing to apply the doctrine of equitable tolling to extend the time limit for challenging a notice of intent to issue a conceptual permit approving overall master project design).

60. When a state agency is an adversarial party, it is appropriate to apply the doctrine of equitable tolling in a manner that prevents the agency from benefiting from any act or omission that misleads or lulls its adversary into noncompliance with the applicable time limits for filing a petition for administrative hearing. An agency that misleads or lulls its adversary into noncompliance with a time limit is properly deemed to have waived the time limit.

61. The rationale and equitable justification for the doctrine of equitable tolling may be less compelling in cases where an agency is merely a facilitating party and two or more

other parties are the adversarial parties and the real parties in interest. If the agency misleads or lulls one of the adversarial parties into noncompliance with an applicable time limit, it is neither reasonable nor equitable to apply the doctrine of equitable tolling in a manner that prejudices the other adversarial party who did not cause the noncompliance by a culpable act, omission, or similar misconduct. A facilitating agency that misleads or lulls one party into noncompliance with a time limit does not have the authority or capacity to waive a statutory defense on behalf of the party's adversary who did not cause the noncompliance.

62. If the doctrine of equitable tolling were applied in this case to allow an untimely Petition, the result would frustrate the equitable purpose of the doctrine. The result would prejudice Whitley by waiving statutory defenses available to Whitley in Sections 373.427(2((c) and 120.569(2)(c); even though Whitley did not mislead Petitioner or lull Petitioner into noncompliance with the 14-day statutory time limit established by the Legislature in Section 373.427(2)(c). The doctrine of equitable tolling is not intended to prejudice innocent parties who are not state agencies and do not mislead or lull their adversaries into noncompliance with a time limit.

63. Many of the cases cited in this Recommended Order involve rule challenges conducted pursuant to Section 120.56

rather than Section 120.57(1). The rule challenge cases nevertheless provide relevant standards for deciding this case.

64. No agency, including DEP and DOAH, should formulate proposed agency action or interpret agency rules in a manner that modifies, enlarges, or contravenes the underlying statutory authority. Section 120.52(8). A determination of the statutory authority for proposed agency action and related rules is essential to fairness in an administrative proceeding even though a particular proceeding may not involve a rule-challenge and there may be no jurisdiction to invalidate a particular rule. Proposed agency action and related rules should be enforced in a manner that preserves the statutory validity of each in much the same manner that an ALJ without jurisdiction to determine the constitutionality of a statute must construe the statute, whenever possible, in a manner that preserves the constitutional validity of the statute. Sections 120.52(8), 120.56, and 120.57(1)(e). See, e.g., Myers v. Hawkins, 362 So. 2d 926, 930 (Fla. 1978); State v. McDonald, 357 So. 2d 405, 407 (Fla. 1978); Novo v. Scott, 438 So. 2d 477, 478 (Fla. 3d DCA 1983)(doubts concerning legislative intent for a statute should be resolved in favor of its constitutionality).

RECOMMENDATION

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

RECOMMENDED that DEP enter a final order dismissing the Petition for noncompliance with the 14-day time limit in Section 373.427(2)(c) and for noncompliance with the requirement for a timely petition in Section 120.569(2)(c).

DONE AND ENTERED this 4th day of April, 2001, in Tallahassee, Leon County, Florida.

_____
DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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 must be filed with the agency that will issue the final order in this cause.