ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

JUDGE RAY and GERRA GATLIN,

Petitioners,

vs.

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

Respondents.
_____/

SJRWMD F.O.R. 97-1731
97-1732
DOAH CASE NOS. 97-0803
97-0804
CONSOLIDATED

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings (DOAH), by its duly designated Administrative Law Judge, the Honorable Donald R. Alexander, held a formal administrative hearing in the above-styled case on May 30, 1997, in Macclenny, Florida.

A. APPEARANCES

For Petitioners: J. Victor Barrios, Esquire
1026 East Park Avenue
Tallahassee, Florida 32301-1673

Susan K. S. Scarcelli, Esquire
Post Office Box 3399
Tampa, Florida 33601-3399

For Respondent: (St. Johns River Water Management District) Nancy B. Barnard, Esquire
Post Office Box 1429
Palatka, Florida 32178-1429

For Respondent: (Department of Transportation) Francine M. Ffolkes, Esquire
Mary S. Miller, Esquire
Haydon Burns Building
Mail Station 58
Tallahassee, Florida 32399-0458

On July 14, 1997, Mr. Alexander submitted to the St. Johns River Water Management District (hereinafter referred to as the "District"), and all other parties to this proceeding, a Recommended Order, a copy of which is attached hereto as Exhibit

"A." The District received the Recommended Order on July 16, 1997. On July 31, 1997, Petitioners timely filed Exceptions to the Recommended Order. Additionally, on July 31, 1997, the District filed its Exceptions to Recommended Order. On August 11, 1997, the District filed its Response to Petitioners' Exceptions. On August 12, 1997, the Department of Transportation (hereinafter referred to as the "Department") filed its Response to Petitioners' Exceptions and its Response to the District's Exceptions to Recommended Order. On August 12, 1997, Petitioners filed their Response to the District's Exceptions to Recommended Order. This matter then came before the Governing Board on August 12, 1997, for final agency action.

B. STATEMENT OF THE ISSUES

The issues in this case are:

(1) Whether the Respondents' motions to dismiss the amended petitions should be granted on the ground they were not timely filed; and

(2) Whether the time limitation for filing a request for an administrative hearing was equitably tolled.

C. RULINGS ON EXCEPTIONS

STANDARD OF REVIEW

The rules regarding an agency's consideration of exceptions to a recommended order are well established. An agency may not reject or modify the findings of fact of an administrative law judge contained in the recommended order unless the agency first determines from a review of the entire record that the findings of fact were not based upon competent substantial evidence, or that the proceedings on which the findings were based did not comply with the essential requirements of law. Section 120.57(1)(j), Fla. Stat. (1996 Supp.). If an administrative law judge's finding is supported by any competent substantial evidence from which the finding could reasonably be inferred, then it cannot be disturbed. Berry v. Dept. of Environmental Regulation, 530 So. 2d 1019, 1022 (Fla. 4th DCA 1988)(construing similar language formerly with section 120.57(1)(b)10., Fla. Stat.). The issue is not whether the record contains evidence contrary to the administrative law judge's finding, but whether the finding is supported by any competent substantial evidence. Florida Sugar Cane League v. State Siting Board, 580 So. 2d 846, 851 (Fla. 1st DCA 1991). The term "competent substantial evidence" relates not to the quality, character, convincing power, probative value or weight of the evidence, but refers to

the existence of some quantity of evidence as to each essential element and as to the legality and admissibility of that evidence. Scholastic Book Fairs v. Unemployment Appeals Commission, 671 So. 2nd 287, 289n.3 (Fla. 5th DCA 1996).

1. PETITIONERS' EXCEPTION 1:

Petitioners take exception to finding of fact 13. In the accompanying argument, Petitioners take exception to the Administrative Law Judge's finding that the "receiving water" for storm water discharge is the St. Marys River rather than the South Prong of the St. Marys River. This finding is supported by competent substantial evidence consisting of the testimony of Mr. Patrick M. Frost (T: 199-201; 206-207) and by St. Johns River Water Management District's Exhibits 1, 2, 3, and 4. Therefore, Petitioners' exception 1 is rejected.

2. PETITIONERS' EXCEPTION 2:

Petitioners take exception to part of finding of fact 26. Finding of fact 26 states:

> Even though they did not read the notice, petitioners contend that it was "confusing and misleading to readers." First, they point out that the legal notice identifies the receiving water as the St. Mary's River. Both the application and technical report of the District staff, however, identified the receiving water as the South Prong St. Mary's River. The South Prong St. Mary's River flows north and south and crosses under U.S. Highway 90 at the bridge replacement site. It eventually flows into the St. Mary's River, which is approximately six miles further north and forms the boundary between Florida and Georgia in that area. Therefore, the notice was technically correct since the St. Mary's River is the ultimate receiving water from the small tributary. Even if the notice erred in this respect, the error was immaterial and would not mislead the reader. This is because the cited sections, township, ranges and road being improved are all at least five miles south of the St. Mary's River, and thus the notice could not lull readers into believing that the project would actually be closer to that river, some six miles to the north.

Petitioners take exception to the Administrative Law Judge's statement that "[e]ven if the notice erred in [respect to naming the St. Marys River as the receiving water], the error was immaterial and would not mislead the reader." Petitioners

assert that naming the St. Marys River as the receiving water in the notice is not immaterial as the receiving water is both practically and technically pertinent as correctly identified by District staff. Essentially, Petitioners seek the Governing Board to reweigh the evidence and reject the following two findings: (1) that the receiving water is the St. Marys River (finding of fact 13); and (2) that the notice was technically correct since the St. Marys River is the ultimate receiving water from the smaller tributary (finding of fact 26). However, the Governing Board is not free to weigh the evidence or to otherwise interpret the evidence to fit an ultimate conclusion, but is limited to determining whether particular findings of fact are based upon any competent substantial evidence or that proceedings in which findings were based did not comply with essential requirements of law. Goin v. Commission on Ethics, 658 So. 2d 1131, 1139 (Fla. 1st DCA 1995); Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Accordingly, the Governing Board will not weigh the evidence presented in this proceeding and will not substitute its findings of fact for the findings of fact of the Administrative Law Judge.

The first issue raised in Petitioners' exception 2 is whether there exists any competent substantial evidence to support the Administrative Law Judges finding of fact that the St. Marys River is the receiving water. This is the same issue as was addressed in Petitioners' exception 1. As indicated above, finding of fact 13 is supported by competent substantial evidence. Petitioners' exception 2, as it relates to finding that the St. Marys River is the receiving body, is rejected for the same reasons given above for rejecting Petitioners' exception 1.

The second issue in Petitioners' exception 2 is whether the Administrative Law Judge's finding that the notice was technically correct. A review of the complete record to this proceeding demonstrates that the Administrative Law Judge's finding that "the notice was technically correct since the St. Mary's River is the ultimate receiving water from the smaller tributary" is supported by competent substantial evidence consisting of the testimony of Mr. Patrick M. Frost (T: 199-201; 206-207). Therefore, Petitioners' exception 2 as it relates to the finding that the notice was technically correct is rejected. Section 120.57(1)(j), Fla. Stat. (1996 Supp.).

The third issue raised in the argument accompanying exception 2 is if naming the St. Marys River as the receiving water in the notice was error, was the error "immaterial." Petitioners argue that the issue regarding the receiving body is not "immaterial." Petitioners state that "the Administrative

Law Judge acknowledges that the District's position is that, '. . . the receiving body is the South Prong St. Mary's River."' To the contrary, the Administrative Law Judge merely acknowledged that the "technical report of the District staff. . . identified the receiving water as the South Prong St. Mary's River."

Moreover, the Administrative Law Judge did not find the notice in error. The statement that "[e]ven if the notice erred in this respect, the error was immaterial and would not mislead the reader" is obiter dictum. That is, this conclusion of law[1] based on supposition and not finding of fact, is not essential to the outcome of this proceeding. Although this conclusion of law is neither based upon a finding of fact, nor essential to the outcome of this proceeding, the Governing Board is not required by law to reject it. Therefore, Petitioner's exception 2 as it relates to this conclusion of law is rejected as irrelevant and immaterial to any portion of the outcome of this proceeding.

3. PETITIONER'S EXCEPTION 3:

Petitioners take exception to part of finding of fact 20. Petitioners argue that the last sentence of finding of fact 20, which provides that there is no evidence that the Department of Transportation provided certain ownership information with the intent to mislead the District, is irrelevant to this proceeding.[2] The Governing Board may not reject or modify this finding of fact, in whole or in part, unless it is not supported by competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Section 120.57(1)(j), Fla. Stat. (1996 Supp.).

The question is did the proceedings comply with the essential requirements of law? Petitioners would answer "no." Underlying Petitioners exception is the unstated proposition that the admission of irrelevant evidence violated the essential requirements of law. Section 120.569(2)(e), Florida Statutes (1996 Supp.), states that irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The finding of fact that the Department did not intend to mislead the District is not probative as to the issue of timeliness of filing the petition. However, Petitioners raised the issue of equitable tolling as an affirmative defense to the District and the Department's Motions to Dismiss. Whether or not the Department intended to mislead the District is relevant to the issue of equitable tolling as raised by Petitioners. The last sentence of this finding of fact is supported by competent substantial

evidence consisting of the testimony of Mr. Van Humphreys (T: 109, 129-130). Therefore, Petitioners' exception 3 is rejected.

4. DISTRICT'S EXCEPTION 1:

The District takes exception to part of finding of fact 16. In the last sentence of finding of fact 16, the Administrative Law Judge states that "a request for a hearing was not filed by petitioners by the August 10 deadline." The District takes exception to the finding that the deadline for filing a petition occurred on August 10. This finding is not supported by any competent substantial evidence from which the finding could reasonably be inferred. Therefore, finding of fact 16 is modified by striking the last sentence of the paragraph.

5. DISTRICT'S EXCEPTION 2:

The District takes exception to part of finding of fact 40. In the first sentence of finding of fact 40, the Administrative Law Judge stated that "[i]n late September 1996, Cortopassi telephoned Wallace and advised him that a further review of her files revealed that two permits had been issued for the project." In support of its exception, the District argues that the evidence showed that Mr. Wallace called Ms. Cortopassi. Mr. Peter Michael Wallace testified that he called Ms. Helen Cortopassi "at the end of September . . ." (T: 235, 251) The record is vacant of any competent substantial evidence that would support the Administrative Law Judge's finding that Ms. Cortopassi called Mr. Wallace in late September. However, the testimony of Mr. Wallace supports the finding that Mr. Wallace called Ms. Cortopassi. Therefore, finding of fact 40 is modified to reflect that Mr. Wallace called Ms. Cortopassi.

6. DISTRICT'S EXCEPTION 3:

The District takes exception to finding of fact 43 on the grounds that the proceedings on which the findings were based did not comply with essential requirements of law pursuant to section 120.57(1)(a)9., Florida Statutes.[3] Essentially, the District argues that evidence of the location of the storm water detention pond with respect to wetlands is not relevant to the issues presented in this proceeding and therefore, should not have been admitted. Questions relating to the admissibility of evidence are legal questions rather than factual questions. See Department of Professional Regulation v. Melvin S. Wise, M.D., 575 So. 2d 713, 716 (Fla. 1st DCA 1991). Irrelevant evidence shall be excluded from Chapter 120 proceedings. Section 120.569(2)(e), Fla. Stat. (1996 Supp.).

In its argument accompanying exception 3, the District asserts that "[b]ecause the area of disputed wetlands is within the geographical area of the notices, the delineation of wetlands would not have altered the noticing that occurred. Therefore, the correctness of the delineation of the wetlands is a substantive issue regarding the merits of the case and not relevant[4] in the hearing on whether the District provided a clear point of entry to the Gatlins." On the other hand, Petitioners, in their Response to [the District's] Exceptions contend that the evidence was admitted as it related to noticing and point of entry, and not the merits of the permit.

We agree that the issue of whether or not part of the stormwater pond is located in wetlands is a substantive issue applicable to the merits of Petitioners' case. However, we must explore whether or not the evidence regarding the delineation of the stormwater pond is relevant to determining whether or not the District provided Petitioners adequate notice thereby creating a clear point of entry into an administrative proceeding.

Petitioners proffered evidence regarding the delineation of the stormwater pond in order to show that they would have received different notice that would have alerted them to the Department's activities. Nevertheless, the issue in this proceeding is whether the notices provided were adequate to create a clear point of entry to an administrative proceeding. These are two different issues. Evidence allegedly demonstrating that a different notice would provide adequate notice is not relevant to proving whether the notices provided were adequate. Furthermore, evidence regarding the delineation of the stormwater pond is not relevant to determining whether the doctrine of equitable tolling applies to the Petitioners, or whether the doctrine of reasonable inquiry (asserted by the Department at the hearing) imposed an adequate basis for a finding of implied actual notice. Accordingly, finding of fact 43 is irrelevant; as such, it violates Section 120.569(2)(e), Florida Statutes (1996 Supp.).

The Administrative Law Judge erred in admitting evidence regarding the delineation of the stormwater pond. To this extent, the proceedings on which finding of fact 43 was based did not comply with essential requirements of law pursuant to section 120.57(1)(j), Florida Statutes. The competency of evidence refers to its admissibility under the legal rules of evidence. Scholastic Book Fairs v. Unemployment Appeals Commission, 671 So. 2d 287, 289n.3 (Fla. 5th DCA 1996). Inadmissible evidence is not competent. Thus, finding of fact 43 is not supported by any competent substantial evidence. For the foregoing reasons, finding of fact 43 is rejected.

ACCORDINGLY, IT IS HEREBY ORDERED:

Based on the foregoing and the complete review of the record in this proceeding, the Recommended Order dated June 14, 1997. a copy of which is attached hereto as Exhibit A, is adopted as modified by this Final Order. The Department of Transportation and the St. Johns River Water Management District's Motions to Dismiss First Amended Petition for Formal Administrative Hearing on permit no. 4-003-OOlOG in St. Johns River Water Management District File of Record 97- 1731 (DOAH Case No. 97-0803) are GRANTED. The Department of Transportation and the St. Johns River Water Management District's Motions to Dismiss First Amended Petition for Formal Administrative Hearing on permit no. 12-003-OOOlG in St. Johns River Water Management District File of Record 97-1732 (DOAH Case No. 97-0804) are GRANTED. Petitioners, Judge Ray Gatlin and Gerra Gatlin's First Amended Petition for Formal Administrative Hearing on permit no. 4-003-OOlOG is DISMISSED with prejudice. Petitioners, Judge Ray Gatlin and Gerra Gatlin's First Amended Petition for Formal Administrative Hearing on permit no. 12-003-OOOlG is DISMISSED with prejudice.

DONE AND ORDERED this 13th day of August 1997, in Palatka, Putnam County, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY:_____
WILLIAM SEGAL,
GOVERNING BOARD
CHAIRMAN

RENDERED this 14th day of Aug. 1997.

BY:_____
PATRICIA C. SCHULTZ
DISTRICT CLERK

ENDNOTES

1/ It is noted that the statement "the error was immaterial" is a conclusion of law. Although the statement is made in the section entitled "Findings of Fact;" this agency is not bound by labels affixed by the Administrative Law Judge to findings of fact and conclusions of law. See, Battaglia Properties Ltd v.

Florida Land and Water Adjudicatory Commission, 629 So. 2d 161 (Fla. 5th DCA 1993).

2/ During the hearing, Petitioners' did not object to the admission of testimony of the Department of Transportation's intent to mislead the District.

3/ The District's cite to section 120.57(1)(a)9., Florida Statutes, is incorrect. The correct cite is 120.57(1)(j), Florida Statutes (1996 Supp.). Section 120.57 was substantially reworded by Chapter 96-159, Laws of Florida (1996).

4/ The District objected to the admissibility of any testimony addressing the location of the stormwater pond as not relevant to the issues before the Administrative Law Judge. (T: 229)

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within 90 days of rendering of the final District action.

2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla.R.App. 9.110 within 30 days of the rendering of the final District action.

3. A party to the proceeding who claims that a District order is inconsistent with the provisions and purposes of Chapter 373, Florida Statutes, may seek review of the order pursuant to Section 373.114, Florida Statutes, by the Land and Water Adjudicatory Commission (Commission) by filing a request for review with the Commission and serving a copy on the Department of Environmental Protection and any person named in the order within 20 days of adoption of a rule or the rendering of the District order.

4. A District action or order is considered "rendered" after it is signed by the Chairman of the Governing Board on behalf of the District and is filed by the District Clerk.

5. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 or #2 or for Commission review as described in paragraph #3 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been furnished by United States Mail to:

VICTOR BARRIOS, ESQ.
1026 EAST PARK AVENUE
TALLAHASSEE FL 32301-1673

At 4:00 P.M. this 14TH day of AUGUST, 1997.

_____
PATRICIA C. SCHULTZ
DISTRICT CLERK
St. Johns River Water
Post Office Box 1429
Palatka, Florida 32178-1429

CERTIFIED MAIL # P182 700 014 Management District

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within 90 days of rendering of the final District action.

2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla.R.ApP. 9.110 within 30 days of the rendering of the final District action.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been furnished by United States Mail to:

SUSAN K S SCARCELLI ESQ
PO BOX 3399
TAMPA FL 33601-3399

At 4:00 P.M. this 14TH day of AUGUST, 1997.

PATRICIA C. SCHULTZ
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429

CERTIFIED MAIL # P182 700 015

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within 90 days of rendering of the final District action.

2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla.R.App. 9.110 within 30 days of the rendering of the final District action.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been
furnished by United States Mail to:

FRANCINE M FFOLKES ESQ
MARY S MILLER ESQ
HAYDON BURNS BUILDING
MAIL STATION 58
TALLAHASSEE FL 32399-0458

At 4:00 P.M. this 14TH day of AUGUST, 1997.

_____
PATRICIA C. SCHULTZ
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429

CERTIFIED MAIL # P182 700 016

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JUDGE RAY and GERRA GATLIN,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case Nos. 97-0803
	)	97-0804
ST. JOHNS RIVER WATER	)	
MANAGEMENT DISTRICT and	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondents.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, these matters were heard on May 30, 1997, in Macclenny, Florida, by Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: J. Victor Barrios, Esquire
1026 East Park Avenue
Tallahassee, Florida 32301-1673

Susan K. S. Scarcelli, Esquire
Post Office Box 3399
Tampa, Florida 33601-3399

For Respondent: (SJRWMD) Nancy B. Barnard, Esquire
Post Office Box 1429
Palatka, Florida 32178-1429

For Respondent: (DOT) Francine M. Ffolkes, Esquire
Mary S. Miller, Esquire
Haydon Burns Building, Mail Station 58
Tallahassee, Florida 32399-0458

STATEMENT OF THE ISSUE

The issues are whether respondents' motions to dismiss the amended petitions should be granted on the ground they were not timely filed, or whether the time limitation for filing a request for hearing was equitably tolled.

PRELIMINARY STATEMENT

These cases began on December 20, 1996, when petitioners, Judge Ray and Gerra Gatlin, filed petitions with respondent, St. Johns River Water Management District, seeking to contest the issuance of two permits to respondent, Department of Transportation. More specifically, Case No. 97-0803 involves a challenge to the issuance of a management and storage of surface waters permit issued on August 10, 1993, while Case No. 97-0804 involves a challenge to the issuance of a wetlands resource management permit issued the same date.

On February 7, 1997, petitioners filed amended petitions seeking to invoke the doctrine of equitable tolling because the applications and notices allegedly contained "false and misleading statements." Thereafter, motions to dismiss the amended petitions were filed by respondents. The cases were referred to the Division of Administrative Hearings on February 24, 1997, with a request that an Administrative Law Judge be assigned to conduct a hearing. On March 20, 1997, the cases were consolidated on the undersigned's own motion.

By order dated April 21, 1997, a final hearing on the

motions to dismiss was scheduled on May 20, 1997, in Tallahassee, Florida. The matters were continued on the undersigned's own motion to May 30, 1997, in Macclenny, Florida.

At final hearing, petitioners presented the testimony of Peter M. Wallace, an environmental consultant and accepted as an expert in wetland jurisdiction and wetland site assessment; and Judge Ray Gatlin. Also, they offered petitioners' exhibits 1 and 3-8. All exhibits were received except exhibit 7. The Department of Transportation presented the testimony of Keith E. Couey, public involvement coordinator; James Knight, project engineer; Van Humphreys, permit coordinator; Alex G. Paul, senior right-of-way agent; and Debra S. Babb, senior attorney. Also, it offered DOT exhibits 1-37. All exhibits were received except exhibits 15-19. The St. Johns River Water Management District presented the testimony of Patrick M. Frost, assistant director of the department of resource management. Also, it offered District exhibits 1-6. All exhibits were received in evidence. Finally, the Department of Transportation's pending motion for official recognition has been granted.

The transcript of hearing (two volumes) was filed on June 11, 1997. Proposed findings of fact and conclusions of law were filed by the parties on June 20, 1997, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

A. Background

1. Petitioners, Judge Ray and Gerra Gatlin (petitioners or Gatlins), own a parcel of real property in the central portion of Baker County, Florida, generally located to the north of U. S. Highway 90 between Glen St. Mary and Macclenny, Florida. Respondent, St. Johns River Water Management District (District), is the state agency charged with the responsibility of issuing Water Resource Management (WRM) and Management and Storage of Surface Water (MSSW) permits within its boundaries. Respondent, Department of Transportation (DOT), is a state agency charged with the responsibility of maintaining the state highway system.

2. On April 27, 1993, DOT filed two applications with the District seeking MSSW and WRM permits for a road widening and bridge replacement project on State Road 10, also known as U. S. Highway 90, in Baker County. After notices of receipt of application and intent to grant the applications were published in a local newspaper on June 3 and July 22, 1993, respectively, and no requests for a hearing were received, the District issued the two permits on August 10, 1993.

3. On December 20, 1996, or 1,216 days after the permits had been issued, petitioners filed their petitions for

administrative hearing to contest the issuance of the permits. The petition challenging the MSSW permit has been assigned Case No. 97-0803 while the challenge to the issuance of a WRM permit has been assigned Case No. 97-0804. As amended on February 10, 1997, the petitions generally allege that the Gatlins were not given actual notice of the WRM application as required by a District rule, DOT supplied inaccurate or false information in the applications as to the ownership of the property on which a portion of the work was to be performed, and the District's notice was confusing and misleading. Because of this, they contend the time limitation for challenging the permits was equitably tolled. Motions to dismiss the amended petitions on the ground they are untimely have been filed by the District and DOT, and they are the subject of these proceedings.

B. Events Prior to Issuance of the Permits

4. As early as 1990 or 1991, the DOT began planning for certain improvements to State Road 10 from County Road 125 in Glen St. Mary, Florida, east to State Road 121 in Macclenny, Florida. The work involved the widening of the road from two to four lanes and replacing an existing bridge. Excluding the work within the two municipalities, the total length of the project was less than two miles.

5. On April 23, 1991, the DOT sent all property owners along U. S. Highway 90 a letter advising that a public meeting would be held on May 16, 1991, to discuss the proposed

improvements. Although DOT records indicate that petitioners were on the mailing list, petitioners deny that they ever received a letter. In addition to a personal letter to each owner, notice of the meeting was published in a local newspaper.

6. Another meeting with owners of property adjacent to U. S. Highway 90 was held on August 13, 1992, concerning the proposed project. Although a letter was sent to all property owners on July 21, 1992, advising that such a meeting would be held, petitioners deny that they ever received one. A notice of the meeting was also published in a local newspaper.

a. The MSSW permit

7. On April 23, 1993, DOT filed with the District an application, with various attachments, seeking the issuance of a MSSW permit. If approved, the permit would authorize DOT to construct surface water works, including the treatment of stormwater runoff by wet detention ponds, on an approximately eleven acre site. The application described the project as follows:

> The proposed facility typical section will be a four-lane roadway with a center turn lane through Glen St. Mary and unincorporated Baker Co. [T]hrough Macclenny, the typical section will be a two-lane roadway with a center turn lane.

8. It further described the location of the project as follows:

> The segment of SR 10 (US 90) presented in this application begins approximately 500 feet west of the intersection of SR 10 and CR

> 125 and runs east to the intersection of SR 10 and SR 121. The project is located in Section 36, Township 2 south, and Range 21 east and Sections 31 and 32, Township 2 south, and Range 22 east in Baker County.

9. In answer to a question regarding who owned the works to be constructed, DOT identified itself as the owner. The application did not require, however, that an applicant certify that it was the present owner of the property on which the proposed works were to be constructed. In fact, DOT followed its standard practice of not filling in the areas on the application form that asked for "Project Acreage" and "Total Acreage Owned" because it did not know exactly how much property it would need to acquire through exercise of its power of eminent domain until the District had approved the design of the proposed surface water works. It was clear, however, that DOT had the ability and intention to acquire whatever property was needed through eminent domain proceedings.

10. Attached to the application were certain sketches. They did not depict the storm detention pond which was to be built on the Gatlins' property.

11. Under an applicable District rule and statute, the District was required to give actual notice of the application only to persons who had previously filed a written request for such notice. Because petitioners had not made such a request, they were not given actual notice. In the absence of a written request, the statute allows constructive notice of the agency’s

intended action to be provided by publication in a newspaper of general circulation in the county in which the work is to be performed. The specific requirements for this notice are found in Rule 40C-1.511(5), Florida Administrative Code. They include "a brief description of the proposed activity and its location," "location of the application," "statement of the District's intended action," "scheduled date of Board action," and "notification of administrative hearing opportunity."

12. On July 22, 1993, the District published notice of its intended agency action in The Baker County Press, a weekly newspaper of general circulation published in Macclenny, Florida. The notice read, in pertinent part, as follows:

> The District gives notice of its intent to issue a permit to the following applicant on August 10, 1993:
>
> FLORIDA DEPARTMENT OF TRANSPORTATION, P. O. Box 1089, Lake City, Fla., 32056, application #4-003-0010AG. The project is located in Baker County, Sections 31, 32 & 36, Township 02 South, Ranges 21 & 22 East. The application is for the CONSTRUCTION OF A SURFACE WATER MANAGEMENT SYSTEM ASSOCIATED WITH THE WIDENING OF SR 10 (U.S. 90) FROM CR 125 TO SR 121. The receiving waterbody is the St. Mary's River.
>
> The file containing the above-listed application is available for inspection Monday through Friday except for legal holidays, 8:00 am to 5:00 pm at the St. Johns River Water Management District headquarters or the appropriate field office. The District will take action on the permit application listed above unless a petition for an administrative hearing is filed pursuant to the provisions of section 120.57, F.S., and section 40C-1.511. A person whose

> substantial interests are affected by the District's proposed permitting decision identified above may petition for an administrative hearing in accordance with section 120.57, F.S. Petitions must comply with the requirements of Florida Administrative Code Rules 40C-1.111 and 40C-1.521 and be filed with (and received by) the District Clerk, P.O. Box 1429, Palatka, Florida 32178-1429. Petitions must be filed within fourteen (14) days of publication of this notice or within fourteen(14) days of actual receipt of this intent, whichever occurs first. Failure to file a petition within this time period shall constitute a waiver of any right such person may have to request an administrative determination (hearing) under Section 120.57, F.S., concerning the subject permit application. Petitions which are not filed in accordance with the above provisions are subject to dismissal.

Thus, the notice provided a brief description of the project and its location, the location of the application, the District's intended action, the scheduled date of Board action, and notification as to the right of a hearing.

13. Although petitioners acknowledge that they never read the notice, they contend that, even if they had read it, the notice was nonetheless misleading and confusing in several respects. First, they point out that the legal notice identified the receiving waterbody as the St. Mary's River. The application, however, identified the receiving water as the South Prong St. Mary's River whereas the technical report of the District staff identified the receiving water as the Little St. Mary's River. The South Prong St. Mary's River and the Little St. Mary's River are the same river, and it eventually flows into

the St. Mary's River approximately six miles north of petitioners' property. Therefore, the notice is technically correct since the larger St. Mary's River is the ultimate receiving water for the smaller tributary. Even if the notice was in error in this respect, however, for the reasons cited below, the error was immaterial and would not mislead or confuse readers.

14. The notice provides further clarification on the project's location by stating that the project encompasses the "construction of a surface water management system associated with the widening of SR 10 (U.S. 90) from CR 125 to SR 121." This clearly alerts the reader that the project is on or near U. S. Highway 90 between Glen St. Mary and Macclenny, a short stretch of road less than two miles in length. Given this description, a reasonable person would not assume that the work would take place on the St. Mary's River, six miles to the north, as petitioners suggest.

15. Petitioners also point out that the notice identified the location of the project as "Sections 31, 32 & 36, Township 02 South, Ranges 21 & 22 East," an area petitioners say encompasses some 1,900 acres of land. Because the MSSW project will actually involve only 11 acres of land, they contend the notice is misleading. Although the notice identifies three sections, and each section is one square mile, the notice alerts the reader that the project will be confined to the "widening of S. R. 10

(U. S. 90)" between Glen St. Mary and Macclenny, a relatively short stretch of roadway. Finally, the notice provided that a copy of the application was on file at the "appropriate field office" of the District should any member of the public desire more detailed information.

16. Petitioners' property lies within Sections 31 and 36 and would therefore be affected by the application. Although they reside in Baker County, petitioners did not subscribe to The Baker County Press, and therefore they did not read the legal advertisement. Accordingly, a request for a hearing was not filed by petitioners by the August 10 deadline.

17. When no requests for a hearing were filed within the fourteen day time limitation, the District took final agency action on August 10, 1993, and issued MSSW permit number 4-003-0010G.

b. The WRM permit

18. On April 27, 1993, DOT filed with the District an application, with attachments, seeking the issuance of a WRM permit. If approved, the permit would authorize the excavation and filling (dredging and filling) associated with the bridge replacement over the Little St. Mary's River, also known as the South Prong St. Mary's River, midway between Glen St. Mary and Macclenny on U. S. Highway 90. The dredge and fill project encompasses approximately one-half acre of land.

19. The WRM application contained the same description and

location of the project as did the MSSW permit application.

20. Question 14 on the application form required an applicant to certify as to ownership of the property. The applicant could either indicate that it was the record owner of the property on which the proposed project was to be undertaken, or it could indicate that it was not the record owner, but it intended to have the requisite ownership before undertaking the proposed work. DOT checked off the box which indicated that it was the record owner. At hearing, a DOT representative agreed that this was an incorrect response since around 8,953 square feet of the land on which the dredging and filling would take place was then owned by petitioners. In hindsight, the DOT witness says he probably should have checked off both boxes since DOT owned most of the property and would acquire the remaining part through eminent domain proceedings before the project began. Acquisition of the land was clearly within DOT's power and authority. There is no evidence that DOT provided the information with the intent of misleading the District, or that the ownership information affected the District's decision.

21. In 1988, the Department of Environmental Regulation (DER), now known as the Department of Environmental Protection, delegated its dredge and fill permitting authority to water management districts. In carrying out that delegation of authority, the districts were required to follow all applicable DER rules. One such rule, Rule 62-312.060(12), Florida

Administrative Code, required that the District forward a copy of the application to and request comments from the adjacent waterfront property owners unless the number of owners was so extensive that personal notice was impractical. Petitioners own adjacent waterfront property, and it was not shown that the number of waterfront owners was so extensive that personal notice was impractical.

22. To implement the above rule, question 5 on the application form required the applicant to identify all adjacent waterfront owners. DOT answered "See Attachment." At hearing, the individual who prepared the application "believed" that a list was attached to the application when it was filed with the District, but he could not locate a copy of the list in his file.

23. The application was the first dredge and fill permit application for Baker County processed by the District. When the application was received by the District, a clerical employee reviewed the application to determine if it was complete. If an item was missing, the clerk was instructed to note the missing item on an "initial checkoff sheet." In this case, a "very, very cursory look" was made, and no box on the checkoff sheet was marked. This would indicate that the list was attached to the application. After this review was made, the application was sent to the technical staff for review.

24. Whether the attachment was ever received by the District, and then lost or misplaced, is conjecture. In any

event, a District witness acknowledged that there may have been a "mix-up" during the initial review. Because the District had no attached list, it gave no actual notice to adjacent owners, including petitioners, prior to publication of the notice. Therefore, the rule requiring actual notice on this type of application was not satisfied. Except for this instance, the District is unaware of any other occasion when a list of adjacent waterfront property owners, through inadvertence, was lost or not provided.

25. On July 22, 1993, the District published notice of its intent to issue a permit in The Baker County Press. The notice read, in pertinent part, as follows:

> The District gives notice of the Intent to Issue a permit to the following applicant on August 10, 1993:
>
> FLORIDA DEPARTMENT OF TRANSPORTATION, P. O. Box 1089, Lake City, Fla., 32056, application #4-003-0010AG. The project is located in Baker County, Sections 31, 32 & 36, Township 02 South, Ranges 21 & 22 East. The application is for EXCAVATION AND FILLING ASSOCIATED WITH THE WIDENING OF SR 10 (U.S. 90) FROM CR 125 TO SR 121. The receiving waterbody is the St. Mary's River.
>
> The file pertaining to the above-listed application is available for inspection Monday through Friday except for legal holidays, 8:00 am to 5:00 pm at the St. Johns River Water Management District headquarters or the appropriate field office. The District will take action on the permit application listed above unless a petition for an administrative proceeding (hearing) is filed pursuant to the provisions of section 120.57, F.S., and section 40C-1.511, F.A.C. A person whose substantial interests are

> affected by the District's proposed permitting decision identified above may petition for an administrative hearing in accordance with the requirements of Florida Administrative Code Rules 40C-1.111 and 40C-1.521 and be filed with (received by) the District Clerk, P.O. Box 1429, Palatka, Florida 32178-1429. Petitions for administrative hearing on the above application must be filed within fourteen (14) days of publication of this notice or within fourteen (14) days of actual receipt of this intent, whichever first occurs. Failure to file a petition within this time period shall constitute a waiver of any right such person may have to request an administrative determination (hearing) under section 120.57, F.S., concerning the subject permit application. Petitions which are not filed in accordance with the above provisions are subject to dismissal.

Thus, the notice provided a brief description of the project and its location, the location of the application, the District's intended action, the scheduled date of Board action, and notification of hearing opportunity.

26. Even though they did not read the notice, petitioners contend that it was "confusing and misleading to any readers." First, they point out that the legal notice identifies the receiving water as the St. Mary's River. Both the application and technical report of the District staff, however, identified the receiving water as the South Prong St. Mary's River. The South Prong St. Mary's River flows north and south and crosses under U. S. Highway 90 at the bridge replacement site. It eventually flows into the St. Mary's River, which is approximately six miles further north and forms the boundary

between Florida and Georgia in that area. Therefore, the notice was technically correct since the St. Mary's River is the ultimate receiving water from the smaller tributary. Even if the notice erred in this respect, the error was immaterial and would not mislead the reader. This is because the cited sections, township, ranges and road being improved are all at least five miles south of the St. Mary's River, and thus the notice could not lull readers into believing that the project would actually be closer to that river, some six miles to the north.

27. Petitioners also point out that, even though the dredge and fill project encompasses only one-half acre, the notice identifies the project as being located in Sections 31, 32, and 36, Township 2 South, Ranges 21 and 22 East, a tract of some 1,900 acres. These sections, township and ranges are the same ones included in the legal description of the then existing right-of-way for U. S. Highway 90 owned by DOT and which was attached to the application. While it is true that each section is one square mile, the actual work site within the sections was narrowed considerably by advice that the work would be "associated with the widening of SR 10" between Glen St. Mary and Macclenny. Given this information, a prudent person owning land on U. S. Highway 90 between the two municipalities would be alerted that the project might well impact his property. Finally, the notice provided that a copy of the application was on file for review if any member of the public desired more

specific information.

28. As a corollary to the above argument, petitioners contend that the notice implies that dredge and fill work will only be performed on DOT's existing right-of-way since the sections, township and ranges track the legal description of DOT's right-of-way along U. S. Highway 90. Again, however, only a "brief description" of the project's location is required, and the above description in the notice satisfies this requirement.

29. Although petitioners reside in Baker County, they did not subscribe to the local newspaper, and therefore they did not read the legal advertisement. Accordingly, they did not file a request for a hearing.

30. When no requests for a hearing were received within fourteen days after publication of the notice, on August 10, 1993, the District issued WRM permit number 12-003-0001G.

C. Events After Issuance of the Permits

31. On September 22, 1994, DOT sent to petitioners, by certified mail, a Letter of Notification regarding DOT's intention to acquire the interest in eight parcels of the Gatlins' property for the road improvement project. The letter was received by Gerra Gatlin on September 23, 1994.

32. While the letter did not specifically state that a detention pond and bridge replacement project would be built on the Gatlins' property, it explained that DOT was currently planning the construction of a "highway facility" on State Road

10 and that its records indicated that petitioners owned property within the area which was needed for right-of-way on this project. The letter went on to describe the project in general terms, and it referenced parcel 140 which was owned by the Gatlins. On a separate parcel information sheet attached to the letter, parcel 140 was divided into three parcels: 140A, 140B, and 140C. The sheet noted that parts B and C were designated as "water storage" areas. Parcel 140B is 10.727 acres in size and will hold the stormwater detention pond currently being constructed by DOT. A portion of the dredge and filling related to the bridge replacement project will occur on parcel 140C.

33. Ray Gatlin acknowledged that he became aware of a "pond" when he initially reviewed the packet, but he was not sure in which part of parcel 140 the pond would be located since the "printing was off" on the drawings, and he could not find parcel 140C. Therefore, he immediately hired a Jacksonville attorney, Robert S. Yerkes, to represent him and his wife in the condemnation matter.

34. On October 31, 1994, Yerkes sent a letter to DOT requesting a copy of "the current right way map and construction plans, as well as the present schedule for aquisition and construction." On November 17, 1994, DOT sent Yerkes the right-of-way maps but noted that "[c]onstruction plans are still not available." Whether Yerkes requested the construction plans after that date is not of record.

35. On May 22, 1995, a DOT right-of-way specialist met with Yerkes and Ray Gatlin regarding the acquisition of the Gatlins' property.

36. On July 19, 1995, DOT initiated an action in eminent domain against petitioners, and several other landowners, by filing a petition in the Circuit Court of Baker County. Among other things, the petition sought to condemn parcels 140A, 140B, and 140C owned by petitioners. An Order of Taking was entered by the court on September 6, 1995, which conveyed fee simple title of parcel 140, and its parts, to DOT.

37. When Yerkes "didn't get the job done," the Gatlins hired new counsel, who made an appearance on July 31, 1996. Just prior to the appearance of new counsel, and because of "a problem with the assessment," the Gatlins hired an environmental consultant, Peter M. Wallace, to verify whether DOT had correctly told them that no jurisdictional wetlands existed within the parcel being condemned. At this time, the Gatlins were in a dispute with DOT over the value of their property.

38. After determining that wetlands existed on the parcel, Wallace made inquiry in late July 1996 with a District employee, Christine Wentzel, to ascertain if any permits had been issued to DOT for a project on U. S. Highway 90 between Glen St. Mary and Macclenny. Wentzel was unaware of any permits being issued, but she referred Wallace to Helen Cortopassi, who would have reviewed the applications three years earlier. Cortopassi told Wallace

that no permits relating to this project had been issued.

39. Because Wallace believed that the storm detention pond would impact wetlands, and therefore required a review by DER or the United States Army Corps of Engineers, he made similar inquiries with those two agencies regarding the issuance of permits. He was assured that those two agencies had not issued permits.

40. In late September 1996, Cortopassi telephoned Wallace and advised him that a further review of her files revealed that two permits had been issued for the project. Because Wallace had inquired about permits for a project on U. S. Highway 90, and Cortopassi had created a file for the project under State Road 10 (rather than U. S. Highway 90), she had failed to discover them when Wallace first made his inquiry two months earlier.

41. On October 15, 1996, Wallace went to the DOT office and reviewed its files pertaining to the project. He found copies of the issued permits and a set of construction plans which revealed a pond. A public records request filed by the Gatlins' counsel with DOT in September 1996 was later granted, and copies of the applications were eventually obtained from DOT on December 9, 1996, or almost three months after the request was made. Within fourteen days thereafter, or on December 20, 1996, the Gatlins filed their initial requests for a hearing.

42. DOT did not begin work on the project until March 1997, or some three months after the requests for hearing were filed.

Photographs received into evidence show that, in April 1997, some excavation work was being done around the bridge site. Work has continued during the pendency of this proceeding.

43. At least a small portion of the storm detention pond will be built in wetlands. The District made no review of the wetlands impact associated with the pond. Had this been done, a disclosure of the pond in the dredge and fill permit application would have been required. Petitioners contend that, if actual notice of the WRM had been given, as required by rule, and a wetlands impact performed, in this way they would have had actual notice of the MSSW application by simply reviewing the WRM application. The District contends, however, that the content and manner of notice would not have changed.

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Section 120.57(1), Florida Statutes.

45. Petitioners raise several arguments in opposition to the motions. First, they assert that they were entitled to due process of law with regard to the notice of the permits. By failing to give actual notice of the application, and subsequently failing to grant them a hearing, petitioners contend that their due process rights under both the Constitution of Florida and the United States were violated. As to this contention, it is preserved in the record for review by an

appellate court if appropriate. Second, they argue that DOT does not have a validly issued dredge and fill permit for the project because the legal description contained in the application is inaccurate. This contention, however, does not relate to the issue of whether the requests for hearing were timely filed, and accordingly it has been disregarded. Third, petitioners argue that the District did not follow an applicable rule in issuing a dredge and fill permit. More specifically, they point out that DOT failed to attach to its WRM application a list of adjacent waterfront property owners, and that the District in turn failed to provide them with actual notice, as required by Rule 62-312.060(12). They add that an agency is, of course, obligated to follow its own rules, and no subsequent constructive notice could cure this defect. Fourth, they contend that the information contained in the permit applications and constructive notices demonstrates that they were never provided a point of entry. In other words, they argue that because the notices were so broad and misleading, they could not put them on notice that their property might be affected by the project. Finally, petitioners assert that the information provided in the permit applications and constructive notices, together with the subsequent conduct of the DOT and District, constitute equitable tolling of their point of entry. Specifically, petitioners suggest that they were misled or lulled into inaction by the "false and misleading information" contained in the two applications and notices, the

inability of their counsel to get information from DOT in 1994, the incorrect representations of District representatives in July 1996, and the subsequent inability of their counsel to obtain copies of requested documents from DOT until December 1996.

46. In 1993, the notice requirements for the issuance of a MSSW permit were found in Section 373.116(2), Florida Statutes (1993). That section required that

> [u]pon receipt of an application for a permit . . . the governing board shall cause a notice thereof to be published in a newspaper having general circulation within the affected area. In addition, the governing board shall send, by regular mail, a copy of such notice to any person who has filed a written request for notification of any pending applications affecting this particular designated area.

A similar requirement was also found in Section 373.413(3) and (4), Florida Statutes (1993), which governed the issuance of permits for construction or alteration of stormwater management systems. Because petitioners had never "filed a written request for notification of any pending applications affecting" their property, only notice by publication was required.

47. Rule 40C-1.511(5), Florida Administrative Code, requires that when notice is provided by publication, it shall contain, as a minimum:

> (a) name of applicant and a brief description of the proposed activity and its location;
> (b) location of the application and its availability;
> (c) statement of the District's intended action;
> (d) scheduled date of Board action, if such

action is necessary; and
(e) notification of administrative hearing opportunity.

48. The notice pertaining to the MSSW permit published on July 22, 1993, satisfied all parts of the rule since it contained the name of the applicant, a brief description of the proposed activity and its location, a statement of the District's intended action, the scheduled date of Board action, and notification of the right to an administrative hearing.

49. As to the WRM permit, Section 403.815, Florida Statutes (1993), also authorized constructive notice of the District's intended action. While containing no specificity regarding the description of the project, the statute allowed DER to specify the format and size of the notice. Like Rule 40C-1.511(5), DER Rule 62-312.150(2)(c), Florida Administrative Code, requires that the notice contain the name of the applicant and a brief description of the proposed activity and its location, location of the application and its availability, the intended action, and notice of right to a hearing.

50. Here, the District's notice of intended action regarding the WRM permit satisfied both the statute and rule since it contained the name of the applicant and a brief description of the project and its location, the location of the application and its availability, the District's intended action, and a notice of right to a hearing.

51. Petitioners did not read the notices. Even so,

petitioners essentially contend that reading them would have been a futile exercise since they were "misleading" and did "not really describe either the property or the affected parties in a manner in which any average person could understand." For the reasons cited in findings of fact 12-15 and 26-28, however, the notices are determined to be in compliance with the rule, and they are not confusing or misleading. Even if an error occurred, it was immaterial. Compare H & H Land Clearing, Inc. v. C & D Recycling Corp., et al, 1994 WL 739240 (Dep't Env. Prot., Dec. 9, 1994)(inaccurate township reference in notice was immaterial and did not constitute ground to waive point of entry). Therefore, the contention that petitioners were effectively denied a point of entry by virtue of the deficient notices is deemed to be unavailing.

52. Petitioners next contend that the District violated the requirement in Rule 62-312.060(12), Florida Administrative Code, which required that they be provided personal notice. That rule provides, in pertinent part, as follows:

> (12) The (District) shall forward a copy of the application to and request comments from the adjacent waterfront property owners, unless the number of adjacent waterfront property owners is so extensive that personal notice is impractical. In those cases, the (District) shall require the applicant to publish either the Notice of Application or the Notice of Proposed Agency Action on Permit Application pursuant to Rule 62-103.150, Florida Administrative Code.

This rule should be distinguished from Section 403.815 and Rule

40C-1.511 since it simply requires that a copy of the application be given each adjacent waterfront property owner, but it does not require that notice of the District's intended action be given by personal notice. Rather, notice of intended action is accomplished by constructive notice. The rule also provides that whenever their number is so extensive as to make personal notice "impractical," adjacent waterfront property owners are not entitled to a copy of the application. Under those circumstances, constructive notice is all that is required.

53. It is undisputed that the requirements of the rule were not satisfied. This is because petitioners are "adjacent waterfront property owners," and there was no showing by respondents that "the number of adjacent waterfront property owners (was) so extensive that personal notice (was) impractical." Even so, respondents contend that by subsequently publishing a notice, any defects in the process were cured. In doing so, they rely upon the case of Carver et al v. South Fla. Water Mgmt. Dist. et al, 12 F.A.L.R. 2822 (DER, June 15, 1990), which also involved an untimely appeal. In Carver, petitioners filed an amended petition for hearing with DER under Rule 17-312.060(12) (now renumbered as 62-312.060) challenging the issuance of a permit to construct a control structure in Palm Beach County 234 days after publication of the DER's notice of intent. Among other things, petitioners contended that they were entitled to actual notice of the application under the cited

rule. In rejecting the petition as being untimely, DER noted that petitioners had failed to allege that they were adjacent waterfront property owners so as to qualify for actual notice, and even if they were, "any defect in notice was cured by the subsequent publication of notice." Id. at 2824. Petitioners have cited no authority to the contrary, but simply argue that reliance on the Carver case is misplaced because the petitioners in Carver also relied on economic injury, not found here, and they did not allege that they owned waterfront property. The case, however, is directly on point, it is found to be persuasive, and it should be followed. Therefore, the Distict's failure to follow the rule requiring actual notice was cured by its subsequent publication of notice.

54. Finally, petitioners contend that due to a variety of circumstances, the time for requesting a hearing was equitably tolled. Because of this contention, a hearing was held to determine whether petitioners' claims justify application of the doctrine of equitable tolling. See, e.g., Castillo v. Dep't of Admin., Div. of Retirement, 593 So. 2d 1116, 1117 (Fla. 2d DCA 1992)(factfinding hearing appropriate where doctrine raised). Because the fourteen-day time limitation is nonjurisdictional, it is subject to equitable considerations such as tolling. State Dep't of Env. Reg. v. Puckett Oil, 577 So. 2d 988, 992 (Fla. 1st DCA 1991).

55. The doctrine of equitable tolling has been 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 Admin., 523 So. 2d 1132, 1134 (Fla. 1988). It is used in the interest of justice to accommodate both an agency's right not to be called upon to defend a stale claim, and a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing. Id. at 1134.

56. Here, petitioners did not file their claim in the wrong forum, and they have not contended that "in some extraordinary way" they have been prevented from asserting their rights. Instead, they contend that they were misled or lulled into inaction by various acts of the District and DOT. These include "false and misleading" information contained in the applications and notices, the inability of DOT to provide their counsel with construction plans in October 1994, inaccurate information pertaining to the issuance of permits in July 1996, and an almost three-month delay by DOT in responding to a public records request in October 1996.

57. As to the "false and misleading" information in the applications regarding the ownership of the property, the Gatlins do not explain how this misled or lulled them into inaction. Even so, the evidence shows that DOT checked the box indicating it was the owner since it intended to acquire the property before

the project was built, and the "false and misleading" information did not affect the District's decision on the permits. Accordingly, it is concluded that this information did not "mislead or lull" the Gatlins into inaction.

58. As noted earlier, the notices published by the District complied with all applicable rules and statutes governing constructive notice. Even if they were deficient in any respect, such errors were immaterial and did not mislead or confuse the readers so as to lull them into inaction. See H & H Land Clearing, Inc., supra.

59. Similarly, the unsuccessful efforts by the Gatlins' counsel in October 1994 to obtain from DOT construction plans for the project do not constitute equitable circumstances so as to toll the time for filing a request for a hearing. By that time, the Gatlins were on notice that DOT intended to utilize two parts of parcel 140 for "water storage," and Ray Gatlin conceded that he knew that a pond would be constructed on his property, but he wasn't sure of its exact location.

60. The District admittedly gave inaccurate information to the Gatlins' agent in July 1996 regarding the issuance of permits, but it gave correct information two months later. This occurred three years after the initial point of entry had been offered, and long after the Gatlins were on notice that DOT's project would impact their property. The same conclusion must be reached with respect to the short delay by DOT in responding to a

public records inquiry in the fall of 1996.

61. Because there are no equitable circumstances that would warrant the tolling of the time limitations for requesting a hearing, the Gatlins' request that the doctrine of equitable tolling be invoked is hereby denied.

62. Finally, citing Symons v. Dep't of Banking and Finance, 490 So. 2d 1322 (Fla. 1st DCA 1986), DOT argues alternatively that petitioners were under a duty of reasonable inquiry since they had the means to obtain knowledge under the circumstances reasonably suggesting the need for an inquiry. In other words, DOT contends that even if some equitable circumstances exist, or a rule was not followed, these circumstances and omission are negated by the fact that the Gatlins failed to exercise due diligence in making an inquiry with the District or DOT. In Symons, the court held that:

> [i]mplied actual notice is inferred from the fact that a person had the means of knowledge and the duty to use them but did not. It is based on the premise that a person has no right to shut his eyes or ears to avoid information and then say he had no notice; it will not suffice the law to remain willfully ignorant of a thing readily ascertainable when the means of knowledge is at hand. Id. at 1124.

63. Here, petitioners had actual notice of the project in 1994 when DOT sent a right-of-way acquisition packet informing them that certain parcels of their property would be acquired as a part of a road widening project. Ray Gatlin acknowledged that he knew a pond would be constructed on parcel 140, but he did not

know on which part of the parcel it would be located. He also met with a DOT representative in 1995 regarding the eminent domain action. With this "means of knowledge at hand," and given the fact that he knew DOT was widening U. S. Highway 90, which was adjacent to his property, it was unreasonable not to make further inquiry with the District until July 1996 to asertain if any permits were being issued in conjunction with the project. Under these circumstances, it is concluded that petitioners were under a duty of reasonable inquiry, and by failing to do so, they have waived their right to a hearing.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the St. Johns River Water Management District enter a final order granting the motions to dismiss and dismissing the amended petitions for hearing in Case Nos. 97-0803 and 97-0804 with prejudice.

DONE AND ENTERED this 14th day of July, 1997, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675, SUNCOM 278-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of July, 1997.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order within fifteen days. Any exceptions to this Recommended Order should be filed with the St. Johns River Water Management District.