

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**POLK COUNTY,
A political subdivision of the
State of Florida,**

Petitioner,

vs.

OGC Case No. 19-0201

**FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

Respondent,

**ORDER GRANTING PETITION FOR WAIVER FROM
RULE 62S-2.072(2)(d), FLORIDA ADMINISTRATIVE CODE**

On March 11, 2019, Polk County, Florida (Petitioner) filed a petition for a waiver with the State of Florida Department of Environmental Protection (Department) under §120.542, Florida Statutes. See Exhibit 1. The petition requests a waiver of Rule 62S-2.072(2)(d), F.A.C., which provides that a grantee with two incomplete Recreational Trails Program (RTP) projects is ineligible to apply for an additional grant under the program. The Department published notice of the petition in the Florida Administrative Register on March 22, 2019, but received no written comments in response.

FINDINGS OF FACT

1. Petitioner currently has two active and incomplete RTP projects: T15005 - Bone Valley ATV Trail Crossings and T17016 - Panther Point Trail. Petitioner received an extension for T15005 based on damage from Hurricane Irma. They have received notice to proceed and expect to complete construction in September 2019. Petitioner is working on completing their commencement documentation for T17016 and anticipate requesting an extension to their grant contract.

2. Hurricane Irma, in 2017, delayed work on both of Petitioner's outstanding projects. Polk County suffered \$38 million in hurricane-related damages. Both direct impact to the projects and overall impacts to the county caused delays.

3. During the application cycle that ended February 1, 2019, Petitioner sought to apply for a third grant to construct a road crossing connecting two parcels within the Bone Valley ATV Park. Petitioner received a project-planning grant from the State of Florida Department of Agriculture and Consumer Services T. Mark Schmidt Off-Highway Vehicle Recreation Grant Program to plan the proposed project.

CONCLUSIONS OF LAW

UNDERLYING PURPOSE OF THE STATUTES

4. Section 120.542(2), F.S., provides that an agency should grant a variance or waiver when the person subject to a rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means and when application of the rule would create a substantial hardship or would violate principles of fairness. "Substantial hardship" is defined as a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. "Principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

5. Rule 62S-2.072(2)(d), F.A.C., implements §260.016(1)(g), F.S., which authorizes the Department to disburse funds for recreational trails as pass-through grants to local government agencies and grants authority to the Department to adopt rules implementing the recreational trails grant program. Section 260.016(1)(g), F.S., specifically advises that the Department's rules should govern the "number of pending grants . . ."

6. Rule 62S-2.072(2)(d), F.A.C., provides, "A grantee with two incomplete RTP projects by the closing date of an application submission period shall not be eligible to apply." This rule is intended to implement

the Project Administration requirements of the Interim Recreational Trails Program Guidance (Rev. 1 August 1999), which advises states to “ensure that project sponsors proceed with project implementation and expend the funds within a reasonable time frame.”

7. The Department finds that the Petitioner is on track to complete their two outstanding grant projects within an acceptable period of time. Thus, Petitioner will achieve the purpose of the rule even if they are allowed to submit an additional grant application.

8. Petitioner has demonstrated sufficient economic hardship to justify a waiver of Rule 62S-2.072(2)(d), F.A.C. The delay in completing their outstanding grants was caused by extensive damage from Hurricane Irma.

9. Consequently, the Department waives Rule 62S-2.072(2)(d), F.A.C. Petitioner may proceed with their pending grant application.

NOTICE OF RIGHTS

This action is final and effective on the date filed with the Clerk of the Department of Environmental Protection (“Department”) unless a petition for an administrative proceeding is timely filed pursuant to sections 120.569 and 120.57, F.S. 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., the petition 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 each petitioner or petitioner's representative, which shall be the address for service purposes during the course of the proceeding; the Department case identification number, and the county in which the subject matter or activity is located;

(c) A statement of how and when each petitioner received notice of the Department action;

(d) A statement of how each petitioner's substantial interests are affected by the Department action;

(e) A statement of the material facts disputed by the petitioner, if any. If there are none, the petition must so indicate;

(f) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the Department action;

(g) A statement of specific rules or statutes the petitioner contends require reversal or modification of the Department action, including an explanation of how the alleged facts relate to the specific rules or statutes;

(h) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wants the Department to take with respect to the Department's proposed action.

The petition must be filed (received by the Department Clerk) in the Department's Office of General Counsel, 3900 Commonwealth Boulevard, MS 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., 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 under section 120.573, F.S., 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, MS 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 31st day of May, 2019, in Tallahassee, Florida.

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION



Callie DeHaven
Director, Division of State Lands

Filed on this date, pursuant to s. 120.52, F.S., with the designated Department Clerk, receipt of which is hereby acknowledged.

Lea Randall 5-31-19
Clerk Date

Copy furnished to:
Jim Freeman, County Manager
330 W. Church Street
P.O. Box 9005, Drawer CA01
Bartow, Florida 33831

March 11, 2019

Dept. of Environmental Protection
Office of General Counsel

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**POLK COUNTY,
A political subdivision of the
State of Florida,**

Petitioner,

vs.

CASE NO: _____

**FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

Respondent,

_____ /

**PETITION FOR WAIVER OF
RULE 62S-2.072(2)(d), FLORIDA ADMINISTRATIVE CODE**

Petitioner, POLK COUNTY, a political subdivision of the State of Florida ("Polk County"), hereby petitions Respondent, the FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION (FDEP) for a waiver of Rule 62s-2.072(2)(d), Florida Administrative Code, which states: "A grantee with two incomplete RTP projects by the closing date of an application submission period shall not be eligible to apply."

In support, Petitioner states the following:

- 1. The name, address, email address, telephone number, and facsimile number of the petitioner is:**

Polk County
c/o Jim Freeman, County Manager
330 W. Church St.
P.O. Box 9005, Drawer CA01
Bartow, Florida 33831
jimfreeman@polk-county.net
Telephone: 863-534-6018
Fax: 863-534-7069

2. The name, address, e-mail address, telephone number and facsimile number of the Petitioner's qualified representative is:

Mike Callender
Parks and Recreation Manager
Polk County Parks and Natural Resources
4177 Ben Durance Road
Bartow, FL 33830
mikecallender@polk-county.net
Telephone: 863-534-7861
Fax: 863-534-7374

3. Rule from which the waiver is sought:

Petitioner requests a waiver of Rule 62S-2.072(2)(d), Florida Administrative Code, which provides that a "grantee with two incomplete RTP projects by the closing date of an application submission period shall not be eligible to apply."

4. Rule 62S-2.072(2)(d), Fla. Admin. Code, implements the following statutes:

Rule 62S-2.072(2)(d) implements Section 260.016(1), Florida Statutes (2018), which articulates the general powers of the Department of Environmental Protection regarding the Florida Greenways and Trails Act.

5. Type of action requested:

The Petitioner currently has two incomplete RTP projects: T15005 – Bone Valley ATV Trail Crossings; and T17016 – Panther Point Trail (the "current RTP projects"). Thus, the Petitioner respectfully requests a waiver of the provision in Rule 62S-2.072(2)(d) that a grantee with two incomplete RTP projects by the closing date of an application submission period shall not be eligible to apply.

6. Specific Facts that demonstrate a substantial hardship or a violation of the principles of fairness that would justify the waiver of Rule 62S-2.072(2)(d):

Hurricane Irma, a declared natural disaster, delayed work on both of Petitioner's current RTP projects. Hurricane Irma's unprecedented statewide effects impacted many government agencies and contractors undertaking public work projects for local governments in Florida. Polk County suffered \$38 million in hurricane-related damages. As the process of damage assessment gave way to the practical challenges of restoration, repair, and recommencing construction projects, the natural disaster caused shortages in qualified administration and labor, equipment, and materials. In recognition of the substantial hardship caused by Hurricane Irma, many agencies, including the Internal Revenue Service, extended time to file documents and other forms of mitigation. Federal agencies, such as the IRS, have recognized and provided mitigation for the substantial hardship caused by

Hurricane Irma; likewise, a waiver of Rule 62S-2.072(2)(d) in this instance is justified.

7. The reason why the variance or waiver requested would serve the purposes of the underlying statute:

A waiver of Rule 62S-2.072(2)(d), would allow Polk County to apply for a third RTP grant. This would serve the purposes of the underlying statutes by meeting the needs of urban, suburban, and small communities in Polk County and the State of Florida for high-quality outdoor recreational opportunities, trails, and open space not fully met by previous acquisition programs.

The current application will increase access to public lands and develop necessary infrastructure that will in turn supply a broad range of outdoor recreational opportunities. Such access and development are compatible with the resource values and management objectives for the Bone Valley ATV Park, which include promoting an appreciation for the state's natural assets and improving the quality of life.

The bridging of County Road 630 from 200-acre Bone Valley ATV Park (operational since 2016) to the additional 300 acres (currently under development for trail riding to the north) provides a vital link between 2 trail systems. In addition, this bridge will remove the clear danger and attractive nuisance of crossing a highway in vehicles that are not street-legal and often driven by unlicensed drivers.

8. Statement of Waiver timeframe:

The Petitioner requests that the waiver continue until the completion of at least one of Polk County's two open RTP projects.

Dated this 11th day of March, 2019

/s/ Jennifer M. Vasquez
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