

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

JAN KRASOWSKI,

Petitioner,

vs.

**OGC CASE NO. 13-1187
PERMIT 0222355-012-JN**

**COLLIER COUNTY, and
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,**

Respondent.

_____ /

**FINAL ORDER DISMISSING AMENDED PETITION
WITH PREJUDICE**

On October 2, 2013, the Department of Environmental Protection (Department) received an amended petition for administrative hearing (Amended Petition) from Petitioner Jan Krasowski (Mrs. Krasowski) in response to the September 16, 2013, Order Dismissing with Leave to Amend (Order Dismissing), which dismissed Mrs. Krasowski's initial petition as untimely and insufficient, with leave to amend.

As noted in the Order Dismissing, Mrs. Krasowski was added to Bob Krasowski's Amended Petition as new party/Petitioner. Therefore, Bob Krasowski's Amended Petition was Mrs. Krasowski's "initial petition" challenging the Department's decision to issue a permit modification to Collier County for beach renourishment activities.

Rule 62-110.106(3), Florida Administrative Code (F.A.C.), and the notice provided to the Petitioner requires that persons whose substantial interests are affected by the agency's decision must file a petition for an administrative determination (hearing) in the Department's Office of General Counsel within 14 days of publication of notice or receipt of notice, whichever occurs

first. See Fla. Admin. Code R. 62-110.106(2); City of LaBelle v. Bio-Med Serv., Inc., 598 So. 2d 207, 208 (Fla. 2d DCA 1992).

Rule 62-110.106(3)(b), F.A.C., provides that the failure to file a petition within the applicable time period constitutes a waiver of any right to request an administrative proceeding under Chapter 120, Florida Statutes.

Mrs. Krasowski's Amended Petition states that she "received official notice of the agency decision on September 22, 2013." Mrs. Krasowski is undoubtedly referring to the date she received the Department's Order Dismissing Petition with Leave to Amend. However, in the Initial Petition, Mrs. Krasowski alleged that she received notice of the agency action on July 26, 2013. Mrs. Krasowski's initial filing in this matter was received on September 3, 2013, 38 days after receipt of the Department's Notice of Agency Decision.

In the September 17, 2013, Order Dismissing Petition with Leave to Amend, Mrs. Krasowski was given the opportunity to explain the reasons why a request for administrative hearing was late before the Department entered a final order denying the request as untimely. In her Amended Petition, Mrs. Krasowski states that it is her "understanding that when a petition is amended, a petitioner could be added as an intervener in an ongoing proceeding according to, FS 403.412 (5) ..." Mrs. Krasowski further states that "after [her] husband Bob Krasowski's original petition was dismissed with leave to amend based upon a failure to demonstrate standing on September 3, 2013, I decided to take part in the action as a co-petitioner, intervener and become a legal participant." She further requests that she

be granted the opportunity to petition for an administrative hearing in a request for the above permit modification as either a co-petitioner with my husband or as an individual intervener and that my untimely entrance be excused as having an understanding that my entrance into the process had the legal basis stated above.

First, in her untimely filed initial petition, Mrs. Krasowski sought to participate as a party under 28-106.201, F.A.C., not as an intervenor under 28-106.205, F.A.C. She filed no motion to intervene. In her Amended Petition, Mrs. Krasowski does not explain why she could not have filed a timely petition within 14 days after she received notice of the permit. Further, Mrs. Krasowski's understanding of her ability to intervene pursuant to §403.412(5), Fla. Stat., is incorrect. At the time she filed her Amended Petition, the Second Amended Petition filed by her husband, Bob Krasowski, had been dismissed with prejudice. Therefore, there was not an ongoing proceeding in which to *intervene*, and thus no right to do so. Env't'l. Conf. of SW Fla., Inc. v. IMC Phosphates, Inc., 857 So 2d 207, 211 (Fla. 1st DCA 2003) (the rights of an intervenor are conditional in that they exist only so long as the litigation continues between the parties.); Commercial Standard Ins. Co. v. Miller, 274 So. 2d 588 (Fla. 1st DCA 1973) (no right to intervene after case dismissed).

Finally, Mrs. Krasowski's failure to understand the legal ramifications of her failure to file a timely petition and her belief that she could later file a motion to intervene cannot support a finding of excusable neglect. Peterson v. Lake Surprise Condo. Ass'n, 118 So. 3d 313 (Fla. 3d DCA 2013).

This failure to provide the Department with facts establishing excusable neglect for the untimely filing of her initial petition in this proceeding constitutes a waiver of Mrs. Krasowski's right to request an administrative proceeding under Chapter 120, Florida Statutes. See Fla. Admin. Code R. 62-110.106(3)(b); Env'tl. Res. Ass'n of Fla., Inc. v. Dep't of Gen. Serv., 624 So. 2d 330, 331 (Fla. 1st DCA 1993)(reflecting that appellant waived its right to a hearing when it failed to avail itself of the opportunity provided by agency's notice).

In view of the above, the Second Amended Petition must be dismissed as required by Section 120.569(2)(c), Florida Statutes. See also Brookwood Extended Care Ctr. of Homestead, LLP v. Agency for Healthcare Admin., 870 So. 2d 834, 841 (Fla. 3d DCA 2003).

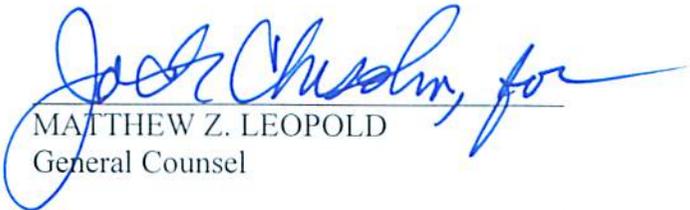
IT IS THEREFORE ORDERED:

- A. The Amended Petition is DISMISSED, with prejudice.
- B. This order constitutes final agency action of the Department.

Any party to this proceeding has the right to seek judicial review of this order under Section 120.68, Florida Statutes, by filing a notice of appeal under 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, Mail Station 35, Tallahassee, Florida 32399-3000, and by filing a copy of the notice of appeal accompanied by the applicable filing fee with the appropriate district court of appeal. The notice of appeal must be filed within thirty days after the date this order is filed with the clerk of the Department.

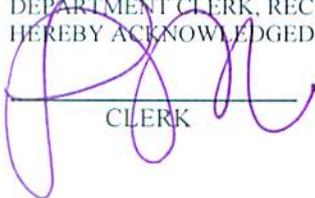
DONE AND ORDERED this 3rd day of October, 2013, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION


MATTHEW Z. LEOPOLD
General Counsel

3900 Commonwealth Boulevard – MS 35
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.


CLERK

10.3.13
DATE

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished via ELECTRONIC MAIL ONLY this 3rd day of October, 2013, to:

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STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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