

FEB 29 2024

PALATKA, FLORIDA  
DISTRICT CLERK  
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STATE OF FLORIDA  
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

BEAR WARRIORS UNITED, INC.,  
THE SWEETWATER COALITION  
OF VOLUSIA COUNTY, INC.,  
DEREK LAMONTAGNE, an individual,  
and BRYON WHITE, an individual,  
Petitioners,

vs.

DOAH CASE NO.: 23-1512  
SJRWMD F.O.R. NO.: 2023-06

ST. JOHNS RIVER WATER  
MANAGEMENT DISTRICT and  
FLORIDA DEPARTMENT OF  
TRANSPORTATION,  
Respondents.

**RESPONDENT, FLORIDA DEPARTMENT OF TRANSPORTATION'S  
MOTION TO STRIKE PETITIONERS' UNTIMELY FILING**

COMES NOW, Respondent, the State of Florida Department of Transportation ("FDOT"),  
by and through its undersigned counsel, and hereby files this Motion to Strike Petitioners' untimely  
filed Responses to Respondents' Exceptions. In support thereof, FDOT states:

**INTRODUCTION**

1. This matter concerns whether Environmental Resource Permit ("ERP") application  
number 103479-2 for construction and operation by Respondent, Florida Department of  
Transportation ("FDOT") of a stormwater management system for a highway interchange at the  
intersection of Interstate Highway 95 ("I-95") and Pioneer Trail in Volusia County, Florida, meets  
the criteria in Rules 62-330.301 and 62-330.02, Florida Administrative Code, and the Applicant's  
Handbook ("A.H.") Volumes I and II for issuance of an ERP.

2. At the conclusion of the final hearing, Petitioners requested additional time to file  
Recommended Orders which FDOT opposed. (Tr. p. 1862-1863). Petitioners' request for

additional time to provide proposed recommended orders was authorized and the parties were provided twenty days from filing of the transcripts to file (an additional ten days). *Id.*

3. On November 29, 2023, the Final Transcripts were filed and the Administrative Law Judge Early entered a Scheduling Order directing the Proposed Recommended Orders be filed by December 19, 2023, and stating the Recommended Order would be issued no later than January 8, 2024. The Recommended Order was ultimately issued January 29, 2024.

4. Exceptions to that order were to be filed no later than February 13, 2024.

5. On February 13, 2024, the parties filed exceptions to Administrative Law Judge E. Gary Early's Recommended Order. At that point, under Rule 28-106.217, Florida Administrative Code, the parties had the opportunity to file responses to exceptions within ten (10) days.

6. On February 23, 2024, Respondents both filed responses to Petitioners' Exceptions to (Amended) Recommended Order.

7. On February 23, 2024, Petitioners filed a Motion for an Extension of Time for Filing Response(s) to Respondents' Exceptions to (Amended) Recommended Order ("Motion"). Petitioners conferred with Respondents on the Motion on February 23, 2024, as to position for extension but provided no basis supporting their request. Prior to this date, Petitioners provided no indication that additional time would be required to respond to the Respondents' Exceptions.

8. As noted by Petitioners, the Motion was opposed by both FDOT and St. Johns River Water Management District ("District").

9. On February 27, 2024, Petitioners filed their Responses to Respondents' Exceptions.

## ARGUMENT

10. Rule 28-106.217(3), Florida Administrative Code, states that “any party *may* file responses to another party’s exceptions within ten (10) days from the date that exceptions were filed with the agency.” (emphasis added). While responses to exceptions are not required, the rule establishes a specific timeframe should parties wish to exercise the option. Petitioners’ responses were due no later than February 23, 2024.

11. There is no automatic stay, or tolling, of the time to file responses to exceptions based upon the mere filing of a request for extension of time. *Compare* Fla. Admin. Code R. 28-106.111(3) (providing that a timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon), *with* Fla. Admin. Code R. 28-106.217 (no automatic tolling provision is provided in the rule). Indeed, the Administration Commission’s express provision for tolling under Rule 26-106.111, F.A.C., and failure to provide similar tolling language in Rule 28-106.217, F.A.C., indicates an intent that no such tolling be provided when moving to extend the time to file exceptions or responses. *See Nunes v. Herschman*, 310 So. 3d 79 (Fla. 4th DCA 2021) (“We can also look to the omitted case canon of construction. Under this canon, ‘[n]othing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered.’ Scalia & Garner, *Reading Law* at 93.”) Here, the District should not add words to Rule 28-106.217, F.A.C. which were intentionally omitted.

12. As such, Petitioners’ Motion did not toll Petitioners’ deadlines to respond to Respondents’ Exceptions, which is why both Respondents filed their Responses on February 23, 2024, and Responses in Opposition to Petitioners’ Request for Extension on February 27, 2024.

13. Should the District accept Petitioners' untimely filing, the District will have conferred an unfair advantage to Petitioners by giving them additional time not enjoyed by Respondents and, more importantly, the ability to review Respondents' arguments ahead of their own filing.

14. As discussed in FDOT's Response to Petitioners' Motion for Extension of Time for Filing Response(s) to Respondents' Exceptions to (Amended) Recommended Order, this case has been marked by continuous delay and enough extensions of time. Further delay will adversely impact FDOT which must expend the funding source for this project or else see it expire.

#### **CONCLUSION**

WHEREFORE, FDOT, the applicant for the permit in question, respectfully requests that the St. Johns River Water Management District enter an Order striking Petitioners Responses to Respondents' Exceptions as being filed untimely and not in compliance with Rule 28-106.217(3), Florida Administrative Code.

#### **CONSULTATION WITH OTHER PARTIES**

The undersigned has consulted with counsel for the St. Johns River Water Management District and they have no objection to the motion. The undersigned has consulted with Petitioners' Qualified Representative regarding Petitioners' position on this motion and said Representative stated that Petitioners oppose the motion.

Respectfully submitted this 29th day of February, 2024.

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