STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

MEL AND DIANE BRYANT and BRENT MAHIEU,	)	
Petitioners,	)	
vs.	)	**OGC CASE NO. 07-1346**
	)	**DOAH CASE NO. 07-4611**
CITY OF PORT ST. LUCIE and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

FINAL ORDER

On November 20, 2007, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order of Dismissal ("RO") to the Department of Environmental Protection ("DEP" or "Department") in this administrative proceeding. The RO indicates that copies were served to the Petitioners, Mel and Diane Bryant and Brent Mahieu. A copy was also served to counsel for Co-Respondent, City of Port St. Lucie ("City"). A copy of the RO is attached hereto as Exhibit A. On December 5, 2007, the Petitioners filed Exceptions to the RO. No responses to Petitioners' Exceptions were filed. The matter is now before me as Secretary of DEP for final agency action.

BACKGROUND

This case involves the proposed issuance by DEP of two wastewater permits (FLA139653-011-DW1P and FLA139653-012-DW1P) to the City, which generally

authorize the modification and expansion of the capacity of the City's Westport Wastewater Treatment Facility ("Facility") from 3.93 million gallons per day (mgd) to 6.24 mgd. Petitioners, who live near the Facility, oppose the expansion allegedly because of "odor emanating from the plant" in violation of Florida Administrative Code Rule 62-600.400(2)(a).

On April 11, 2007, Petitioners met with certain City officials, including the City Manager. In Affidavits attached to their Amended Petition, the Petitioners alleged that the City Manager advised them that "all permits for the expansion of the plant from its current capacity of 3.93 mgd to the planned capacity of 6.24 mgd had been approved and obtained and that the only permit still required to be obtained was the operational permit which would be obtained after construction was completed"; and "that there was nothing that [Petitioners] could do to stop the expansion of the plant to 6.24 mgd." The City denies these statements were made, but for purposes of the ALJ ruling on its Motion to Dismiss, has accepted this allegation as being true. On June 26, 2007, the Department issued its Notice of Intent to Issue Permit ("Notice"). Although they had the right to do so, Petitioners did not request that they receive separate written notice from the Department when action on the City's applications was taken.

On July 6, 2007, the City published a copy of the Notice in the Palm Beach Post, St. Lucie Edition. The Notice provided, inter alia, that petitions challenging the issuance of the permits must be filed within fourteen days from the date of the publication, or by July 20, 2007; otherwise, a point of entry would be waived. See Fla. Admin. Code R. 62-110.106(2). Pursuant to a public records request made to the City, Petitioners and

their counsel met with City representatives on July 13, 2007, to review certain City files relating to the Facility. Among the documents reviewed was a copy of the Department's Notice dated June 26, 2007. On July 27, 2007, or fourteen days later and seven days past the deadline in the published Notice, Petitioners filed their initial Petition. In an Order Dismissing Petition with Leave to Amend ("Order") dated September 14, 2007, the Department dismissed the initial Petition without prejudice to Petitioners' "filing an amended petition which shows why the Petition dismissed in this order should be considered timely." The basis for the dismissal was that "the City published notice [on July 6, 2007] in the Palm Beach Post, charging Petitioners with constructive notice . . . , and establishing a deadline [July 20, 2007)] for a Petition to be filed." Because the initial Petition was not filed until July 27, 2007, or seven days after the deadline, it was deemed to be untimely.

An Amended Petition was later filed on September 28, 2007, in response to the Department's Order dismissing the initial pleading. The Amended Petition was referred to DOAH on October 8, 2007. The City filed a Motion to Dismiss with Incorporated Memorandum of Law ("Motion") on October 26, 2007. A Notice of Filing Case Law in Support of its Motion to Dismiss was also filed by the City on November 7, 2007. By its Motion, the City sought to dismiss the Petitioners' Amended Petition on the ground that it was untimely filed. It further argued that under the circumstances presented, the doctrine of equitable tolling, upon which Petitioners relied, did not apply. (The doctrine of equitable tolling may be used as a defense to the untimely filing of a petition. See § 120.569(2)(c), Fla. Stat. (2006).) A Response in opposition to the Motion was filed by

Petitioners on November 1, 2007. Respondent DEP took no position on the City's Motion. Subsequently, on November 20, 2007, the ALJ entered the RO.

RECOMMENDED ORDER OF DISMISSAL

The ALJ recommended that the Department grant the City's Motion to Dismiss, and dismiss with prejudice, the Petitioners' Amended Petition on the ground that it was untimely filed. (RO p. 5). The ALJ found that constructive notice of the agency's action was given through the publication of the Notice on July 6, 2007. (RO p. 2, 4-5). The Department's rules provide that: "[r]eceipt of notice of agency action" means "publication of the notice in a newspaper of general circulation in the county . . . in which the activity will take place." Fla. Admin. Code R. 62-110.106(2). The ALJ concluded that since the Petitioners acknowledged that their initial Petition was not filed within fourteen days after the date of publication of the Notice, their Petition was untimely. See Fla. Admin. Code R. 62-110.106(3)(b). (RO p. 4).

The RO stated that the Petitioners raised the doctrine of equitable tolling as a defense to the untimely filing of the initial Petition. See § 120.569(2)(c), Fla. Stat. (2006). (RO p. 3). The doctrine of equitable tolling will be applied "when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." Machules v. Dep't of Administration, 523 So. 2d 1132, 1134 (Fla. 1988). The RO noted that virtually every reported administrative decision involving this doctrine, and particularly those where affected persons have relied on the first circumstance, has arisen out of a claim that the agency, as opposed to another party in the case, has

misled or lulled the affected person into not filing a request for a hearing in a timely fashion. In this case, there was no assertion that the Department engaged in this type of conduct; rather, Petitioners asserted that the permit applicant (the City) made misleading statements. (RO p. 3). The ALJ further found that except for the unilateral filing of the initial Petition on July 27, 2007, nothing in the parties' filings indicate that the Petitioners ever contacted the Department for any advice regarding the pending applications or when a petition should be filed. (RO p. 4). Therefore, the ALJ ultimately concluded that given these undisputed facts, none of the three circumstances described in Machules existed, and as a matter of law, the doctrine of equitable tolling did not apply. (RO p. 4).

STANDARD OF REVIEW

Section 120.57(1)(l), Florida Statutes (F.S.), authorizes an agency to reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." See § 120.57(1)(l), Fla. Stat. (2006). An agency's review of legal conclusions in a recommended order, are restricted to those that concern matters within the agency's field of expertise. See G.E.L. Corp. v. Dep't of Envtl. Protection, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). Agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. See Barfield v. Dep't of Health, 805 So. 2d 1008 (Fla. 1st DCA 2001). Agencies do not have the authority to modify or reject conclusions of law that apply general legal concepts typically resolved by judicial or quasi-judicial officers. See Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001).

RULINGS ON EXCEPTIONS

The Petitioners' Exceptions to the RO consist mainly of legal argument urging me to reject the ALJ's legal conclusion regarding the application of the legal doctrine of equitable tolling to the undisputed facts.[1] The Petitioners are under the mistaken notion that the applicable standard of review of the RO is *de novo.* However, as described above, my review of legal conclusions in a recommended order, are restricted to those that concern matters within this agency's field of expertise. See G.E.L. Corp. v. Dep't of Envtl. Protection, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). Thus, DEP's substantive expertise extends over matters relating to environmental issues and not technical matters of law concerning application of legal doctrines. Id at 1264; see also Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140 (Fla. 2d DCA 2001) (the Court held that the Secretary of DEP correctly concluded that his substantive jurisdiction over environmental protection regulation does not extend to the ALJ's determination of the application of the doctrine of collateral estoppel). Therefore, Petitioners' Exceptions are denied.

The Petitioners' Exceptions also argue that the DEP "is now estopped from asserting that the Petition was not timely filed and has waived any timeliness objection," by referring the Amended Petition to DOAH. First, as the RO indicates, the DEP took no position on the City's Motion. Second, the DEP referred the Amended Petition to DOAH because it contained disputed facts that raised the defense of equitable tolling,

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[1] The City denies the alleged April 2007 statements were made by the City Manager; but for purposes of the ALJ ruling on its Motion to Dismiss, has accepted this allegation as being true. (RO p. 2).

which required resolution by the ALJ in an evidentiary hearing. See e.g., Brown v. Dep't of Financial Services, 899 So. 2d 1246, 1247 (Fla. 4th DCA 2005) (Disputed facts concerning the applicability of the doctrine of equitable tolling required an evidentiary hearing); see also Accardi v. Dep't of Envtl. Protection, 824 So. 2d 992, 995 (Fla. 4th DCA 2002) (The timeliness of a petition can present a disputed issue of fact that must be resolved by the ALJ). However, in filing its Motion the City accepted as true the Petitioners' allegations. Thus, the ALJ was only required to decide if the undisputed facts, as a matter of law, invoked the doctrine of equitable tolling. Therefore, the Petitioners' Exceptions on this issue are denied.

CONCLUSION

Having considered the applicable law and standard of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised, it is ORDERED that:

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

B. Petitioners' Amended Petition for administrative hearing is DISMISSED with prejudice.

C. The Department's Southeast District Office is directed to issue Permit Nos. FLA139653-011-DW1P and FLA139653-012-DW1P to the City of Port St. Lucie as soon as possible.

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

DONE AND ORDERED this 15th day of February, 2008, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

MICHAEL W. SOLE
Secretary

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

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

Kay Buchanan 2/15/08
CLERK DATE

CERTIFICATE OF SERVICE

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

Howard K. Heims, Esq.
Littman, Sherlock & Heims, P.A.
P.O. Box 1197
Stuart, FL 34995

Theresa J. Fontana, Esq.
Assistant City Attorney
121 Southwest Port St. Lucie Boulevard
Port St. Lucie, FL 34984-5042

Claudia Llado, Clerk and
Donald R. Alexander, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Ronald W. Hoenstine, III, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 15th day of February, 2008.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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