

BEFORE THE STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In re: Kings Kamp, LLLP, Captain Jax, LLLP and Black Water Sound Holdings, LLLC

OGC Case No. 19-0179

Petition for Waiver from  
Provisions of Rules 62-312.430(8), F.A.C.

DEP File No.: 44-0352399-002

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**ORDER GRANTING PETITION FOR WAIVER**

On February 27, 2019, co-applicants Kings Kamp, LLLP, Captain Jax, LLLP and Black Water Sound Holdings, LLLC, Petitioners, filed a petition with the Florida Department of Environmental Protection (Department) requesting a section 120.542, Florida Statutes, waiver of, or variance from, the requirements of Rule 62-312.430(8), Florida Administrative Code (F.A.C.). Rule 62-312.430(8), F.A.C., prohibits boat mooring sites at marinas within Outstanding Florida Waters from being located over seagrass bed communities regardless of depth. The Petitioner seeks to construct and operate a 44-slip marina with mooring locations over a seagrass bed community. Due to the nature of the project, the Department has determined the appropriate route to be a waiver from the prohibition in Rule 62-312.430(8), F.A.C., rather than a variance, and treats the petition as such.

Notice of receipt of the petition was published in the Florida Administrative Register on March 12, 2019. No public comment was received.

**BACKGROUND AND APPLICABLE REGULATORY CRITERIA**

Petitioners propose to expand an existing 29-slip marina facility by constructing 6,963 square feet of docks and finger piers to accommodate 44 additional boat slips in Florida Bay, Class III Outstanding Florida Waters. The submerged lands, which are privately owned, contain a mixture of submerged aquatic vegetation, algae and scattered corals. Rule 62-312.430(8), F.A.C., applicable here, prohibits boat moorings over a seagrass bed community or coral reef, regardless of depth. Petitioners have re-designed and modified their project to avoid and minimize impacts to seagrass and coral communities to the greatest extent practicable and have agreed to purchase mitigation bank credits to offset the remaining unavoidable impacts. Because Petitioners have demonstrated that the waiver will meet the underlying statute and a substantial hardship exists, the Department grants Petitioner's waiver from Rule 62-312.430(8), F.A.C.

The activities authorized by this waiver are located at 103650 & 103620 Overseas Highway, Key Largo, Florida 33037 (Parcel ID Nos.: 00085820-000000 & 00085760-000000), in Section 14, Township 61, Range 39 in Monroe County.

THE WAIVER WILL MEET THE UNDERLYING  
PURPOSE OF THE STATUTE

Section 120.542(2), Fla. Stat., states “variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness.” The variance procedure is intended to provide relief from unreasonable, unfair, and unintended results in unique cases.

Section 403.061(34), Florida Statutes, impressed upon the Department the duty to adopt rules with stricter permitting provisions within Outstanding Florida Waters, aquatic preserves, areas of critical state concern, and areas subject to chapter 380 resource management plans adopted by rule by the Administration Commission, when the plans for an area include waters that are particularly identified as needing additional protection.

The Environmental Resource Commission (“ERC”) designated the Florida Keys and the area encompassing Petitioners’ site as a Class III Outstanding Florida Waterbody in Rule 62-302.700(9)(i)(13), F.A.C. In addition, the Florida Legislature designated the Florida Keys as an Area of Critical State Concern. § 380.0552, F.S. In Rule 62-312.400(2)(a), F.A.C., the ERC found that the waters of the Florida Keys and other Outstanding Florida Waters in Monroe County are an irreplaceable asset which require special protection.

Rule 62-312.430(8), F.A.C., implements section 403.061(34), F.S., and is intended to provide the most stringent protection for the applicable waters allowable by law.

Petitioners have demonstrated that they have achieved the underlying purpose of the above laws by modifying their project design such that the impacts to seagrass and coral communities have been avoided and minimized to the greatest extent practicable, and by offsetting all unavoidable impacts with the purchase of mitigation bank credits.

SUBSTANTIAL HARDSHIP TO THE PETITIONER and  
VIOLATIONS OF PRINCIPLES OF FAIRNESS

“Substantial hardship” means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. Petitioners request a waiver of the strict application of Rule 62-312.430(8), F.A.C., because applying the rules to their permit application would be unreasonable, unfair, and would create a substantial hardship. Petitioners demonstrated that strict application of the rule would result in substantial economic hardship to Petitioners. The Rule stands as a blanket prohibition on boat mooring over seagrass communities and coral reef in all of Monroe County – regardless of water depth. In the instant case, Petitioners have completely avoided coral reefs by relocating and reducing the project area. Seagrass communities, on the other hand, cannot be completely avoided because they are found continuously throughout Petitioners’ property. However, unavoidable shading of seagrass by boats within the proposed slips remains even though Petitioners have incorporated grated decking, minimized boat pilings, eliminated or minimized finger piers, and relocated boat slip to deeper water to avoid shading impacts. Any further reduction of the project area or design would make the project economically infeasible.

**THEREFORE, IT IS ORDERED:**

Based on the foregoing reasons, Petitioners have demonstrated that they have met the requirements for a waiver from 62-312-430(8), F.A.C. PETITIONERS REQUEST FOR A WAIVER IS GRANTED.

This waiver shall also be subject to the following conditions:

- a. This waiver is valid only if Environmental Resource Permit No. 44-0352399-002 EI (the "Permit") is issued for this project and is subject to any and all conditions of the Permit.
- b. This waiver shall remain in effect for the duration of the Permit.
- c. Petitioners must complete the project in accordance with the conditions of the Permit. Any modification to the Permit may require a modification of this waiver.

**PUBLICATION OF NOTICE**

You (the petitioners) are required to publish at your own expense the enclosed notice of this waiver. The notice is required to be published one time within 30 days, in the legal advertisements section of a newspaper of general circulation in the area affected. For the purpose of this rule, "publication in a newspaper of general circulation in the area affected" means publication in a newspaper meeting the requirements of Sections 50.011 and 50.031, F.S., in the county where the activity is to take place. The applicant shall provide proof of publication to:

Department of Environmental Protection  
Environmental Resources Program  
South District  
P.O. Box 2549  
Fort Myers, Florida 33902-2549  
[southdistrict@floridadep.gov](mailto:southdistrict@floridadep.gov)

The proof of publication shall be provided to the above address within seven days of publication. Failure to publish the notice and provide proof of publication within the allotted time shall be grounds for denial of the variance or waiver.

**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 request for a variance or waiver.

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. Pursuant to Rule 28-106.201, F.A.C., a petition for an administrative hearing must contain the following information:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name, address, telephone number, and any e-mail address of the petitioner; the name, address, telephone number, and any e-mail address of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests are or will be affected by the agency determination;

(c) A statement of when and how the petitioner received notice of the agency decision;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the agency's proposed action;

(f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and

(g) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wishes the agency to take with respect to the agency's proposed action.

The petition must be filed (received by the Clerk) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000. Also, a copy of the petition shall be mailed to the applicant at the address indicated above at the time of filing.

#### Time Period for Filing a Petition

In accordance with Rule 62-110.106(3), F.A.C., petitions for an administrative hearing must be filed within 21 days of receipt of this written notice. 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.

#### Extension of Time

Under Rule 62-110.106(4), F.A.C., a person whose substantial interests are affected by the Department's action may also request an extension of time to file a petition for an administrative hearing. The Department may, for good cause shown, grant the request for an extension of time. Requests for extension of time must be filed with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, before the applicable deadline for filing a petition for an administrative hearing. 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.

#### Mediation

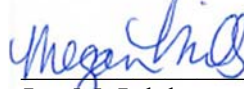
Mediation is not available in this proceeding.

Judicial Review

Once this decision becomes final, any party to this action has the right to seek judicial review pursuant to Section 120.68, F.S., by filing a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this action is filed with the Clerk of the Department.

DONE AND ORDERED this 6<sup>th</sup> day of August 2019 in Lee County, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



for

Jon M. Iglehart  
Director of District Management  
South District

Attachments:

Notice for Publication

Notice of Disposition

Copies furnished to:

Andrew J. Baumann, Esq., Lewis, Longman & Walker, P.A., [adaumann@llw-law.com](mailto:adaumann@llw-law.com)

Joint Administrative Procedures Committee

Stephanie Gray, Office of General Counsel, [Stephanie.A.Gray@floridadep.gov](mailto:Stephanie.A.Gray@floridadep.gov)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Order, including all copies, were mailed before the close of business on **August 6, 2019**, to the above listed persons.

FILING AND ACKNOWLEDGMENT

FILED, on this date, under 120.52(7) of the Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.



Clerk

August 6, 2019

Date

STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
NOTICE OF ORDER GRANTING WAIVER

The Department of Environmental Protection gives notice of its determination pursuant to section 120.542, Florida Statutes, in File No. 44-0352399-002 to grant a waiver to Kings Kamp, LLLP, Captain Jax, LLLP and Black Water Sound Holdings, LLC from Rule 62-312.430(8), Florida Administrative Code (F.A.C.), in order to construct and operate a 44-slip marina with mooring locations over a seagrass bed community at 103650 & 103620 Overseas Highway, Key Largo, Florida 33037 (Parcel ID Nos.: 00085820-000000 & 00085760-000000), in Section 14, Township 61, Range 39 in Monroe County.

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. Pursuant to Rule 28-106.201, F.A.C., a petition for an administrative hearing must contain the following information:

- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests are or will be affected by the agency determination;
- (c) A statement of when and how the petitioner received notice of the agency decision;
- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
- (e) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the agency's proposed action;
- (f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
- (g) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wishes the agency to take with respect to the agency's proposed action.

The petition must be filed (received by the Clerk) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000. Also, a copy of the petition shall be mailed to the applicant at the address indicated above at the time of filing.

In accordance with rule 62-110.106(3) of the Florida Administrative Code, petitions for an administrative hearing must be filed within 21 days of publication of this notice or receipt of written notice, whichever occurs first. However, any person who has previously asked the Department for notice of this agency action may file a petition within 21 days of receipt of such notice, regardless of the date of publication. 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.

A person whose substantial interests are affected by the Department's action may also request an extension of time to file a petition for an administrative hearing. The Department may, for good cause shown, grant the request for an extension of time. Requests for extension of time must be filed with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, before the applicable deadline for filing a petition for an administrative hearing. 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.

Mediation is not available in this proceeding.

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, this process may result in a modification of the agency action or even a denial of the request for a variance or waiver.

A copy of the Order may be obtained by contacting: Katie Teyshak, South District Marathon Office, Department of Environmental Protection, 2796 Overseas Highway Suite 221, Marathon, Florida 33050; (305) 289-7070; [Katie.Teyshak@FloridaDEP.gov](mailto:Katie.Teyshak@FloridaDEP.gov) or [SouthDistrict@Floridadep.gov](mailto:SouthDistrict@Floridadep.gov) during normal business hours, 8:00 a.m. to 5:00 p.m., Monday through Friday, except legal holidays.



# FLORIDA DEPARTMENT OF Environmental Protection

South District Branch Office  
2796 Overseas Highway, Suite 221  
Marathon, Florida 33050  
[SouthDistrict@FloridaDEP.gov](mailto:SouthDistrict@FloridaDEP.gov)

**Ron DeSantis**  
Governor

**Jeanette Nuñez**  
Lt. Governor

**Noah Valenstein**  
Secretary

## Notice of Disposition

The Department of Environmental Protection **hereby gives notice:** That it has issued an order on August 6, 2019 **granting** Kings Kamp, LLLP, Captain Jax, LLLP and Black Water Sound Holdings, LLC's Petition for a Waiver. The Petition was received on February 27, 2019. Notice of receipt of this Petition was published in the Florida Administrative Register on March 12, 2019]. The petition requested a waiver from Rule 62-312.430(8), F.A.C., which prohibits locating boat mooring sites over a seagrass bed community or coral reef regardless of water depth. Petitioners desire to construct and operate a 44-slip marina with mooring locations over a seagrass bed community. No public comment was received. The Order, file number 19-0179, granted the Petition to Rule 62-312.430(8), F.A.C., based on a showing that Petitioner demonstrated that a strict application of the rule would result in substantial hardship to Petitioner and because Petitioner demonstrated that the purpose of the underlying statute will be or has been achieved by other means.

**A copy of the Order may be obtained by contacting:** Katie Teyshak, South District Marathon Office, Department of Environmental Protection, 2796 Overseas Highway Suite 221, Marathon, Florida 33050; (305) 289-7070; [Katie.Teyshak@FloridaDEP.gov](mailto:Katie.Teyshak@FloridaDEP.gov) or at [SouthDistrict@FloridaDEP.gov](mailto:SouthDistrict@FloridaDEP.gov); during normal business hours, 8:00 a.m. to 5:00 p.m., Monday through Friday, except legal holidays.