



Rule 62B-33.0051(1)(a)1, F.A.C.: *Construction of armoring shall be authorized under the following conditions:*

1. *The proposed armoring is for the protection of an eligible structure;*
3. Petitioner's property is located at 4588 Coastal Highway, St. Augustine, Florida.
4. The petition was received on April 20, 2015.
5. On September 11, 2015, Petitioners filed a waiver of 90-day time limit imposed on the Department pursuant to Chapter 120 for processing the petition until October 3, 2015. On October 2, 2015, Petitioners filed an additional waiver of the 90-day time limit, until October 16, 2015.
6. On October 3, 2015, Petitioners filed a revised petition for variance or waiver, which corrected certain statements made in the original petition.
7. The segment of shoreline comprising Petitioners' property has been designated by the Department as "critically eroded." The DEP Critically Eroded Beaches in Florida report updated in June 2015 designated 6.5 miles of South Ponte Vedra Beach and Vilano Beach located between FDEP monuments R-84 and R-117 as "critically eroded." The subject property is located approximately 225 feet south of Monument R-104 and is within this critically eroded portion of the beach. Petitioners' property experienced significant erosion recently and over the past 12 years -- approximately 85 feet of beach on Petitioners' property has been lost due to erosion. Between 2003 and 2012, Petitioners' property erosion rate was approximately -1.0 feet per year. Since 2012, Petitioners' property erosion rate has increased significantly to approximately -24.7 feet per year.
8. St. Johns County issued several Emergency Proclamations in 2014, with the most recent issued on December 8, 2014, declaring a shoreline emergency along the entire county coastline due to a "coastal storm".
9. There is an on-site LP gas tank that is located along the north side of the dwelling. Utility lines for water and sewer service are located underneath the house. The current and expected rate of erosion can be expected to compromise Petitioners' LP gas tank, and underground utilities. Use of the LP gas tank and underground utilities is integral to the dwelling.
10. The top of dune as of February 9, 2015, was approximately 27 feet seaward of the foundation of the dwelling. According to the Department's engineering analysis, the erosion limits will terminate just seaward of the foundation of the dwelling from the high frequency storm event. The frontal dune that existed at the time the dwelling was constructed has eroded and now the primary dune is the only feature on the property that protects the dwelling from storm impacts. However, the extremely high recent erosion rate continues to erode the base of the primary dune rendering it unstable, and susceptible to collapse. Consequently, the dwelling and its utilities are expected to be undermined by erosion from the high frequency storm event if the erosion rate continues.

11. Petitioners propose to install coastal armoring to protect the dwelling at 4588 Coastal Highway, St. Augustine, Florida. A permit application for construction of coastal armoring (SJ-1217 AR) was received on September 3, 2015, and is under review by the Department.

**SECTION 120.542, F.S., VARIANCE AND WAIVER PROVISION**

12. Section 120.542, F.S., provides in pertinent part:

- (1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. . . Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section.

\* \* \*

- (2) 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. For purposes of this section, “substantial hardship” means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, “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.

**Section 120.52(21), F.S. defines “variance” to mean:**

- (21) “Variance” means a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule. Any variance shall conform to the standards for variances outlined in this chapter and in the uniform rules adopted pursuant to s. 120.54(5).

**Section 120.52(22), F.S. defines “waiver” to mean:**

- (22) “Waiver” means a decision by an agency not to apply all or part of a rule to a person who is subject to the rule.

**PRINCIPLES OF FAIRNESS AND  
SUBSTANTIAL HARDSHIP TO THE PETITIONER**

13. The Petitioners seek a permanent variance or waiver from Rules 62B-33.002(18) and (43), and 62B-33.0051(1)(a)1, F.A.C., because the Petitioners allege that applying these rules to their situation would be unreasonable, unfair, and would create an unintended result and substantial hardship and would violate the principles of fairness.

14. The Petitioners allege that a substantial technical hardship will exist if additional erosion occurs that causes removal of sand from beneath the floor slab of the dwelling. Petitioners allege that, based on an engineering opinion, future dune erosion could cause uncertainty with regard to the stability of the (dwelling) structure itself if sand were to be removed from beneath the home causing the complete destruction of the home.

15. The Petitioners allege that a substantial economic hardship would result if further erosion undermines the dwelling and its associated elements, including the LP gas tank and underground utility lines. The Petitioners also allege that other non-structural measures to protect the property, such as sand placement and temporary measures, would require costs. The Petitioners allege that economic hardship would result due to the devaluation of the property. Moreover, the Petitioners allege that economic hardship would result if the Petitioners have to secure housing elsewhere if the existing dwelling is rendered uninhabitable due to the erosion.

16. Petitioners allege that strict application of the rules will lead to an unreasonable, unfair, and unintended result when compared to other persons subject to the rules. The Petitioners assert that the rules do not take into consideration the critical nature of the erosion that has occurred and is occurring on the shoreline, the current highly unstable nature of the dune and the uncertainty associated with the integrity of water lines, sewer lines and LP gas tank if significant erosion were to occur beneath the dwelling.

17. Petitioners allege that principles of fairness are violated in that other properties north of their property were issued armoring permits.

**THE VARIANCE OR WAIVER WILL MEET THE  
UNDERLYING PURPOSE OF THE STATUTE**

18. The Coastal Construction Control Line ("CCCL") program was established to protect Florida's beaches and dunes while assuring reasonable use of private property lying seaward of the CCCL. One purpose of the program is to protect the coastal system from improperly sited and designed structures which can destabilize the beach and dune system, accelerate erosion, endanger adjacent properties, or interfere with public beach access. Construction activities which take place seaward of the CCCL require Department approval. In the instant case, the armoring and the habitable major structure and its associated underground utilities are located seaward of the CCCL.

19. Section 161.085, F.S., sets forth the state's policy on rigid coastal armoring structures. This section recognizes the need to protect private structures and public infrastructure from damage or destruction caused by coastal erosion. The statute provides that armoring may be permitted provided that the private structures or public infrastructure is vulnerable to damage from frequent coastal storms, and that the siting and design of the armoring takes into consideration protection of the beach-dune system, impacts on adjacent property, preservation of public beach access, and protection of native coastal vegetation and nesting marine turtles and their hatchlings. The intent of the statute is to strike the appropriate balance between protection of the coastal system and the need to protect private structures and public infrastructure.

### **CONCLUSION**

20. Given the specific circumstances at Petitioner's property, including the significant rate of erosion that did not exist at time of construction of the dwelling, the appropriate siting of the armoring will be consistent with similar armoring recently permitted in St. John's County. Such armoring will minimize adverse effects to the beach and dune system and adjacent property owners. The armoring would be consistent with the purpose of the underlying statute if constructed in compliance with the requirements of the CCCL and its regulations. For the foregoing reasons and the economic and other hardships as alleged, it is appropriate to grant the requested variance subject to the condition below.

21. Section 120.542, F.S., requires the agency to consider the Petitioners' "substantial hardship" (economic, technical, legal and other hardship) when considering whether a variance from or waiver of the rule(s) should be granted. The section also directs the Department to consider whether the "principles of fairness" are violated when the literal application of the rule(s) affects a particular person in a manner significantly different than other similarly situated persons who are subject to the rule(s).

22. Petitioners have demonstrated an actual substantial economic hardship that will be suffered if the armoring is not allowed to be installed.

23. Taken as a whole, literal application of the rules in this instance would be unfair because Petitioners' property is subject to high rates of erosion that did not exist at the time that construction of the dwelling was authorized.

### **THEREFORE, IT IS ORDERED:**

The petition of George and Cynthia Andrew for a variance from Rules 62B-33.002(18) and (43), and 62B-33.0051(1)(a)1, F.A.C., is GRANTED, subject to the conditions below.

### **Conditions for Approval**

1. The variance shall be for a period of time to run concurrent with the period of time of any Department-issued permit to the Petitioners to construct coastal armoring at the property. A permit for coastal armoring allows for a construction period of 3 years from date of issuance pursuant to Rule 62B-33.008(8), F.A.C.

2. Petitioners' armoring shall be sited and designed to meet the requirements of the CCCL statute and regulations, including to adequately minimize impacts to the beach and dune system, adjacent properties, marine turtles; and adequately preserve public beach access, as required by sections 161.053, and .085, F.S., and Rule 62B-33.0051, F.A.C.

### **NOTICE OF RIGHTS**

The Department's proposed agency action will become final unless a timely petition for an administrative hearing is filed under sections 120.569 and 120.57 of the Florida Statutes before the deadline for filing a petition. The procedures for petitioning for a hearing are set forth below.

A person whose substantial interests are affected by the Department's Order may petition for an administrative proceeding (hearing) under sections 120.569 and 120.57 of the Florida Statutes. The petition must contain the information set forth below and must be filed (received) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, and Tallahassee, Florida 32399-3000. Petitions filed by the Petitioner or any of the parties listed below must be filed within twenty-one days of receipt of this written notice.

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

Petitions filed by any persons other than those entitled to written notice under section 120.60(3), Florida Statutes must be filed within twenty-one days of publication of the notice or within twenty-one days of receipt of the written notice, whichever occurs first. Under section 120.60(3), Florida Statutes, however, any person who asked the Department for notice of agency action may file a petition within twenty-one days of receipt of such notice, regardless of the date of publication.

The petitioner shall mail a copy of the petition to the applicant at the address indicated above at the time of filing. The failure of any person 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 of the Florida Statutes, or to intervene in this proceeding and participate as a party to it. Any subsequent intervention (in a proceeding initiated by another party) will only be at the discretion of the presiding officer upon the filing of a motion in compliance with rule 28-106.205 of the Florida Administrative Code.

A petition that disputes the material facts on which the Department's action is based 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 Department action;
- (f) A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action; 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.

A petition that does not dispute the material facts on which the Department's action is based shall state that no such facts are in dispute and otherwise contain the same information as set forth above, as required by rule 28-106.301, F.A.C.

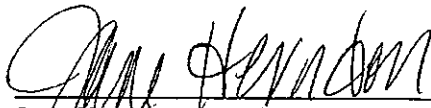
Because the administrative hearing process is designed to formulate final agency action, the filing of a petition means that the Department final action may be different from the position taken by it in this notice. Persons whose substantial interests will be affected by any such final decision of the Department have the right to petition to become a party to the proceeding, in accordance with the requirements set forth above.

Mediation is not available for this proceeding.

Once this permitting decision becomes final, any party to the final agency action has the right to seek judicial review of it under section 120.68 of the Florida Statutes, by filing a notice of appeal under rule 9.110 of the Florida Rules of Appellate Procedure with the clerk of the Department in the Office of General Counsel, Mail Station 35, 3900 Commonwealth Boulevard, Tallahassee, Florida 32399-3000, or via email at [agency\\_clerk@dep.state.fl.us](mailto:agency_clerk@dep.state.fl.us), 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 must be filed within thirty days after this order is filed with the clerk of the Department.


**DONE AND ORDERED** this 16th day of October, 2015, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



Jane Herndon, Esquire, Deputy Director  
Division of Water Resource Management  
2600 Blair Stone Road  
Tallahassee, Florida 32399-2400

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

 10/16/2015  
CLERK      DATE

Electronic Copies Furnished to:

Laura L. Mahoney, Toco Engineering, Inc. ([lmahoney@toco.com](mailto:lmahoney@toco.com))  
Agents for Petitioners

Tony McNeal, DEP CCCL Program ([tony.mcneal@dep.state.fl.us](mailto:tony.mcneal@dep.state.fl.us))

Betsy Hewitt, DEP Office of General Counsel ([betsy.hewitt@dep.state.fl.us](mailto:betsy.hewitt@dep.state.fl.us))

Lea Crandall, DEP Agency Clerk ([agency\\_clerk@dep.state.fl.us](mailto:agency_clerk@dep.state.fl.us))

Suzanne Printy, Chief Attorney, Joint Administrative Procedures Committee  
([printy.suzanne@leg.state.fl.us](mailto:printy.suzanne@leg.state.fl.us))