


Florida Department of  
Environmental Protection

Memorandum

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**TO:** Bureau of Beaches and Coastal Systems

**FROM:**  Jeff Littlejohn, P.E., Deputy Secretary for Regulatory Programs

**DATE:** April 15, 2011

**SUBJECT:** Beach Program Improvements

The following beach program improvements should be implemented immediately:

1. **Sand Rule Interpretation.** A principle of "statutory construction" is that a specific provision governs over a general one. This applies to our "sand rule." The "similar in character" provision within the preamble to the rule and the very general beaches rule requirement to "minimize impacts to the beach and dune system" are general provisions that should not override a very specific provision regarding the content of fines within beach fill material. Our beaches rules must be read in their entirety, and the "sand rule" does not operate alone. However, there is specific case law that requires that where both a specific provision and "also a general one that in its most comprehensive sense would include matters embraced in the former" apply, "the particular provision will nevertheless prevail; the general provision must be taken to affect only such cases as are not within the terms of the particular provision." (Fletcher v. Fletcher)

Therefore, an applicant's proposed borrow material may contain silt or other "non-sand components" as allowed by the criteria in 62B-41.007(2)(j)1.-3. These criteria may be reduced only if the placement of fill containing these non-sand components would likely result in cementation under 62B-41.007(2)(j)5.

Further, our primary focus of the sand rule should be to permit the placement of beach compatible sand. To protect environmental character and functionality of our beaches, the applicant should demonstrate that their sand source is similar in grain size, distribution, etc. of the existing (native) beach. The contaminants listed in 62B-41.007(2)(j)1.-3. are not "sand" and as such, should not be considered when evaluating the sand grain size, distribution, etc.

2. **Reasonable Assurance.** Reasonable assurance does not require an applicant to perform every known test or conduct every possible study. The applicant is not required to eliminate all contrary possibilities, however remote, or to address unlikely theoretical impacts which could not be measured in real life; the applicant instead must provide reasonable assurances which take into account contingencies that might reasonably be expected. Competent substantial evidence based upon detailed site plans and engineering studies, coupled with credible expert engineering testimony is a sufficient basis for a finding of reasonable assurance. (Hamilton County Board of County Commissioners v. FDEP)
3. **Avoidance and Minimization.** The "avoidance and minimization" process must not be allowed to adversely affect the project design. Only "practicable" modifications should be considered, and modifications that result in a bad design are not practicable.
4. **Public Interest.** The Florida Legislature has declared, in Section 161.088, Florida Statutes (F.S.), that beach restoration and beach nourishment projects on critically eroded beaches are in the public interest. When evaluating such projects using the seven factors in Section 373.414, F.S., the legislative finding of public interest can only be overcome with significant evidence that the project is contrary to the public interest or, in the case Outstanding Florida Waters, not clearly in the public interest.
5. **Conservation of Fish and Wildlife and their Habitats.** While we must consider the potential for adverse impacts to fish and wildlife and their habitats, we must keep the following fact clear in our minds: The restoration of a critically eroded beach increases habitat and has been determined by the legislature to be in the public interest.
6. **We SHOULD NOT require a Joint Coastal Permit (JCP) for work upland of the Mean High Water Line (MHWL).** We should be in favor of dune restoration using beach compatible material on eroded beaches, because it is often the best and least impactful way to place sand on the dry beach. To this end, only a Coastal Construction Control Line (CCCL) permit should be presumed necessary when permitting dune restoration projects. Staff should request information relating to JCP permitting only if information clearly indicates that the dune project will have an immediate impact below the MHWL.

7. **Stay out of the Weeds.** We should not need detailed planting plans or sections through planted areas to reach a decision on a project's potential to impact the beach and dune system. Replace detailed application requirements with a simple performance condition for planted areas.
  
8. **Reasonable Monitoring.** While post-project environmental monitoring is an important part of establishing that a project's impacts have been properly offset through mitigation, any required monitoring must be meaningful and useful, or it must be eliminated. We must also have a legitimate use for the data gathered.
  
9. **Request for Additional Information (RAI) Policy.** Any item listed in an RAI must cite the specific rule authority for the information requested. At a minimum, staff will cite to the subsection of the rule that is the underlying basis for the question/information requested.