Fiber Optic Cable Rule Amendments

Frequently Asked Questions

Q: Why is it necessary to establish zones?

A: Establishing zones is consistent with the state's constitutional[1] and statutory[2] obligations to protect and manage Florida's submerged lands and natural resources. There are many fiber optic cable projects either already installed or proposed to be installed. The state is obligated to consider the individual and cumulative environmental impacts of these projects and the potential pre-emptive effect of these projects on public lands and the use of natural resources.

Industry Response: Industry believes that the substance of this question is based on the erroneous premise that there will be "many fiber optic cable projects" in the offing. As we have discussed, the number of cables projected, even in the most optimistic of forecasts, is a fraction of those represented by the DEP in its public presentations. The establishment of zones does not affect in any way the individual or cumulative impact of any cable or cables. In fact, the creation of zones serves to discourage companies from seeking out and using sites that may pose lesser environmental impacts than sites that exist in an arbitrarily designated zone.

Q: How does establishing zones improve on the present permit/easement application review process?

A: Establishing zones allows the state to affirmatively manage sovereign submerged lands and public natural resources consistent with the constitutional and statutory obligations to do so by guiding FOC projects to locations that will minimize adverse impacts to natural resources. In contrast, the permit and easement application review process is reactive; the Department and the Board of Trustees react to requests for permits and easements based on routes and alignments selected by the applicant. These routes and alignments may not represent the best locations for managing public trust resources.

Industry Response: Despite the DEP's statement that applicant selected "routes and alignments may not represent the best locations for managing public trust

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[1] Florida's constitution (Article X, Section 11) establishes a trust relationship between the state and the people of Florida regarding the use of sovereign submerged lands. Private uses of sovereign submerged lands may be authorized by law, but only when such uses are not contrary to the public interest.

The constitution (Article II, Section 7) also directs that "it shall be the policy of the state to conserve and protect its natural resources and scenic beauty."

[2] Laws enacted to accomplish these constitutional mandates require, among other restrictions, that "submerged lands shall be considered single-use lands and shall be managed primarily for the maintenance of essentially natural conditions. . . ." (s. 253.034(2). F.S.)

resources," in fact they do. There has been little objection by the DEP to the selected sites for cable landings, and there has been a fair degree of recognition that the site selection process has been effective. In contrast, the proposed zones do not offer any assurance that sites will be the most favorable for the protection of public trust resources. As the process exists today, the "reactive" element of a proposal is largely addressed through the pre-application process. Under the DEP rule proposals, the permit and easement process may be equally reactive. Location in a zone is no guarantee that a cable easement will issue. The DEP has indicated that it retains the authority to deny a GP if it believes that standards have not been met. While a GP does present a mechanism for review and approval of a cable project that is proportionate to its impact, the adverse effect of zones and high fees on an applicant's ability to select the most environmentally compatible and economically sensible location outweighs the benefits of the GP to the cable industry.

Q. Where are the proposed zones? How were the proposed zones selected?

A: The proposed zones are located in the coastal waters on northern Martin County, northern Palm Beach County, southern Palm Beach County, and northern Dade County. Each zone is approximately five miles wide and is oriented to on-shore range markers. The zones were chosen based on general environmental suitability and the degree of existing pre-emption of sovereign submerged lands and public natural resources. The zones will be large enough to allow applicants for FOC projects to route their projects through the submerged lands to minimize environmental impacts while maintaining flexibility to take advantage of favorable terrestrial landing sites. If more suitable zones are identified during rulemaking, the proposed rule will be modified appropriately.

Industry Response: The somewhat arbitrary nature of the zones is best exemplified by the fate of the Martin County zone. That zone was selected without sufficient information as to projected uses of offsite resources, and it has been withdrawn. The northern Palm Beach zone was moved and enlarged (though industry has yet analyzed the modified zone sent out on 5/15). There may be features within that zone that make it equally problematic. The advantage of an applicant's unfettered search for an appropriate landing is that such areas are identified and avoided. To date, other than having zones in the general vicinity of existing projects (which were sited based on specific, not general criteria) industry has been unable to ascertain what studies have been undertaken by the DEP to demonstrate "general environmental suitability." The easements are not exclusive, so industry does not believe that preemption of the resource is a valid concern.

Industry has been unable to ascertain what studies have been undertaken by the DEP regarding the availability of terrestrial landing sites and ICW crossing sites. Studies performed by TyCom indicate that such sites are scarce in the southern Palm Beach zone. Once the zones are established by rule, the limited sites for landings will become immediately obvious, thus creating concentrated economic power in the few and fortunate upland owners.

Q. What are the proposed fees for FOC projects in the zones? What about FOC projects not in the zones?

A: DEP is proposing a one-time $ 15,000 easement application fee for all FOC projects in coastal waters. The easement fee for FOC projects in the zones will be $ 100 per year per cable. The easement fee for FOC projects outside of the zones will be $ 50 per linear foot per year (approximately $ 792,000 per year in Atlantic coastal waters to the territorial limit) per cable.

Industry Response: The proposed out-of-zone fee is excessively high to the point of being confiscatory, is wildly out of proportion to the impact or the preemptive nature of the project. Further, the fee is far more than fees charged for any other comparable use. Finally, the fee estimate is low due to the DEP's failure to calculate on the basis of a nautical mile, and failure to take into account any curves and non-perpendicular runs of cable that are necessary for resource avoidance.

Q: How were the proposed fees determined?

A: The $ 100 per year easement fee for FOC projects within the zones was selected based on the Board of Trustees stated preference (March 13th, 2001) to continue to make Florida an attractive location for the telecommunications industry.

The $ 50 per linear foot per year fee is based on California's model of assessing submerged lands use fees based on the appraisal value of the adjacent uplands. In Palm Beach County, the average appraised value of beachfront property is $ 100 per square foot. Using this upland value, the fee for FOC projects out of the zones computes to approximately $ 50 per linear foot. The fee is to be assessed annually for the term of the easement. The fee will be adjusted annually based on changes in the consumer price index.

Industry Response: Please see the previous response. In addition, it is apparent that the DEP studied all other state fee structures, and without regard to establishing valid comparable criteria (e.g., easement width, number of cables allowed), selected the most burdensome and onerous method for out-of-zone fees. No other state comes close. In that regard, industry does not believe the "California model" has been applied in that state as a policy of general applicability.

The selection of the fee methodology is inconsistent with easement fee methodology for any other activity in Florida, and is thus arbitrary and capricious. Furthermore, based on recent experience before the Florida Cabinet, industry does not believe that the selection of that method is consistent with what the Cabinet intends as state policy.

Finally, industry is interested in how the Department plans to justify its decision to value state resources offshore of low-income or poor locations at a level less than the value of the same resources offshore of affluent locations, a decision that seems to violate concepts of environmental justice.

Q: In addition to the financial incentive to locate an FOC project in the zones, are there other incentives?

A: Yes. DEP is proposing that easements for FOC projects in the zones be delegated from the Board of Trustees to Department staff for approval, and that upon

issuance of the appropriate permit, a temporary consent of use be granted. Avoiding the Cabinet process should shorten the review process considerably.

Industry Response: Industry is in favor of an efficient GP and easement process. The GP and easement delegation currently proposed offers a framework for further discussion, but are not useful or workable in its present form. Problems include, but are not limited to, size limitations, restrictions on abrasion or impact to "hardbottom," elements of state jurisdiction above the MHW, delegation authority withdrawn if application alleged to be "controversial" caused by "heightened public concern," failure to include Corps of Engineers and local program participation, and, notably, the prohibition against connecting the cable to upland infrastructure until DEP approval of the cable lay.

Q: Do the proposed rule amendments establishing zones apply to other utilities in coastal waters?

A. No.

Industry Response: If the concern of the DEP is environmental impact and resource preemption, industry can come to no rational reason why all similar utilities utilizing sovereign submerged lands, wherever located, would not be similarly treated. Basic equity would indicate that similar uses be treated in a similar manner.

Q: Why is DEP proposing a general permit for FOC projects?

A: FOC projects generally involve minimal environmental impact when conducted using appropriate best management practices and installation procedures. Also, our recent experience reviewing applications for FOC project has enabled Department staff to recommend standardized noticing, mitigation, monitoring, and reporting.

Furthermore, the Governor and Cabinet have clearly stated a desire to streamline the review process for FOC projects if environmental protection criteria can be met. There is a 30-day review and approval process for projects qualifying for general permits; in contrast, individual permit applications usually take 3-6 months or longer to process.

Industry Response: Industry agrees that FOC projects generally involve minimal environmental impact, and that the industry in Florida has led the way in developing and implementing BMPs. Therefore, the creation of arbitrary zones and grossly inflated out-of-zone fees is unwarranted.

Q: What are the natural resource impacts allowed within the proposed general permit? How were these thresholds arrived at?

A: To qualify for the proposed general permit, a route must be selected which results in less than 500 sq. ft. of impact (in, on, or over) hardbottom communities, seagrasses, and other natural resources on submerged lands. Within the 500 sq. ft. of impact, there is an additional requirement to limit impacts to corals to less than 30 sq. ft. Both the 500 sq. ft. and the 30 sq. ft. thresholds are starting points for the public rulemaking process.

The 500 sq. ft. threshold is based on the following calculation:

> 2" o.d. cable x 3 miles x 20 % (approximate percentage of hardbottom community within territorial waters) = 529 sq. ft

Furthermore, DEP's environmental resource permitting rules contain exemptions for certain projects impacting up to 500 sq. ft. of submerged lands.

The 30 sq. ft. threshold for corals is based on the amount of coral impacted (and mitigated for) in recent permits issued by the Department.

Industry response: Industry representatives will address the numeric impact standards on 5/22.

Q: Are there mitigation requirements for the impacts?

A: Yes. The proposed general permit requires 50 sq. ft. of artificial reef (concrete modules or limerock boulders) for every 10 sq. ft. of hardbottom or other natural resources impacted by construction.

Industry Response: Industry agrees that mitigation is appropriate, and has led the way in developing and implementing appropriate mitigative measures.

Q: What happens when an FOC project can not be designed to stay under the thresholds in the general permit, even if it's in one of the zones?

A: An individual environmental resource permit is required; the easement processing and fee requirements for FOC projects in the zones still apply.

Industry response: This is a general restatement of the law regarding general permits. Therefore, a comment is not required.

Q: What happens if there are problems during installation and the total impacts exceed the thresholds in the general permit?

A: Just like with any other Department-issued general permit, if non-compliance occurs during construction, the Department will take appropriate enforcement actions to correct the non-compliance, which may include restoration and possible civil penalties.

Industry response: This is a general restatement of the law regarding compliance and enforcement. Therefore, a comment is not required.

Q: How will DEP know if there are problems?

A: The Department expects to work closely with the installers during construction. The general permit includes notices for various phases of the installation, requirements for reporting, contacting the Department if problems are observed, and for fixing problems as soon as they are observed. Also, the general permit contains a requirement that the terrestrial connection can not be made until the permittee has

submitted a report describing the installation and route of the project, including problems encountered and the amount of actual impact.

Industry Response: Representatives of the industry involved in this matter have been among the leaders in monitoring and inspecting conduit and cable installation, remediation, and post-installation activities. As to the prohibition against connection pending the report, industry does not believe that the DEP has jurisdiction to control in any way activities that occur above the MHW, including connection, lighting and use of the cable. Industry will not, under any circumstance, agree to that condition, and will take all such measures within its control to fight any attempt to limit connection immediately upon completion of the cable lay.