

Administrative Code Rule 18-21.005(1)(c), from the Board of Trustees of the Internal Improvement Trust Fund (BOT).¹ On June 14, 2021, Jimenez filed a Petition for Administrative Hearing (Petition), challenging DEP's verification that the Project qualified for a statutory exemption (Exemption Verification) and issuance of a letter of consent (Letter of Consent) for the use of BOT sovereign submerged lands. On July 7, 2021, DEP issued an Order Dismissing Petition with Leave to Amend for failure to identify when and how Jimenez received notice of the agency action being challenged. On July 22, 2021, Jimenez filed an Amended Petition for Administrative Hearing and, in the Alternative, Request for Enlargement of Time to File Petition (Amended Petition). On September 2, 2021, DEP referred this challenge to DOAH for assignment of an ALJ to conduct an administrative hearing. The final hearing was scheduled for October 27 and 28, 2021.

On September 28, 2021, DEP filed a motion to dismiss the amended petition (Motion to Dismiss), contending that Jimenez had untimely filed her Petition which waived her right to an administrative hearing under chapter 120 to challenge the Exemption Verification and Letter of Consent. Also, on September 28, 2021, Rodriguez filed a notice of joinder in DEP's Motion to Dismiss. On October 5, 2021, Jimenez filed her response in opposition to DEP's Motion to Dismiss, asserting that if her Petition was filed untimely equitable tolling applies to excuse the untimely filing.

On October 6, 2021, Jimenez filed a Motion for Continuance, which was granted; and the final hearing was rescheduled for December 14 and 15, 2021. The ALJ conducted a status

¹ The Secretary of the Department is delegated the authority by the Board of Trustees of the Internal Improvement Trust Fund to review and take final agency action on applications to use sovereignty submerged lands when the application involves an activity for which the Department has permitting authority as set forth in the respective operating agreements between the Department and the water management districts. *See Fla. Admin. Code R. 18-21.0051(2)(2022)*.

conference hearing on October 28, 2021. At the parties' request, the ALJ authorized the parties to file additional briefings on the equitable tolling issue with an evidentiary hearing to be held on December 14, 2021, regarding only the equitable tolling issue. The ALJ and the parties agreed that, in the interest of conserving their resources, the final hearing would be rescheduled on a future date, depending on the ALJ's ruling on the equitable tolling issue.

On November 5, 2021, DEP filed a Reply Memorandum; and on November 10, 2021, Rodriguez filed his Reply to Petitioner's Response to Motion to Dismiss, both responding to the equitable tolling defense raised by Jimenez. Jimenez filed Petitioner's Surreply on November 22, 2021.

DOAH held the evidentiary hearing on Jimenez's equitable tolling defense on December 14, 2021, by Zoom Conference. Jimenez testified on her own behalf and presented the testimony of Jack Bridges, Esquire. She did not tender any exhibits for admission into evidence. Rodriguez testified on his own behalf and did not tender any exhibits for admission into evidence. DEP did not present the testimony of any witnesses. The ALJ admitted DEP's Exhibit Nos. 1 through 8 without objection.

The ALJ authorized the parties to file post hearing submittals by January 28, 2022. The parties timely filed the following pleadings on January 28, 2022: Petitioner's Post[-]Hearing Brief, Respondent Department of Environmental Protection's Proposed Recommended Order, and the Written Argument of Respondent, Jose Roodriguez. The ALJ gave due consideration to the post-hearing submittals in preparing the Recommended Order of Dismissal.

SUMMARY OF THE RECOMMENDED ORDER

In the RO of Dismissal, the ALJ recommended that the Department enter a final order dismissing the Petition for Administrative Hearing filed by Jimenez. (RO at p. 22). In doing so, the ALJ concluded that equitable tolling does not apply in this case to excuse the late filing of Jimenez's Petition. (RO at ¶ 59). Accordingly, the ALJ concluded that Jimenez's Petition must be dismissed as untimely pursuant to section 120.569(2)(c), Florida Statutes. (RO at ¶ 59).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of 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. (2021); *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 Env't. 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, 1026-1027 (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 Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1141-142 (Fla. 2d DCA 2001); *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1011-12 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cnty.*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999). 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 and 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 Env’t. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996). The Department is charged with enforcing and interpreting chapters 373 and 403 of the Florida Statutes. As a result, DEP has substantive jurisdiction over interpretation of these statutes and the Department’s rules adopted to implement these statutes.

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. Regul.*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep’t of Bus. Regul.*, 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

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. (2021). The agency, however, 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.*

A party that files no exceptions to certain findings of fact “has thereby expressed its agreement with, or at least waived any objection to, those findings of fact.” *Env’t Coal. of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. 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)(I), Fla. Stat. (2021); *Barfield*, 805 So. 2d at 1012; *Fla. Pub. Emp. Council, v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

RULINGS ON THE PETITIONERS’ EXCEPTIONS

The Department will address the Petitioners’ exceptions to paragraphs from the Recommended Order in the order presented in the exceptions.

JIMENEZ’s Exception No. 1 to the Finding of Fact in Paragraph No. 5

The Petitioner takes exception to the finding of fact in RO paragraph no. 5, which reads in its entirety: “Specifically, the Exemption Verification confirmed that the proposed activity qualified for the statutory exemption from regulatory permitting codified at section 373.406(6).”

The Petitioner contends that the Exemption Verification did not confirm anything, but instead erroneously found that the Department determined that the proposed activity is exempt. RO ¶ 5. Contrary to the Petitioner’s exception, the ALJ’s finding in paragraph 5 is supported by competent substantial evidence. (DEP Ex. 1). Because the finding in paragraph 5 is supported by competent substantial evidence, this exception must be rejected.

Based on the foregoing reasons, Jimenez’s Exception No. 1 to the Finding of Fact in paragraph No. 5 of the RO is denied.

JIMENEZ's Exception No. 2 to the Finding of Fact in Paragraph No. 30

The Petitioner takes exception to the mixed findings of fact and conclusions of law in RO paragraph no. 30, which reads in its entirety: "Pursuant to rule 62-110.106(2), Bridges received written notice of DEP's agency action regarding the boat lift on April 30, 2021, when he received the Agency Action Letter containing the Exemption Verification and granting the Letter of Consent." RO ¶ 30.

The Petitioner contends that the agency action letter that provided notice when her attorney received it was ineffective, because it was directed to Respondent Rodriguez, and not to her or her counsel Jack Bridges.

The Petitioner's exception is rejected, because it misinterprets Florida law as to "receipt of notice." There is no legal requirement that the Department must send a third party *a letter addressed to that third party* containing the agency action to trigger receipt of the agency action, which initiates the timeframe for the Petitioner to file an administrative hearing under Chapter 120 of the Florida Statutes. Florida Administrative Code Rule 62-110.106(2) defines "receipt of agency action" as "either receipt of written notice or publication of the notice in a newspaper of general circulation in the county or counties in which the activity is to take place, whichever first occurs" Rule 62-110.106(2), Fla. Admin. Code (2022).

Moreover, contrary to the Petitioner's exception, the ALJ's finding in paragraph No. 30 is supported by competent substantial evidence. (Bridges, T., pp. 20, 24²; DEP Ex. Nos. 4, 7, 8). Because the finding in paragraph 30 is supported by competent substantial evidence alone, this exception must be rejected.

² Jeff Bridges, Esquire, testified that "I think I have said a few times now I guess, I acknowledge we received [the agency action letter] on April 30th." (Bridges, T. p. 24, lines 7-12).

Based on the foregoing reasons, Jimenez's Exception No. 2 to the Finding of Fact in paragraph No. 30 of the RO is denied.

JIMENEZ's Exception No. 1 to the Conclusions of Law regarding Paragraph No. 32³

The Petitioner's heading states she takes exception to RO paragraph no. 32; however, she quotes paragraph no. 30 of the RO, to which she has already filed an exception.

Under Section 120.57(1)(k), Florida Statutes, the reviewing agency need not rule on an exception that does not "include appropriate and specific citations to the record," or that "does not identify the legal basis for the exception." § 120.57(1)(k), Fla. Stat. (2021). *See Yon v. Town of Grand Ridge and Fla. Dep't of Env't Prot.* (DEP Case No. 07-0704, March 20, 2008) (DOAH Case No. 07-2414, February 8, 2008)(DEP Final Order denied exception no. 14, partly because petitioner failed to identify the legal basis for the exception and did not include appropriate and specific citations to the record). This alone is a sufficient basis to reject Exception No. 1 to the Conclusions of Law regarding paragraph no. 32 of the RO.

Nevertheless, based on the totality of the Petitioner's exceptions and the Recommended Order, the Petitioner appears to take exception to the conclusions of law in paragraph no. 31 and not paragraph no. 30 or 32. Out of an abundance of caution and a desire for clarity, the Department will rule on what appears to be the Petitioner's exception to paragraph no. 31 of the RO.

³ Although Petitioner states she takes exception to paragraph no. 32 of the RO, she appears to be objecting to the RO's conclusions of law in paragraph no. 31. Petitioner's Exceptions at p. 3. Specifically, the Petitioner's quotation of paragraph no. 32 instead quotes paragraph no. 30 of the RO, to which the Petitioner has already filed an exception. However, the Petitioner's written objection is consistent with the concepts in paragraph no. 31 of the RO. Consequently, the Department will treat the Petitioner's exception no. 1 to the Conclusions of Law as an exception to paragraph no. 31 of the RO (and not paragraph no. 30 or 32 of the RO).

In paragraph no. 31 of the RO, the ALJ concluded that:

31. The express language in the Agency Action Letter Notice of Rights — specifically, that in the section titled “Time Period for Filing a Petition”— places *any persons other than the applicant* on notice that a petition filed by any of those persons (i.e., persons *other* than the applicant) must be filed within 21 days of receipt of the written notice of agency action. Bridges is not the applicant for the Exemption Verification or the Letter of Consent. Therefore, when he received the Agency Action letter, that language placed him, as a non-applicant, on notice that he had 21 days in which to file a petition challenging that agency action.

RO ¶ 31 (*See* footnote 3 herein).

The Petitioner “takes exception to the ALJ’s finding that Mr. Bridges was incorrect when he did not interpret the provision that ‘any person other than the applicant had 21 days from receipt of the notice to file a petition’ as applying to any other person than the applicant, including him” Petitioner’s Exceptions at p. 4.

The Department concludes that paragraph no. 31 of the RO is a mixed finding of fact and conclusion of law. If the Department, as the reviewing agency, modifies or rejects a conclusion of law set out in the ALJ’s recommended order, it must state with particularity the reasons for the modification or rejection, and must find that its substituted conclusion of law “is as or more reasonable than that which was rejected or modified.” § 120.57(1)(1), Fla. Stat. (2021). However, the Petitioner’s counsel did not offer an adequate justification for why his legal interpretation is more reasonable than the ALJ’s legal interpretation of the Department’s Notice of Rights section titled “Time Period for Filing a Petition,” in its agency action letter. Instead, the Petitioner merely contends that the ALJ’s interpretation is incorrect.

The Petitioner seeks to have the Department reweigh the evidence upon which the conclusion of law in paragraph 31 of the RO is based, because the Petitioner rejects the ALJ’s conclusions of law and findings of fact in paragraph 31 of the RO. Drawing reasonable inferences from the evidence, is an evidentiary-related matter wholly within the province of the

ALJ, as the “fact-finder” in this administrative proceeding. *See e.g., Tedder*, 842 So. 2d at 1025. The Department as the reviewing agency may not reweigh the evidence presented at the DOAH hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. If there is competent substantial evidence to support an ALJ’s findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Constr Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623. Contrary to the Petitioner’s exception, the ALJ’s findings are supported by competent substantial evidence, including inferences drawn by the ALJ from the totality of the evidence presented at the final hearing, and the testimony of the Petitioner’s counsel Jack Bridges, Esquire. (Bridges, T., pp. 20, 24; DEP Ex. Nos. 4, 7, and 8).

Moreover, the Department concurs with the ALJ’s interpretation of its Notice of Rights section titled “Time Period for Filing a Petition,” in its agency action letter. The ALJ correctly interpreted the Department’s Notice of Rights language to have placed Petitioner’s counsel Jack Bridges, as a non-applicant, on notice that he had 21 days on behalf of his client in which to file a petition challenging the Department’s agency action.

Based on the foregoing reasons, Jimenez’s Exception No. 1 to the Conclusions of Law regarding paragraph No. [31] of the RO is denied.

JIMENEZ’S Exception No. 2 to the Conclusions of Law regarding Paragraph No. 41

The Petitioner takes exception to the conclusion of law in RO paragraph no. 41, which reads in its entirety: “For these reasons, it is concluded that Jimenez’s Petition was untimely filed, and, therefore, must be dismissed, as required by section 120.569(2)(c), unless equitable tolling applies to excuse that untimely filing.” RO ¶ 41.

The Department concludes that paragraph 41 is an “ultimate fact,” sometimes termed a mixed question of law and fact, necessary to determine the issues in a case. *Costin v. Florida A & M University Bd. of Trustees*, 972 So. 2d 1084 (Fla. 5th DCA 2008). The Petitioner disagrees with the ALJ’s findings and seeks to have the Department reweigh the evidence. However, the Department is not authorized to reweigh evidence presented at a DOAH hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307.

Contrary to the Petitioner’s exception, the ALJ’s finding in paragraph 41 that Jimenez’s Petition was untimely filed is supported by competent substantial evidence, including inferences drawn by the ALJ from the totality of the evidence presented at the final hearing. (Bridges, T. pp. 20, 24; DEP Exs. 4, 7, 8). Because the findings in paragraph 41 are based on competent substantial evidence, the Department may not reject the ALJ’s findings of fact in paragraph 41 of the RO.

Based on the foregoing reasons, Jimenez’s Exception No. 2 to the Conclusions of Law in paragraph no. 41 of the RO is denied.

JIMENEZ’S Exception No. 3 to the Conclusions of Law regarding Paragraph Nos. 49-50

The Petitioner takes exception to RO paragraph nos. 49-50, in which the ALJ concluded:

49. Jimenez’s reliance on *Machules* in this case is misplaced. In *Machules*, a state employee who was terminated from his employment was informed of his right to appeal to the agency within a specified time period. . . . Crucial to the court’s determination that equitable tolling applied to excuse the employee’s late filing of his appeal was that the agency had engaged in conduct which had the effect of lulling or misleading him into missing the time for filing his appeal.

50. By contrast, here, DEP did not engage in any conduct that lulled or misled Jimenez into filing her Petition after the 21-day challenge period had expired. Although DEP did not personally send written notice to Jimenez of its agency action, she was not legally entitled, by statutes or rule, to such notice. Moreover, when Bridges filed a public records request specifically asking for all permitting-related records for Rodriguez’s property, DEP promptly responded, sending him

the documents he had requested, including the Agency Action Letter, which contained the Notice of Rights language directed at “any person other than the applicant” and concerned the specific project that was the reason for his having filed the public records request. The fact that Bridges misinterpreted language in the Notice of Rights [language in the Agency Action Letter] does not give rise, under *Machules*, to the application of equitable tolling.

RO ¶¶ 49-50.

The Department concludes that paragraphs 49-50 of the RO contain mixed findings of fact and conclusions of law.

Section 120.57(1)(I), 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 Deep Lagoon Boat Club, Ltd.*, 784 So. 2d at 1141-142; *Barfield*, 805 So. 2d at 1011-12. Accordingly, the Department’s legal review in this Final Order are limited to those within its “substantive jurisdiction.” § 120.57(1)(I), Fla. Stat. (2021). However, the legal interpretation of equitable tolling as examined in paragraph 49 of the RO is not a matter within the Department’s substantive jurisdiction. *Save the Manate Club v. Whitley*, 24 FALR 1271 (Fla. DEP 2001), *aff’d per curiam*, 812 So. 2d 412 (Fla. 1st DCA 2002) (DEP Secretary concluded she did not have “substantive jurisdiction” to overrule the ALJ regarding his interpretation of equitable tolling). *See also Deep Lagoon Boat Club, Ltd.*, 784 So. 2d at 1141-142, 1144 (DEP does not have “substantive jurisdiction” over interpretation of the legal doctrine of collateral estoppel). Because the Department does not have “substantive jurisdiction” over the interpretation of the legal principle of equitable tolling, the Department may not reject the ALJ’s conclusions of law in paragraph 49 of the RO.

Moreover, the Department concludes that it may not reject paragraph 50 of the RO, because it is a conclusion of law that is not within its substantive jurisdiction or a finding of fact supported by competent substantial evidence. The Petitioner disagrees with the ALJ’s findings

and seeks to have DEP reweigh the evidence. However, DEP is not authorized to reweigh evidence presented at a DOAH hearing, attempt to resolve conflicts therein, or judge the credibility of a witness. *See, e.g., Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307. If there is competent substantial evidence to support the ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co.*, 592 So. 2d at 280; *Conshor, Inc.*, 498 So. 2d at 623.

Contrary to the Petitioner's exception, the ALJ's findings in paragraph 50 are supported by competent substantial evidence, including inferences drawn by the ALJ from the totality of the evidence presented at the final hearing. (Bridges, T. pp. 20, 24; DEP Exs. 4, 7, 8). Because the findings in paragraph 50 are based on competent substantial evidence, the Department may not reject the ALJ's findings of fact in paragraph 50 of the RO.

Based on the foregoing reasons, Jimenez's Exception No. 3 to the Conclusions of Law in paragraph nos. 49-50 of the RO is denied.

JIMENEZ's Exception No. 4 to the Conclusions of Law regarding Paragraph No. 58

The Petitioner takes exception to the conclusions of law in RO paragraph no. 58, which reads in its entirety:

58. Further, as DEP has pointed out, applying equitable tolling to the circumstances in this case would create precedent that would effectively eviscerate the filing timeframes and deadlines codified in rule 62-110.106(3). If Jimenez's position were accepted, any person could avoid the time limits for filing a petition stated in a notice of agency action—even after the person receives *written notice* of those time limits, and even when those time limits are clearly and unequivocally stated in the written notice of agency action—simply by claiming confusion on the basis that the notice also states—accurately, under established case law⁷—that the agency action becomes final and effective on the date it is filed with the agency clerk, unless a petition is timely filed under sections 120.569 and 120.57.

⁷ *See, e.g., Fla. Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 786 (Fla. 1st DCA 1981); *Capeletti Bros., Inc. v. Dep't of Transp.*, 362 So. 2d 346, 348 (Fla. 1st DCA 1978).

RO ¶ 58.

Dismissal of an untimely request for hearing is mandatory unless facts exist to support the application of the doctrine of equitable tolling. § 120.569(2)(c), Fla. Stat. (2021).; Fla. Admin. Code R. 28-106.111(4)(2022); *Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1134 (Fla. 1988); *Riverwood Nursing Ctr., LLC v. Ag. For Health Care Admin.*, 58 So. 3d 907 (Fla. 1st DCA 2011); *Cann v. Dep't of Child. & Fam. Servs.*, 813 So. 2d 237 (Fla. 2d DCA 2000); see also *Jancyn Mfg. Corp. v. Dep't of Health*, 742 So. 2d 473, 476 (Fla. 1st DCA 1999)(“the record reveals that the failure to seek yet another extension or to file for a chapter 120 proceeding was the result of appellant’s own inattention, and not the result of mistake or agency misrepresentation.”)

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 *Deep Lagoon Boat Club, Ltd.*, 784 So. 2d at 1141-142; *Barfield*, 805 So. 2d at 1011-12. Accordingly, the Department’s legal review in this Final Order are limited to those within its “substantive jurisdiction.” § 120.57(1)(l), Fla. Stat. (2021). However, the determination of equitable tolling is not a matter within the Department’s substantive jurisdiction. *Save the Manatee Club v. Whitley*, 24 FALR 1271 (Fla. DEP 2001), *aff’d per curiam*, 812 So. 2d 412 (Fla. 1st DCA 2002) (DEP Secretary concluded she did not have “substantive jurisdiction” to overrule the ALJ regarding his interpretation of equitable tolling). See also *Deep Lagoon Boat Club, Ltd.*, 784 So. 2d at 1141-142, 1144 (DEP does not have “substantive jurisdiction” over interpretation of the legal doctrine of collateral estoppel).

Based on the foregoing reasons, Jimenez’s Exception No. 4 to the Conclusions of Law in paragraph no. 58 of the RO is denied.

JIMENEZ's Exception No. 5 to the Conclusions of Law regarding Paragraph No. 59

The Petitioner takes exception to the conclusion of law in paragraph no. 59, which reads in its entirety: "For these reasons, it is concluded that equitable tolling does not apply in this case to excuse Jimenez's late filing of her Petition. Accordingly, pursuant to section 120.569(2)(c), her Petition must be dismissed as untimely." RO ¶ 59.

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 Deep Lagoon Boat Club, Ltd.*, 784 So. 2d at 1141-142; *Barfield*, 805 So. 2d at 1011-12. Accordingly, the Department's legal review in this Final Order are limited to those within its "substantive jurisdiction." § 120.57(1)(l), Fla. Stat. (2021). However, the determination of equitable tolling is not a matter within the Department's substantive jurisdiction. *Save the Manatee Club v. Whitley*, 24 FALR 1271 (Fla. DEP 2001), *aff'd per curiam*, 812 So. 2d 412 (Fla. 1st DCA 2002) (DEP Secretary concluded she did not have "substantive jurisdiction" to overrule the ALJ regarding his interpretation of equitable tolling). *See also Deep Lagoon Boat Club, Ltd.*, 784 So. 2d at 1141-142, 1144 (DEP does not have "substantive jurisdiction" over interpretation of the legal doctrine of collateral estoppel).

Based on the foregoing reasons, Jimenez's Exception No. 5 to the Conclusion of Law in paragraph no. 59 of the RO is denied.

CONCLUSION

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

ORDERED that:

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

B. Mary Jo Haybert Jimenez's Petition for an administrative hearing in the above styled case is DISMISSED.

C. The Exemption Verification and Letter of Consent (ERP Case No. 0290877-003 EE, Monroe County) authorizing the applicant Jose Rodriguez to remove a portion of his existing dock and construct and operate a boat lift is APPROVED.

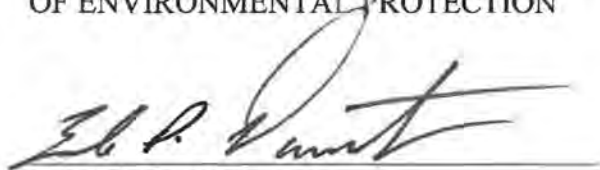
JUDICIAL REVIEW

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 11th day of April 2022, 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.


CLERK

4/11/22
DATE

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by

electronic mail to:

Jack Bridges, Esquire Law Office of Jack Bridges, P.A. Post Office Box 1714 Tavernier, Florida 33070 jack@jackbridges.us linda@jackbridges.us	Tom Woods, Esquire Law Office of Tom Woods, P.A. 116 Porto Salvo Drive Islamorada, Florida 33036 tom@tomwoodslaw.com
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this 11th day of April 2022.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION


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**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

MARY JO HAYBERT JIMENEZ,

Petitioner,

vs.

Case No. 21-2678

JOSE RODRIGUEZ AND DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.

_____ /

RECOMMENDED ORDER OF DISMISSAL

Pursuant to notice, a hearing was held in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2021),¹ on December 14, 2021, by Zoom Conference before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Jack Bridges, Esquire
 Law Office of Jack Bridges, P.A.
 Post Office Box 1714
 Tavernier, Florida 33070

 Tom Woods, Esquire
 Law Office of Tom Woods, P.A.
 116 Porto Salvo Drive
 Islamorada, Florida 33036

For Respondent, Jose Rodriguez:

 Russell A. Yagel, Esquire
 Herschoff Lupino & Yagel, LLP
 88539 Overseas Highway
 Tavernier, Florida 33070

¹ All references to Florida Statutes are to the 2021 codification.

For Respondent, Department of Environmental Protection:

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STATEMENT OF THE ISSUE

The issue in this case is whether equitable tolling applies to excuse Petitioner's untimely filing of a petition for administrative hearing challenging agency action consisting of a verification of exemption from regulatory permitting and a letter of consent issued by Respondent, Department of Environmental Protection, on August 13, 2020.

PRELIMINARY STATEMENT

On August 13, 2020, Respondent, Department of Environmental Protection ("DEP"), issued an agency action letter (hereafter, "Agency Action Letter") to Respondent, Jose Rodriguez, verifying that the removal of a portion of a private residential single-family dock and the installation, on sovereign submerged lands, of a boat lift, is exempt from the requirement to receive a regulatory permit under Part IV of chapter 373, Florida Statutes, and qualifies for proprietary approval in the form of a letter of consent, pursuant to Florida Administrative Code Rule 18-21.005(1)(c).

On June 14, 2021, Petitioner, Mary Jo Haybert Jimenez, through her attorney, filed a Petition for Administrative Hearing ("Petition"), challenging DEP's verification that the activity qualified for the statutory exemption (hereafter, "Exemption Verification") and granting a letter of consent ("Letter of Consent") for the use of sovereign submerged lands. On July 7, 2021, DEP issued an Order Dismissing Petition with Leave to Amend, dismissing the

Petition for failure to state when and how Petitioner received notice of the agency action being challenged. On July 22, 2021, Jimenez filed her Amended Petition for Administrative Hearing and, in the Alternative, Request for Enlargement of Time to File Petition ("Amended Petition"). On September 2, 2021, DEP referred this matter to DOAH for assignment of an ALJ to conduct an administrative hearing pursuant to sections 120.569 and 120.57(1). The final hearing was scheduled for October 27 and 28, 2021.

On September 28, 2021, DEP filed the State of Florida Department of Environmental Protection's Motion to Dismiss ("Motion to Dismiss"), contending that Jimenez had untimely filed her Petition, so that she had waived her right to an administrative hearing under chapter 120 to challenge the Exemption Verification and Letter of Consent, and her challenge must be dismissed. Also on September 28, 2021, Rodriguez filed Respondent, Jose Rodriguez's, Notice of Joinder in State of Florida Department of Environmental Protection's Motion to Dismiss. Jimenez filed Petitioner's Response in Opposition to the State of Florida, Department of Environmental Protection's Motion to Dismiss ("Response in Opposition") on October 5, 2021, asserting that if her Petition was untimely filed, equitable tolling applies to excuse the untimely filing.

On October 6, 2021, Jimenez filed a Motion for Continuance, which was granted, and the final hearing was rescheduled for December 14 and 15, 2021. The undersigned conducted a status conference on October 28, 2021. At the parties' request, it was agreed that they would file additional briefings on the equitable tolling issue, and that an evidentiary hearing on the equitable tolling issue would be conducted on December 14, 2021. The parties also agreed that, in the interest of conserving their resources, the final hearing would be rescheduled on a future date, depending on the undersigned's ruling on the equitable tolling issue.

On November 5, 2021, DEP filed a Reply Memorandum, and on November 10, 2021, Rodriguez filed Jose Rodriguez's Reply to Petitioner's Response to Motion to Dismiss, both responding to the equitable tolling defense raised in the Response in Opposition. Jimenez filed Petitioner's Surreply on November 22, 2021.

The evidentiary hearing on Petitioner's equitable tolling defense was held on December 14, 2021. Jimenez testified on her own behalf and presented the testimony of Jack Bridges, Esquire. She did not tender any exhibits for admission into evidence. Rodriguez testified on his own behalf and did not tender any exhibits for admission into evidence. DEP did not present the testimony of any witnesses. DEP's Exhibit Nos. 1 through 8 were admitted into evidence without objection.

The one-volume Transcript of the hearing was filed at DOAH on January 4, 2022, and the parties were given until January 14, 2022, to file their post-hearing submittals. Subsequently, pursuant to motion, the deadline for filing post-hearing submittals was extended to January 28, 2022. Petitioner's Post[-]Hearing Brief; Respondent Department of Environmental Protection's Proposed Recommended Order; and the Written Argument of Respondent, Jose Rodriguez, were timely filed on January 28, 2022. The undersigned has duly considered the post-hearing submittals in preparing this Recommended Order of Dismissal.

FINDINGS OF FACT

The Parties

1. Respondent, DEP, is the state agency charged with administering and enforcing chapters 373 and 253, Florida Statutes, and the rules implementing those statutes.

2. Respondent, Jose Rodriguez, owns the property at 7 Mutiny Place, Key Largo, Florida, at which he has constructed and is operating a boat lift, pursuant to the Exemption Verification and Letter of Consent which have been challenged in this proceeding.

3. Petitioner, Mary Jo Haybert Jimenez, owns property adjoining Rodriguez's property located at 7 Mutiny Place, Key Largo. Jimenez has challenged DEP's agency action consisting of the Exemption Verification and Letter of Consent authorizing Rodriguez to remove a portion of the existing dock and to construct and operate the boat lift.

Agency Action and Notice of Rights

4. On August 13, 2020, DEP issued the Agency Action Letter, consisting of an Exemption Verification and a Letter of Consent, for the removal of a portion of an existing private residential single-family dock and installation of a boat lift on sovereign submerged lands.

5. Specifically, the Exemption Verification confirmed that the proposed activity qualified for the statutory exemption from regulatory permitting codified at section 373.406(6).

6. Additionally, the Letter of Consent was granted, pursuant to rule 18-21.005(1)(c), authorizing the use of sovereign submerged lands for the activity.

7. The Agency Action Letter stated that the activity did not qualify for the federal State Programmatic General Permit ("SPGP"), so that a separate federal permit from the United States Army Corps of Engineers ("Corps") would be required for the activity.

8. Rodriguez filed a separate application for the required federal permit from the Corps on or about May 15, 2020.

9. The Agency Action Letter contained a section titled "Notice of Rights," which stated, in pertinent part:

NOTICE OF RIGHTS

This action is final and effective on the date filed with the Clerk of the Department unless a petition for an administrative hearing is timely filed under Sections 120.569 and 120.57, F.S., before the deadline for filing a petition. On the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Department. Because the administrative hearing process is designed to formulate final agency action, the hearing process may result in a modification of the agency action or even denial of the application.

Petition for Administrative Hearing

A person whose substantial interests are affected by the Department's action may petition for an administrative proceeding (hearing) under Sections 120.569 and 120.57, F.S.

* * *

Time Period for Filing a Petition

In accordance with Rule 62-110.106(3), F.A.C., petitions for an administrative hearing by the applicant and persons entitled to written notice under Section 120.60(3), F.S., must be filed within 21 days of receipt of this written notice. ***Petitions filed by any persons other than the applicant, and other than those entitled to written notice under Section 120.60(3), F.S., must be filed within 21 days of publication of the notice or within 21 days of receipt of the written notice, whichever occurs first.*** You cannot justifiably rely on the finality of this decision unless notice of this decision and the right of substantially affected persons to challenge this decision has been duly published or otherwise provided to all persons substantially affected by the decision. While you are not required to publish notice of this action, you may elect to do so pursuant to Rule 62-110.106(10)(a).

The failure to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S., or to intervene in this proceeding and participate as a party to it. Any subsequent intervention (in a proceeding initiated by another party) will be only at the discretion of the presiding officer upon the filing of a motion in compliance with Rule 28-106.205, F.A.C. If you do not publish notice of this action, this waiver will not apply to persons who have not received written notice of this action.

Agency Action Letter (emphasis added).

10. The notice of agency action regarding the Exemption Verification and issuance of the Letter of Consent was not published in a newspaper of general circulation in the county in which the activity was to take place, nor was it required, by statute or rule, to be published.

Evidence Adduced at the Hearing Regarding Filing the Petition

11. Jimenez testified that on December 24, 2020, she saw a large barge pull in along the shoreline of Rodriguez's property. According to Jimenez, "they started driving in these huge pilings very close to my dock, within five foot [sic] of the riparian line." According to Jimenez, the "pilings were being positioned in a place that would block the entrance to the front of the pier to my dock."

12. A permit authorizing construction of the boat lift was not posted at Rodriguez's property, so Jimenez contacted the Monroe County Code Compliance Department and the Monroe County Sheriff's Office, both of which went to the site and stopped work on the boat lift. According to Jimenez, she contacted both offices multiple times over the next several weeks, and work on the boat lift was intermittently stopped and restarted over this period. Ultimately, Jimenez was informed that Monroe County had issued a permit for the boat lift.

13. Jimenez testified that she then decided to install a boat lift on her own dock. According to Jimenez, when she investigated how to do that, she was informed that she could not install a structure within 25 feet of her riparian lines without obtaining the adjoining neighbors' signatures.² She testified that "since I was never asked for a signature or I never gave a signature, I couldn't understand how I could have this huge structure sitting by my dock. ... So I went and hired Jack Bridges as my attorney and asked him to help me figure out how this all happened."

14. On or about April 27, 2021, Bridges sent a public records request, via email, to DEP, requesting information on "for any and all records regarding 7 Mutiny Place, Key Largo, Florida 33037[,] concerning all activities requiring permitting during the past ten (10) years."

15. Bridges testified that in requesting the DEP file, he was particularly interested in determining whether DEP had sent a letter providing notice of the activity to Jimenez, and whether notice of the Exemption Verification and Letter of Consent had been published.

16. On April 30, 2021, Bridges obtained a copy of the records he had requested. The documents, consisting of approximately 80 pages, included the Agency Action Letter containing the Exemption Verification, approving the Letter of Consent, and notifying Rodriguez that the project did not qualify for federal authorization under the SPGP.

17. Importantly, the Agency Action Letter contained the Notice of Rights which stated, in pertinent part: "[p]etitions filed by any persons other than the applicant, and other than those entitled to written notice under section 120.60(3), F.S., must be filed within 21 days of publication of the notice or within 21 days of receipt of the written notice, whichever occurs first."

² Rule 18-21.004(3)(d) requires, subject to certain exceptions, that all structures must be set back a minimum of 25 feet inside the applicant's riparian rights line. One of those exceptions is where the person seeking proprietary authorization for use of sovereign submerged lands obtains a letter of concurrence from the affected adjacent upland riparian owner.

18. Bridges testified that he did not file the Petition within 21 days of the date he received the Notice of Rights contained in the Agency Action Letter because

I thought the 21 days had long since expired. I thought that we would be able to file the petition based on the fact that she had never received actual notice.^[3] ... So I figured that we had not yet received actual notice so we could still file, subject, of course, to laches^[4] if we waited years and years to file or something.

19. Bridges testified that because the Agency Action Letter was directed to Rodriguez, and not to Jimenez or any other interested persons, he believed that the 21-day challenge period stated in the Notice of Rights applied only to Rodriguez, and not to anyone to whom the Agency Action Letter was not directed.

20. Bridges acknowledged that it was unlikely that he read the Agency Action Letter on April 30, 2021, when he received it as part of the DEP file.

21. Bridges further testified that when he read the Notice of Rights language in the Agency Action Letter—including the provision in the "Time Period for Filing a Petition" section that expressly informed the recipient that *any persons other than the applicant* had 21 days from receipt of the notice to file a petition—he did not interpret that provision as applying to any person other than the applicant, including him. Rather, he thought he had a "reasonable" amount of time in which to file a petition challenging the Exemption Verification and Letter of Consent. To this point, he testified that had Jimenez received a letter addressed to her containing the notice of

³ Bridges cited no statutory or other authority, including section 120.60(3)—which expressly identifies those who are entitled to receive written notice of agency action—as the basis for his view that Jimenez was entitled to receive "actual notice" of DEP's proposed agency action.

⁴ In Jimenez's Post[-]Hearing Brief, Bridges states that the Transcript contains an error, and that the words "defensible actions" in the Transcript should be "laches." This correction is noted. Because laches is not at issue, this correction is immaterial to the outcome of this proceeding.

agency action, or had notice of agency action been published in the newspaper, then 21 days would constitute a "reasonable" amount of time to file a petition.

22. Bridges testified that the language in the first paragraph of the Notice of Rights stating that "[t]his action is final and effective on the date filed with the Clerk of the Department unless a petition for an administrative hearing is timely filed under Sections 120.569 and 120.57, F.S., before the deadline for filing a petition" lulled him into believing that the agency action had become final and effective within 21 days after the notice was provided to Rodriguez, so that there was no set deadline for persons other than Rodriguez to file a petition. Thus, Bridges did not believe the 21-day period applied to him. He stated that "the only reason I ended up filing this action in the beginning was because I believed they were supposed to give her actual notice."

23. The application form for the federal Corps permit requires an applicant to list the addresses of all property owners whose property adjoins the property at which the activity is proposed. Bridges noted, and the documentary evidence confirms, that the completed application that Rodriguez filed with the Corps included the address of one adjoining property owner, but did not include the address of Jimenez's adjoining property.⁵

CONCLUSIONS OF LAW

24. DOAH has jurisdiction over the subject matter of, and parties to, this proceeding, pursuant to sections 120.569 and 120.57(1).

⁵ As the undersigned noted during the status conference with the parties on October 28, 2021, to the extent the application for the federal Corps permit did not contain required information regarding Jimenez's adjoining property, that issue is appropriately addressed with the Corps rather than with DEP, which is a separate government entity that had no involvement in the review of the application filed with the Corps, or the Corps' decision to issue the federal permit.

Jimenez's Petition was Untimely Filed

25. Section 120.569(2)(c), which governs petitions for administrative hearing under sections 120.569 and 120.57, states, in pertinent part: "[a] petition shall be dismissed if . . . it is untimely filed."

26. Florida Administrative Code Rule 62-110.106(2), which defines "receipt of notice of agency action," states, in pertinent part:

[F]or the purpose of determining the time for filing a petition for hearing on any actual or proposed action of the Department as set forth below in this rule, "receipt of notice of agency action" means either ***receipt of written notice*** or publication of the notice in a newspaper of general circulation in the county or counties in which the activity is to take place, whichever first occurs, ***except for persons entitled to written notice personally or by mail under Section 120.60(3), F.S., or any other statute.*** ..."Notice of agency action" shall include notice of intended agency action as well as actual agency action. Except where otherwise provided by statute or this rule chapter, ***a timely petition requesting an administrative hearing shall be filed within twenty-one days of such receipt of notice of agency action.***

Fla. Admin. Code R. 62-110.106(2)(emphasis added).

27. Rule 62-110.106(3) states, in pertinent part:

(3) Time for Filing Petition.

(a) A petition shall be in the form required by Rule 28-106.201 or 28-106.301, F.A.C., and must be filed (received) in the office of General Counsel of the Department within the following number of days after receipt of notice of agency action, as defined in subsection (2), of this rule above:

* * *

4. ***Petitions*** concerning Department action or proposed action on applications for permits under statutes other than Chapter 403 or Section

373.427, F.S., or **concerning other Department actions or proposed actions: twenty-one days.**

* * *

(b) Failure to file a petition within the applicable time period after receiving notice of agency action shall constitute a waiver of any right to request an administrative proceeding under Chapter 120, F.S.

28. As set forth above, the Agency Action Letter contained a Notice of Rights, which states, in pertinent part:

NOTICE OF RIGHTS

This action is final and effective on the date filed with the Clerk of the Department unless a petition for an administrative hearing is timely filed under Sections 120.569 and 120.57, F.S., before the deadline for filing a petition. On the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Department. Because the administrative hearing process is designed to formulate final agency action, the hearing process may result in a modification of the agency action or even denial of the application.

Petition for Administrative Hearing

A person whose substantial interests are affected by the Department's action may petition for an administrative proceeding (hearing) under Sections 120.569 and 120.57, F.S.

* * *

Time Period for Filing a Petition

In accordance with Rule 62-110.106(3), F.A.C., petitions for an administrative hearing by the applicant and persons entitled to written notice under Section 120.60(3), F.S., must be filed within 21 days of receipt of this written notice. ***Petitions filed by any persons other than the applicant, and other than those entitled to written notice under Section 120.60(3), F.S., must be filed within 21 days of publication of the notice or***

within 21 days of receipt of the written notice, whichever occurs first. You cannot justifiably rely on the finality of this decision unless notice of this decision and the right of substantially affected persons to challenge this decision has been duly published or otherwise provided to all persons substantially affected by the decision. While you are not required to publish notice of this action, you may elect to do so pursuant to Rule 62-110.106(10)(a).

The failure to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under Sections 120.569 and 120.57, F.S., or to intervene in this proceeding and participate as a party to it. Any subsequent intervention (in a proceeding initiated by another party) will be only at the discretion of the presiding officer upon the filing of a motion in compliance with Rule 28-106.205, F.A.C. If you do not publish notice of this action, this waiver will not apply to persons who have not received written notice of this action.

Agency Action Letter (emphasis added).

29. Section 120.60(3), which is referenced both in rule 62-110.106(2) and in the Notice of Rights, states, in pertinent part:

Each ***applicant*** shall be given written notice, personally or by mail, that the agency intends to grant or deny, or has granted or denied, the application for license. The notice must state with particularity the grounds or basis for the issuance or denial of the license, except when issuance is a ministerial act. Unless waived, a copy of the notice shall be delivered or mailed to each party's attorney of record ***and to each person who has made a written request for notice of agency action.*** Each notice must inform the recipient of the basis for the agency decision, inform the recipient of any administrative hearing pursuant ss. 120.569 and 120.57 ... which may be available, indicate the procedure that must be followed, and state the

applicable time limits. The issuing agency shall certify the date the notice was mailed or delivered, and the notice and the certification must be filed with the agency clerk.

30. Pursuant to rule 62-110.106(2), Bridges received written notice of DEP's agency action regarding the boat lift on April 30, 2021, when he received the Agency Action Letter containing the Exemption Verification and granting the Letter of Consent.

31. The express language in the Agency Action Letter Notice of Rights—specifically, that in the section titled "Time Period for Filing a Petition"—places *any* persons *other than the applicant* on notice that a petition filed by any of those persons (i.e., persons *other* than the applicant) must be filed within 21 days of receipt of the written notice of agency action. Bridges is not the applicant for the Exemption Verification or the Letter of Consent. Therefore, when he received the Agency Action Letter, that language placed him, as a non-applicant, on notice that he had 21 days in which to file a petition challenging that agency action.

32. Because Bridges did not file the Petition with DEP within 21 days of April 30, 2021, the Petition was untimely filed. *See Fla. Admin. Code R. 62-110.106(3)(a)4.* (establishing a 21-day challenge period for the types of agency action covered in that paragraph, which includes, as "other Department actions," verification of exemptions under section 373.406(6)).

33. Bridges' position that Jimenez had a "reasonable" amount of time in which to file her Petition because she did not receive "actual notice" appears to be based on his misunderstanding regarding what constitutes "actual notice" in the context of this matter.

34. The term "actual notice" is not used (or defined) in any statutes or DEP rules applicable to this proceeding. Case law describes "actual notice" as being comprised of two types: express notice, which means notice that is based on direct information that was received; and implied notice, which

means notice that is inferred from the fact that a person had the means of knowledge, which it was his duty to use. *Symons Corp. v. Tartan-Lavers Delray Beach, Inc.*, 456 So. 2d 1254, 1257 (Fla. 4th DCA 1984).

35. Here, Jimenez *did* receive *express* actual notice, through the written notice of DEP's agency action that Bridges received on April 30, 2021, in the Agency Action Letter.

36. In contending that Jimenez, as a neighboring property owner, was entitled to receive "actual notice" of DEP's agency action, Bridges appears to equate the term "actual notice" with the term "written notice," as the latter term is used in rule 62-110.106(2). Among other things, this rule specifically refers to persons who are legally entitled, under section 120.60(3), to receive written notice of agency action personally or by mail.

37. Here, there are no statutory or rule provisions which entitled Jimenez to receive written notice of DEP's agency action regarding the Exemption Verification and Letter of Consent.

38. The plain language of section 120.60(3) requires the provision of written notice of agency action *to the applicant* with respect to whom the agency is taking action, *and to each other person who has made a written request for notice of agency action*. Jimenez is not the applicant in this case, and no evidence was presented showing that she made a written request to DEP to receive notice of its agency action regarding Rodriguez's request for an exemption verification and approval to use sovereign submerged lands. Had Jimenez made such a request, she would have been legally entitled, pursuant to section 120.60(3), to receive written notice of DEP's agency action at the time it took that action.

39. In any event, Jimenez, through Bridges, ultimately *did* receive "actual notice" of DEP's agency action via the written notice of agency action in the Agency Action Letter, which Bridges received on April 30, 2021. Had Jimenez's Petition been filed within 21 days of Bridges' receipt of that written

notice of agency action, it would have been timely filed, and Jimenez would be entitled to an administrative hearing to challenge DEP's agency action.

40. Jimenez also was not legally entitled to receive notice regarding Rodriguez's use of sovereign submerged lands for the boat lift. Section 253.115(1) requires, for requests to sell, exchange, lease, or grant an easement on sovereign lands, that public notice of the request be provided to each owner of land lying within 500 feet of the land proposed to be sold, exchanged, leased, or subject to an easement, and to those who have requested to be on a mailing list for such notice. Additionally, section 253.115(3) sets forth the circumstances where notice may be required to be published and provided to specified persons regarding the agency's proposed sale, exchange, lease, or approval of an easement. Here, DEP has issued a *letter of consent* for the boat lift—a type of approval that is excluded from the types of transactions and approvals expressly enumerated in section 253.115 for which written notice must be personally provided to adjacent property owners. Thus, nothing in section 253.115 entitled Jimenez to receive written notice of DEP's proposed agency action to approve the Letter of Consent for the boat lift.

41. For these reasons, it is concluded that Jimenez's Petition was untimely filed, and, therefore, must be dismissed, as required by section 120.569(2)(c), unless equitable tolling applies to excuse that untimely filing.

Equitable Tolling Does Not Apply

42. Jimenez contends that equitable tolling applies in this case to excuse her untimely filing of the Petition challenging the Exemption Verification and Letter of Consent. However, for the reasons discussed below, it is concluded that the circumstances present in this case do not give rise to equitable tolling.

43. The doctrine of equitable tolling has been applied in Florida administrative proceedings, under certain circumstances, to excuse the late

filing of a request for an administrative hearing that otherwise would be time-barred. *Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1134 (Fla. 1988).

44. Equitable tolling is an extraordinary remedy that should be extended only sparingly. *Justice v. United States*, 6 F.3d 1474, 1479-80 (11th Cir. 1993). Generally, a party who files late because of his own negligence may not invoke equity to avoid a filing limitations period. *See id.*

45. Florida courts have applied equitable tolling to excuse untimely filing in three types of circumstances: (1) when a party has been misled or lulled into inaction; (2) when a party has, in some extraordinary way, been prevented from asserting his rights; or (3) when a party has timely asserted his rights mistakenly in the wrong forum. *Machules*, 523 So. 2d at 1134.

46. Here, Jimenez does not contend that she was prevented, in some extraordinary way, from asserting her right to challenge DEP's agency action; nor does she contend that she timely asserted her right to request a hearing in the wrong forum. Rather, she contends that she, through Bridges, was misled or lulled, by language in the Notice of Rights, into missing the 21-day period for filing a petition for administrative hearing after Bridges received written notice of DEP's agency action.

47. As discussed above, Bridges testified that he was lulled or misled into missing the 21-day timeframe by language in the first paragraph of the Notice of Rights, which led him to believe that the time period for filing a petition challenging DEP's agency action already had expired, so that there was no definite timeframe in which Jimenez's Petition had to be filed, as long as he filed a petition within a "reasonable" amount of time after receiving the notice.

48. This argument might have merit if the Notice of Rights did not *also* contain the language, in the section titled "Time Period for Filing a Petition," stating that "[p]etitions filed by *any persons other than the applicant* ... must be filed ... within 21 days of receipt of the written notice." This language expressly, and very clearly, was directed at *any persons other than the*

applicant. Any reasonably careful reading of the Notice of Rights—including the aptly-titled "Time Period for Filing a Petition" section—would clearly inform a non-applicant recipient of the Notice of Rights that he or she had 21 days from the date on which he or she received the notice in which to file a petition challenging the agency action.

49. Jimenez's reliance on *Machules* in this case is misplaced. In *Machules*, a state employee who was terminated from his employment was informed of his right to appeal to the agency within a specified time period. The employee's representative (a non-lawyer) filed a grievance on his behalf with the agency within the appeal period, and the agency set the grievance hearing for the day after the appeal period had expired. The agency then proceeded to inform the employee that his remedy was to challenge his termination through the appeal process, rather than the grievance process. Because the employee had not timely filed an appeal, the agency rejected his appeal as untimely. In determining that the agency's actions had lulled or misled the employee into missing the period for filing an appeal, the court observed that:

[the agency] countenanced and acquiesced in [Machules'] error by participating in the grievance process until after the appeal period had run. We find that the [agency's] actions in this instance sufficiently misled petitioner so as to excuse his failure to timely file in the appropriate forum. This is not a case of mere inaction in the face of petitioner's mistake.

Id. at 1134.

Crucial to the court's determination that equitable tolling applied to excuse the employee's late filing of his appeal was that the agency had engaged in conduct which had the effect of lulling or misleading him into missing the time for filing his appeal.

50. By contrast, here, DEP did not engage in any conduct that lulled or misled Jimenez into filing her Petition after the 21-day challenge period had

expired. Although DEP did not personally send written notice to Jimenez of its agency action, she was not legally entitled, by statute or rule, to such notice. Moreover, when Bridges filed a public records request specifically asking for all permitting-related records for Rodriguez's property, DEP promptly responded, sending him the documents he had requested, including the Agency Action Letter, which contained the Notice of Rights language directed at "any person other than the applicant" and concerned the specific project that was the reason for his having filed the public records request. The fact that Bridges misinterpreted language in the Notice of Rights does not give rise, under *Machules*, to the application of equitable tolling.

51. Rather, the facts in this case are akin to those in *Environmental Resource Associates of Florida, Inc. v. Department of General Services*, 624 So. 2d 330 (Fla. 1st DCA 1993), in which the court found that the attendant circumstances did not warrant the application of equitable tolling to excuse the late filing of a petition challenging agency action. In that case, a state contractor was informed by an agency that its contract was being terminated. The notice of agency action informed the contractor that it had 21 days in which to file its petition challenging the agency action. Rather than filing the petition, as required under the applicable procedural rules and as apprised in the notice of agency action, the contractor's attorney instead sent the petition by certified mail, resulting in the petition being filed four days late. The contractor contended that its late-filed petition should be accepted on equitable principles. Citing *Machules*, the court declined to apply equitable tolling to excuse the late filing of the petition under the circumstances, which involved attorney mistake rather than conduct on the agency's part which reasonably would have lulled or misled a person to miss the filing deadline.

52. Likewise, in *Aleong v. Department of Business and Professional Regulation*, 963 So. 2d 799 (Fla. 4th DCA 2007), the court declined to apply equitable tolling to excuse the late filing of a petition, by an attorney,

challenging agency action imposing discipline on a veterinarian for certain statutory and rule violations. In that case, as here, there was no dispute that an attorney's mistake resulted in the late filing of the petition. In holding that equitable tolling did not apply, the court in *Aleong* noted that three other Florida district courts of appeal also declined to apply equitable tolling when the cause of a late filing was due to attorney mistake. *Id.* at 801.

53. In contending that equitable tolling should apply in this case, Jimenez focuses on language in *Machules* stating that equitable tolling "does not require active deception or misconduct on the part of the agency, but focuses rather on the [person filing the petition], with a reasonably prudent regard for his rights." *Machules*, 523 So. 2d at 1134.

54. Here, not only did DEP *not* engage in "active deception or misconduct" in this case, it did not engage in any conduct whatsoever that could reasonably have lulled or misled Jimenez, through her attorney, to miss the 21-day timeframe for filing her Petition. As discussed above, the only conduct in which DEP engaged was to promptly respond to Bridges' public records request, which provided him the written notice of the specific agency action that was the reason he had filed the public records request.

55. Declining to apply equitable tolling to the circumstances in this case does not unreasonably disregard Jimenez's right to challenge DEP's agency action. Jimenez, through her attorney, received the Agency Action Letter, setting forth DEP's agency action and providing the Notice of Rights, which informed the applicant and other persons regarding their right to challenge the agency action, including the process and time period for doing so. As discussed above, a reasonably careful reading of the Notice of Rights language in the Agency Action Letter—and particularly the language in the "Time Period for Filing a Petition" section specifically directed toward "*any persons other than the applicant*"—would place a reasonably prudent person

on notice that he or she needed to file a Petition within 21 days of having received the Notice of Rights.⁶

56. Jimenez also points to language in *Machules* describing equitable tolling as "a type of equitable modification which 'focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant.'" *Machules*, 523 So. 2d at 1134. However, that language does not support the application of equitable tolling to this case.

57. As discussed above, the "ignorance" (using the court's term) regarding the filing deadline in this case is not excusable. The language in the Notice of Rights directed to "*any persons other than the applicant*" expressly, and very clearly, notified "any person other than the applicant" that he or she had 21 days from the date on which he or she received the Notice of Rights to file the Petition. As noted above, even a reasonably careful reading of more than just the first paragraph of the Notice of Rights would inform the reader of the specific timeframe applicable to challenges by persons other than the applicant.

58. Further, as DEP has pointed out, applying equitable tolling to the circumstances in this case would create precedent that would effectively eviscerate the filing timeframes and deadlines codified in rule 62-110.106(3). If Jimenez's position were accepted, any person could avoid the time limits for filing a petition stated in a notice of agency action—even after the person receives *written notice* of those time limits, and even when those time limits are clearly and unequivocally stated in the written notice of agency action—simply by claiming confusion on the basis that the notice also

⁶ Additionally, to the extent that any person, including a non-applicant, may need additional time to familiarize himself or herself with the applicable rules governing administrative challenges to agency action, or to contact the agency to obtain clarification regarding any uncertainty he or she may have regarding filing timeframes, the person may request an extension of time to file the petition—as was expressly stated in the Agency Action Letter Notice of Rights section titled "Extension of Time."

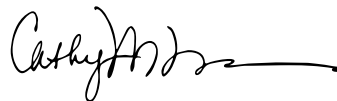
states—accurately, under established case law⁷—that the agency action becomes final and effective on the date it is filed with the agency clerk, unless a petition is timely filed under sections 120.569 and 120.57.

59. For these reasons, it is concluded that equitable tolling does not apply in this case to excuse Jimenez's late filing of her Petition. Accordingly, pursuant to section 120.569(2)(c), her Petition must be dismissed as untimely.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Environmental Protection issue a final order dismissing the Petition for Administrative Hearing filed by Petitioner, Mary Jo Haybert Jimenez, on June 14, 2021.

DONE AND ENTERED this 28th day of February, 2022, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 2022.

⁷ See, e.g., *Fla. Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 786 (Fla. 1st DCA 1981); *Capeletti Bros., Inc. v. Dep't of Transp.*, 362 So. 2d 346, 348 (Fla. 1st DCA 1978).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.