

Awareness Training for Compliance and Enforcement of Coral and Hardbottom Resource Permitting

Rules and Regulations Involving Corals in Southeast Florida (Awareness Training - Unit 2 of 3)

Southeast Florida Coral Reef Initiative (SEFCRI),
Maritime Industry & Coastal Construction Impacts (MICCI) Team
Project 4, 21, 23, 24 – Phase 2
March 2011



Overview of Rules and Regulations Involving Coral in SE Florida

Contents:

- Introduction
- Federal Administrative Rules (& Statutes)
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SEFCRI's Maritime Industry & Coastal Construction Impacts (MICCI) Team

The MICCI focus is on activities such as vessel groundings, infrastructure installation (e.g., cables, pipelines, and outfalls), and dredge and fill operations (e.g., beach renourishment) that can adversely affect coral reefs and associated habitats.

MICCI Project 4, 21, 23, 24 Phase 2: Project Objectives

- Identify issues, gaps, and overlaps that reduce permitting compliance and enforcement efficiency for coral resources.
- Work with agencies to identify methods and processes to increase the effectiveness of coral regulatory oversight and monitoring to improve compliance.
- Develop Awareness Training Materials for agency use - the purpose of these Powerpoint units.

Awareness Training Materials

Three Training units are available as Powerpoint files:

- Unit 1: *Overview of Corals and Hardbottom Resources in Southeast Florida*
- **Unit 2: *Rules and Regulations Involving Corals in Southeast Florida***
- Unit 3: *Permitting and Field Approaches for Efficient Compliance and Enforcement (this file)*

In addition to the Awareness Training powerpoint materials, the associated resources are available:

- Waterproof field cards on rules and biology.
- The Final Report on *Optimizing Compliance and Enforcement of Coral Regulations in SE FL.*

Administrative Acronyms

AA....SEFCRI Awareness & Appreciation Team	LBSP.SEFCRI Land-based Sources of Poll. Team
ATM.....Awareness and Training Materials	MICCI.....SEFCRI Maritime Industry &
BBCS.....FDEP Bureau of Beaches & Coastal Systems	Coastal Construction Impacts Team
BPP.....Best Permitting Practices	NMFS.....National Marine Fisheries Service
BOE...Bureau of Ocean Energy (formerly MMS)	NOV.....Notice of Violation
CCCL.....Coastal Construction Control Line	NTU.....Nephelometric Turbidity Units
CWA.....Clean Water Act	OGC..... FDEP Office of General Counsel
DERM....Miami-Dade Dept. of Envir. Res. Man.	POC.....Point of Contact
DRP... ..Division of Recreation & Parks (FDEP)	PUA.....Possible Unauthorized Activity
EEZ.....Exclusive Economic Zone	RHA.....Rivers and Harbors Act
EFH.....Essential Fish Habitat	RP.....Responsible Party
EFH-HAPC...EFH-Hab. Area of Part. Concern	SAFMC...S. Atl. Fisheries Management Council
ELRA.....Environmental Litigation Reform Act	SED-ERP.....SE District Office (FDEP)
EPGMD.....Broward Co. Environ. Protection & Growth Management Dept.	SEFCRI.....SE Florida Coral Reef Initiative
ERP.....Environmental Resource Permit	SFWMD.....S. Fl. Water Management District
ESA.....Endangered Species Act	SOP.....Standard Operating Procedures
FDEP.....Florida Dept. of Environ. Protection	SSL.....Sovereign Submerged Lands
FDOU.SEFCRI Fish., Diving, & Other Uses Team	USACE.....US Army Corps of Engineers
HCP.....Habitat Conservation Plan	USFWS.....US Fish & Wildlife Service
JCP.....Joint Coastal Permit	USCRTF.....US Coral Reef Task Force
	WMD.....Water Management District

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Primary U.S. Federal Regulations Involving Coral Resources

C & E: compliance and enforcement. See acronym list (slide 5) as needed.

Federal Statute or Administrative Rule	Lead C & E Agency	Consultation (Formal & Informal)
Clean Water Act Section 404(b) 33 CFR § 323.2(e) Requires USACE permit for deposit of dredge or fill material in waters of the United States.	USACE	EPA; NMFS; USFS
Endangered Species Act 50 CFR § 17.3 * Section 9: Prohibits “take” of <i>Acropora</i> corals.	NMFS; USACE	NMFS for corals
Sustainable Fisheries Act Essential Fish Habitat (EFH) provisions include all coral habitats in the SAFMC, including the east coast of FL.	USACE	NMFS; SAFMC
Rivers and Harbors Act Section 10 – Requires a USACE permit for structures or work affecting navigable waters of the US. 33 CFR 322.3.	USACE	NMFS
Outer Continental Shelf Lands Act 43 USC §1333(e) Extends potential reach of Sect. 10 of the RHA to reaches of the continental shelf for “construction of artificial islands, installations, & other devices on the seabed.”	BOE	NMFS; USACE

Clean Water Act (CWA)

Section 404(b) 33 CFR 323.2(e)

- This act regulates the discharge of dredge or fill materials in waters of the US, including certain wetlands.
- Requires USACE permit for deposit of dredge or fill material in waters of the US.
- This permit is issued by the USACE according to environmental criteria developed by the United States Environmental Protection Agency (EPA).
 - For this and other USACE issues: these and all following materials apply only to Regulatory, not Civil Works, issues



CWA, Sect. 404, and Special Conditions

- The USACE may include special conditions related to coral reef protection, or water quality for permits issued under §404 of the CWA (and §10 of the Rivers Harbor Act - treated later).
- Special conditions may be included to ensure that the permitted activity is not contrary to the public interest, or to insure compliance with other legal requirements.
- Special conditions within 404 and other permits are one of the more effective permitting tools to protect corals and a significant focus of compliance and enforcement.
- Detailed examples of special condition templates for different project types are presented in the MICCI Project 4,21,23,24 final report.

Endangered Species Act (ESA)

50 CFR § 17.3

- Section 4(d) of the ESA extends the Section 9 prohibitions on “take” and applies to *Acropora* corals via 50 CFR §223.208.
 - “Take” for threatened corals includes “to harass, harm, . . . wound, kill, . . . or collect, or to attempt to engage in any such conduct.”
- Protects both species and habitat
- §9: prohibition on “take” by any entity (without a permit)
 - Take = harm; harm = significant habitat modification *which actually kills or injures*
- §7: consultation - only for federal government activities
 - If a situation “may affect,” a formal consultation is required.

ESA and “Take” - 50 CFR § 17.3 Section 9 (CFR = Code of Federal Regulations)

- “Take” also includes any “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” §3(19) 16 USC §1532(19)
- Section 10: Allows “take” incidental to an otherwise legal activity with an “incidental take permit” and if the persons engaging in take comply with terms of the permit.

Acropora Species Corals Listed as Threatened under Endangered Species Act



Federal ESA - Threatened

Elkhorn coral
Acropora palmata



Federal ESA - Threatened

Staghorn coral
Acropora cervicornis

Acropora ESA Critical Habitat Definition:

- All waters in the depths of 98 ft (30 m) and shallower to the 6 ft (1.8 m) contour from Boynton Inlet, Palm Beach County, to Government Cut, Miami-Dade County; and the mean low water line from Government Cut south to 82° W longitude in Monroe County.
- Within these specific areas, the essential feature consists of natural consolidated hard substrate or dead coral skeleton that are free from fleshy or turf macroalgae cover and sediment cover.

<http://sero.nmfs.noaa.gov/pr/endangered%20species/specieslist/PDF2010/Florida%20Atlantic.pdf>

Endangered Species Act (ESA)

50 CFR § 17.3

If the action agency determines that a proposed project may affect listed species or critical habitat and:

- Is **likely** to adversely affect listed species, then formal consultation and a biological opinion is required from NMFS.
- Is **not likely** to adversely affect listed species, then informal consultation and written concurrence from NMFS is required.

Researchers – Very Focused on *Acropora* and other Coral Species

- Permits required from NMFS, FWC, and local counties for research. USACE & FDEP need to be consulted, and may also require permits.
- FAQ form for *Acropora* research at:
<http://sero.nmfs.noaa.gov/pr/pdf/ResearchPermitKey.pdf>
(NMFS also known as NOAA Fisheries)



- Essential Fish Habitat (EFH) provisions include all coral habitats within the South Atlantic Fishery Management Council's (SAFMC) jurisdiction, including east Florida.
- EFH-HAPC – Habitat Area of Particular Concern:
 - HAPC is a subset of EFH that is either rare, particularly susceptible to human-induced degradation, especially important ecologically, or located in an environmentally stressed area.
 - *All corals, coral reefs, nearshore hardbottom, and offshore hardbottom in SE Florida are designated as EFH-HAPC* by the SAFMC following the 1996 Magnuson - Stevens Act Reauthorization (the Sustainable Fisheries Act).

EFH Consultations

- Federal action agencies are required to consult with NMFS whenever construction, permitting, funding, or other actions may adversely affect EFH.
- The federal action agency makes a threshold determination and notifies NMFS that EFH may be affected under a new permit application.
- In the case of corals and hardbottom resources the federal action agency is often the USACE.



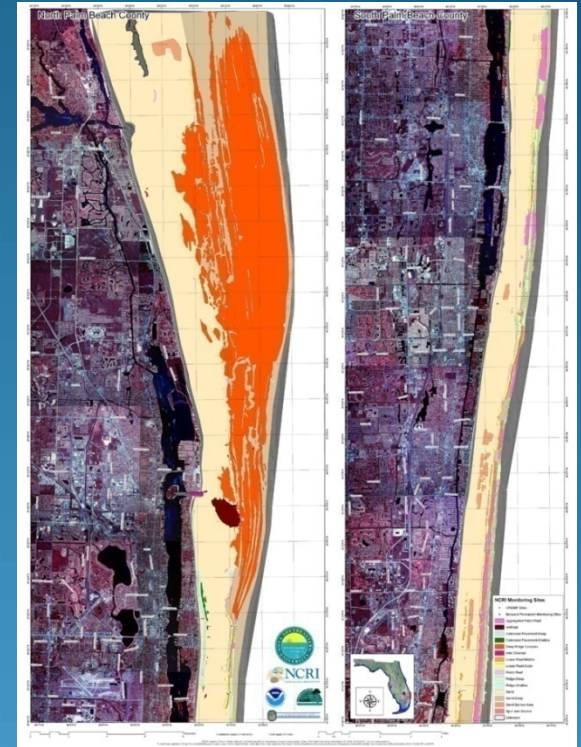
EFH Consultations (cont.)

- NMFS provides EFH conservation recommendations based on a Memorandum of Agreement with the Jacksonville District USACE.
- USACE responds with a description of measures proposed by the agency for avoiding, mitigating, or offsetting the impact of the activity on EFH.
- In the case of a response that is inconsistent with NMFS conservation recommendations, the agency must explain its reasons for not following the recommendations, including the scientific rationale for any disagreements with NMFS over the anticipated effects of the proposed action and the measures needed to offset such effects.

Types and Locations of EFH-HAPC

Habitats designated as EFH-HAPCs in southeast FL are:

- **All hard corals (Scleractinia)**
- **Nearshore hardbottom** (0-4 meters) off the east coast of Florida from Cape Canaveral to Broward County);
- **Offshore hardbottom** of the east coast from Palm Beach Co. to Fowey Rocks;
- **Biscayne Bay, Biscayne Nat. Park & the Florida Keys Nat. Marine Sanctuary.**



There are currently no maps of the EFH-HAPCs in SE FL, but areas can be found using the text and existing habitat maps (e.g., above) at:

<http://www.dep.state.fl.us/coastal/programs/coral/reports/>

Rivers and Harbors Act

- This act gives USACE the ability to ensure that construction activities in waters of the United States do not cause obstructions to navigation and are not contrary to the public interest.
- Section 10—Requires a USACE permit for structures or work affecting navigable waters of the US. 33 CFR 322.3.
- “Work” includes without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.”

Outer Continental Shelf Lands Act

43 USC §1333(e)

- Extends potential geographic reach of Section 10 of the Rivers and Harbors Act to the reaches of the continental shelf for “the construction of artificial islands, installations, and other devices on the seabed.” 33 CFR §320.2(b); §322.3(b)
- Very infrequently used in coral management lead agency is the newly named federal Bureau of Ocean Energy, formerly the Minerals Management Service.

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Primary FL State Regulations Involving Coral Resources

Florida Statute (F.S.) or Administrative Rule (F.A.C.)	Lead C & E Agencies	Consultation (Formal & Informal)
§373.129, .413 & .414, F.S. - Environ. Resource Permitting	FDEP – SED, BBCS	FWC; NMFS, USACE, Counties
62 - 302.500 & 530, F.A.C. - Surface Water Quality	FDEP – SED, BBCS	USEPA
62 - 4.242 & .244, F.A.C. - Permit Guidelines, Mixing Zones	FDEP – SED, BBCS	FWC, NMFS, USEPA
§253.04, F.S. - Protection of Sovereign Submerged Lands 18-14, F.A.C. implements the fine schedule	FDEP – SED, BBCS	FWC, NMFS, Counties
§258.008(3)(a), F.S. - Coral Protection in State Parks	FDEP – DRP	N/ A at state level
§403.121, .161 & .201, F.S. (& others) - Pollution Control Enforcement, Remedies, Fees; Turbidity Variance	FDEP – SED, BBCS	FWC, USACE, Counties, NMFS
§403.93345, F.S. - Coral Reef Protection Act Vessel Grounding and other Damage to Corals	FDEP – CRCP, SED	BBCS, FWC, Counties
§161.054 & .055, F.S. - Joint Coastal Permit; 62B-54, F.A.C. implements the structure of fines	FDEP – BBCS	FWC, USACE, NMFS
68B - 42.009, F.A.C. - Marine Life Rule No Harvest of any Hard Coral, Sea Fan or Fire Coral 68B-8, F.A.C. - Special Activity License: Coral Permits harvest of or research on coral	FWC	Special activity license: NMFS for acroporids
62A-27.003(1)(a), F.A.C. - State Endangered Species Pillar Coral (<i>Dendrogyra cylindrus</i>): status may change	FWC	N/ A at state level

Environmental Resource Permitting §373.413 & .414, F.S.

- Within FDEP, the Submerged Lands and Environmental Resources Program (SLERP) administers ERPs. ERPs are required for many activities affecting surface water, including dredging or filling activities in wetlands or surface waters.
- The ERP program is implemented by Florida's water management districts (WMDs) and the FDEP. Under operating agreements, most marine activities are permitted by FDEP.

Surface Water Quality Standards and Mixing Zones

62 - 302.500 , F.A.C. – Minimum & General Criteria

- Turbidity cannot exceed 29 Nephelometric Turbidity Units (NTUs) above natural background conditions in Class I – V Waters.
- Turbidity cannot exceed ambient background conditions in Aquatic Preserves.

62 – 302.530, F.A.C. - Surface WQ Standards

This rule defines the general state water quality standards for all activities. If an activity will potentially violate these standards, then it will likely require a FDEP permit (ERP or JCP) unless eligible for exemption.

62 - 4.242 & .244, F.A.C. - Mixing Zones

Mixing zones can be granted for selected projects that otherwise can't meet water quality standards within close proximity to the construction activity. More information is available at:

<https://www.flrules.org/gateway/RuleNo.asp?title=PERMITS&ID=62-4.244>

Protection of Sovereign Submerged Lands

§253.04, F.S.

- Chapter 253 FS addresses the state's administration of public lands and property of this state. The statute provides direction regarding the acquisition, disposal, and management of all state lands.
- The Board of Trustees of the Internal Improvement Trust Fund (Board) of the state is vested and charged with the acquisition, administration, management, control, supervision, conservation, protection, and disposition of all lands owned by the state, except for lands acquired for certain purposes.
- 18-14, F.A.C., implements the fine schedule for violations.

Pollution Control - Enforcement, Remedies

§403.121, .161, & .201, F.S. (& others)

- §403.121, F.S.: The Environmental Litigation Reform Act (ELRA): Allows swifter, more efficient use of admin. process for imposing damages and penalties (up to \$10,000 per offense). Outlines administrative penalties for specified violations rules and statutes. Before ELRA, FDEP could pursue corrective actions and civil penalties for violations only by filing in state court.
- §403.141 and §403.161, F.S. Allow imposition of damages and civil liability for causing pollution that harms aquatic life. Remedies are all judicial rather than administrative.
- For adjusted penalties >\$10,000, FDEP instead considers program specific guidelines for characterizing violations and assessing penalties. If a settlement cannot be reached consistent with FDEP's Settlement Guidelines for Civil and Administrative Penalties (FDEP Directive 923), FDEP will file an enforcement action in state court.

Coral Reef Protection Act (CRPA)

§403.93345, F.S.

The Coral Reef Protection Act requires that the responsible party - the owner, operator, manager or insurer of any vessel that has impacted a coral reef must comply with the following :

- Notify the FDEP within 24 hours of damaging or otherwise impacting a coral reef.
- Remove, or cause the removal of, grounded or anchored vessels within 72 hours of the incident, unless prohibited by the U.S. Coast Guard or extenuating circumstances such as weather or marine hazards.
- Remove, or cause the removal of, grounded or anchored vessels in a manner that avoids further damage to the reef and consult with FDEP in accomplishing this task.
- Cooperate with FDEP to undertake damage assessment and primary restoration of the injured coral reef in a timely fashion. Assessment and restoration efforts must be conducted by authorized individuals.

Joint Coastal Permit - §161.055, F.S.

- The JCP Program allows FDEP to concurrently process applications for coastal construction permits, environmental resource permits, and sovereign submerged lands authorizations.
- The consolidation of these programs and the assignment of responsibility to a single bureau (BBCS) has eliminated the potential for conflict between permitting agencies and helped ensure that reviews are conducted in a timely manner.
- JCP permit applications are forwarded to the USACE from FDEP or SFWMD for separate processing and review. (Can also include Section 10 only of RHA activities. Sect 10 of the RHA does not fall under “dredge and fill” activities).

JCP - continued

- A JCP is required for activities that meet *all* of the following criteria:
 - Located on FL natural sandy beaches along the Atlantic Ocean, Gulf of Mexico, Straits of Florida, or associated inlets;
 - Activities that extend seaward of the MHWL;
 - Activities that extend into sovereign submerged lands; &
 - Activities likely to affect beach sand distribution.
- Activities that require a JCP include beach restoration or nourishment, construction of erosion control structures such as groins and breakwaters, public fishing piers, maintenance of inlets and related structures, and dredging of navigation channels that include disposal of dredged material onto the beach or in the nearshore area.

Marine Life Rule - 68B - 42.009, F.A.C.

- **No Harvest of any Hard Coral (Scleractinia)**
- No harvest of these two sea fan species:

*Gorgonia
ventalina*



Common Sea Fan



Venus Sea Fan

*Gorgonia
flabellum*

- No harvest of fire coral (*Millepora* species)



Harvest of any of the above species allowable only with Special Activity License (SAL) from FWC

Coastal Construction Control Line (CCCL) Program

- FDEP's Bureau of Beaches and Coastal Systems (BBCS) has regulatory authority over coastal construction activities seaward of the CCCL under Chapter 161, FS.
- To construct seaward of the CCCL, but landward of the mean high water (MHW) line, one must obtain authorization for construction via a CCCL permit.
- CCCL projects may impact coral and hardbottom resources. For example dune construction or repair requires a CCCL permit, and constructed dunes and beachfaces can enter the water during storms, leading to sedimentation and turbidity.
- FDEP rulemaking to include sediment criteria standards for dune repair and trucked sand fill is ongoing (Dec 2010).

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Miami-Dade County Coral Permitting

Dept. of Environ. Resource Management (DERM)

- DERM has Class 1 permits similar to the ERP based on memoranda with the FDEP.
- Coastal Construction (Class I) Permitting Program: This local program issues permits required for work in, over, or upon tidal waters and coastal wetlands throughout all of Miami-Dade County.
- This includes authorizations required for several coastal construction activities, including renourishment activities, that can affect corals. Managed by DERM's Coastal Resources Section.

Broward County Coral Permitting:

Environ. Protection & Growth Manag. Dept. (EPGMD)

- EPGMD issues and enforces licenses that can involve impacts to corals under the Broward County Pollution Control Code. Corals, along with seagrasses, mangroves, and some other habitats, are treated as regulated aquatic or wetland resources under Section 27-333(a)(1).
- Environmental Resource Licenses with general and specific license conditions are required if projects will potentially impact corals within county jurisdiction.
- Applicants for Environmental Resource Licenses are subject to general and specific conditions determined under EPGMD review that can involve consultation with FDEP for large projects that may affect corals.
- These licenses are most commonly associated with pipeline or cable construction, dredging, ship anchoring, or scientific research that occurs within 3 nautical miles of shore.

Palm Beach County and Martin County Coral Permitting

- Although both counties have environmental protection programs, neither Palm Beach or Martin County has an environmental permitting section.
- Both counties request that any permits being issued within their respective counties be reviewed by local staff.

Websites with Administrative Rule Language and Associated Information:

Federal

<http://www.gpoaccess.gov/cfr/>

State

<https://www.flrules.org/Default.asp>

<http://www.dep.state.fl.us/coastal/programs/coral/ripr.htm>

(Quick Facts on Coral Reef Protection Act)

http://www.dep.state.fl.us/coastal/programs/coral/pub/CRPA_Fact_Sheet.pdf

County

<http://municode.com/>

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- Southeast Florida Coral Reef Initiative
- D. Gilliam
- D. Snyder
- Monterey Bay Aquarium
- Flower Gardens Bank National Marine Sanctuary

Assessment of Training File Effectiveness

Coral training materials will be presented to agency offices by spring 2011. Agencies are encouraged to refine these slides to optimize effectiveness in agency-specific staff training. These assessment questions can assist that process:

- What aspects of this PowerPoint file were of greatest utility?
- What materials are necessary but lacking from this training file?
- What other edits or adds can be made to improve effectiveness?

Please return your input on these questions to your specific agency Point of Contact regarding coral awareness training materials.