~~Indicates Matter Stricken~~

Indicates New Matter

COMMITTEE REPORT

January 13, 2016

**S. 139**

Introduced by Senator Cleary

S. Printed 1/13/16--S.

Read the first time January 13, 2015.

**THE COMMITTEE ON**

**AGRICULTURE AND NATURAL RESOURCES**

To whom was referred a Bill (S. 139) to amend Section 48‑39‑130 of the 1976 Code, relating to permits required for coastal zone critical areas, to allow for certain additional technologies, methodologies, etc., respectfully

**REPORT:**

That they have duly and carefully considered the same and recommend that the same do pass with amendment:

Amend the bill, as and if amended, by striking all after the enacting words and inserting:

/ SECTION 1. Section 48‑39‑130(D)(1) of the 1976 Code, is amended to read:

“(D)(1) The accomplishment of emergency orders of an appointed official of a county or municipality or of the State, acting to protect the public health and safety, upon notification to the department. However, with regard to the ~~beach/dune~~ beach and dune critical area, only the use of sandbags, sandscraping, or renourishment, or a combination of ~~them~~ the following techniques, in accordance with guidelines provided by the department ~~is~~ are allowed pursuant to this item.:

(a) sandbags, provided that a bond is supplied to reasonably estimate and cover the cost of removal;

(b) sand scraping;

(c) renourishment;

(d) any other technology, methodology, or structure pursuant to Section 48‑39‑320(C), provided that:

(i) the emergency order for use is only issued by the department; and

(ii) a bond is supplied to reasonably estimate and cover the cost of removal; or

(e) a combination of these techniques.”

SECTION 2. Section 48‑39‑290(A) of the 1976 Code, as last amended by Act 259 of 2011, is further amended to read:

“Section 48‑39‑290 (A) No new construction or reconstruction is allowed seaward of the baseline except:

(1) ~~wooden~~ walkways no larger in width than six feet and constructed of wood or other department‑approved wood‑like material;

(2) small wooden decks no larger than one hundred forty‑four square feet and constructed of wood or other department‑approved wood‑like material;

(3) fishing piers and associated amenity structures which are open to the public. Those fishing piers with their associated amenity structures including, but not limited to, baitshops, restrooms, restaurants, and arcades which existed September 21, 1989, may be rebuilt if they are constructed to the same dimensions and utilized for the same purposes and remain open to the public. In addition, those fishing piers with their associated amenity structures ~~which~~ that existed on September 21, 1989, and that were privately owned, privately maintained, and not open to the public on ~~this~~ that date also may be rebuilt and used for the same purposes if they are constructed to the same dimensions;

(4) golf courses for repair and maintenance, and any action taken pursuant to Section 48‑39‑135;

(5) normal landscaping, sandfencing, revegetation of dunes, minor beach renourishment and dune construction;

(6) structures specifically permitted by special permit as provided in subsection (D);

(7) existing pools ~~may be reconstructed~~ if they are landward of an existing, functional erosion control structure or device

(8) existing groins, which may be reconstructed, repaired, and maintained. New groins may ~~only~~ be allowed only on beaches that have high erosion rates with erosion threatening existing development or public parks. In addition to these requirements, new groins may be constructed, and existing groins may be reconstructed, only in furtherance of an ongoing beach renourishment effort which meets the criteria set forth in regulations promulgated by the department and in accordance with the following:

(a) The applicant shall institute a monitoring program for the life of the project to measure beach profiles along the groin area and adjacent and downdrift beach areas sufficient to determine erosion/accretion rates. For the first five years of the project, the monitoring program must include, but is not necessarily limited to:

(i) establishment of new monuments;

(ii) determination of the annual volume and transport of sand; and

(iii) annual aerial photographs.

Subsequent monitoring requirements must be based on results from the first five‑year report.

(b) Groins may ~~only~~ be permitted only after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas. The applicant shall provide a financially binding commitment, such as a performance bond or letter of credit that is reasonably estimated to cover the cost of reconstructing or removing the groin and/or restoring the affected beach through renourishment pursuant to subitem (c).

(c) If the monitoring program established pursuant to subitem (a) shows an increased erosion rate along adjacent or downdrift beaches that is attributable to a groin, the department ~~must~~ shall require either that the groin be reconfigured so that the erosion rate on the affected beach does not exceed the preconstruction rate, that the groin be removed, and/or that the beach adversely affected by the groin be restored through renourishment.

(d) Adjacent and downdrift communities and municipalities must be notified by the department of all applications for a groin project.

(e) Nothing in ~~the~~ this section shall be construed to create a private cause of action, but nothing in this section shall be construed to limit a cause of action under recognized common law or other statutory theories. The sole remedies, pursuant to this section, are:

(i) the reconstruction or removal of a groin; and/or

(ii) restoration of the adversely affected beach and adjacent real estate through renourishment pursuant to subitem (c), or both.

An adjacent or downdrift property owner ~~that~~ who claims a groin has caused or is causing an adverse impact shall notify the department of ~~such~~ the impact. The department shall render an initial determination within sixty days of such notification. Final agency action ~~shall~~ must be rendered within twelve months of notification. An aggrieved party may appeal the decision pursuant to the Administrative Procedures Act.

A permit must be obtained from the department for items (2) through (8). However, no permit is required ~~under~~ pursuant to this chapter for associated amenity structures constructed on fishing piers if local governmental bodies having responsibility for the planning and zoning authorize construction of those amenity structures. Associated amenity structures do not include those employed as overnight accommodations or those consisting of more than two stories above the pier decking. Associated amenity structures, excluding restrooms, handicapped access features, and observation decks, may occupy no more than thirty‑five percent of the total surface area of the fishing pier or be constructed at a location further seaward than one‑half of the length of the fishing pier as measured from the baseline. The department, in its discretion, may issue general permits for items (2) and (5) where issuance of the general permit would advance the implementation and accomplishment of the goals and purposes contained in Sections 48‑39‑250 through 48‑39‑360.”

SECTION 3. Section 48‑39‑290(D)(2) of the 1976 Code is amended to read:

“(2) The department’s Permitting Committee Coastal Division shall ~~is the committee to~~ consider applications for special permits.”

SECTION 4. This act takes effect upon approval by the Governor; however, Section 48‑39‑130, as amended, remains subject to the repeal provision pursuant to Section 5, Act 41 of 2011./

Renumber sections to conform.

Amend title to conform.

DANIEL B. VERDIN III for Committee.

**A** **BILL**

TO AMEND SECTION 48‑39‑130 OF THE 1976 CODE, RELATING TO PERMITS REQUIRED FOR COASTAL ZONE CRITICAL AREAS, TO ALLOW FOR CERTAIN ADDITIONAL TECHNOLOGIES, METHODOLOGIES, OR STRUCTURES WITH REGARD TO PROTECTING BEACH AND DUNE CRITICAL AREAS WHEN AN EMERGENCY ORDER IS ISSUED BY APPOINTED OFFICIALS OF COUNTIES AND MUNICIPALITIES; TO AMEND SECTION 48‑39‑280, TO PROHIBIT THE SEAWARD MOVEMENT OF THE BASELINE AFTER JULY 1, 2015, AND TO ELIMINATE THE RIGHT OF LOCAL GOVERNMENTS AND LANDOWNERS TO PETITION THE ADMINISTRATIVE LAW COURT TO MOVE THE BASELINE SEAWARD UPON COMPLETION OF A BEACH RENOURISHMENT PROJECT; TO AMEND SECTION 48‑39‑290, TO NARROW THE EXCEPTION OF GOLF COURSES FROM A PERMIT REQUIREMENT TO REPAIR AND MAINTENANCE OF EXISTING GOLF COURSES, TO PROVIDE FOR AN EXEMPTION FOR SANDFENCING, REVEGITATION OF DUNES, MINOR BEACH RENOURISHMENT, AND DUNE CONSTRUCTION; AND TO AUTHORIZE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL TO APPROVE REPAIRS TO CERTAIN EROSION CONTROL DEVICES WHICH WOULD OTHERWISE BE PROHIBITED, TO PROVIDE FOR THE CIRCUMSTANCES UNDER WHICH REPAIRS MAY BE MADE; TO AMEND SECTION 48‑39‑320 BY ADDING A SUBSECTION TO PROVIDE THAT THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL MAY APPROVE EROSION CONTROL DEVICES NOT PROVIDED FOR IN THIS CHAPTER IF THE BOARD DETERMINES THAT A DEVICE WILL BE SUCCESSFUL WITH REGARD TO EROSION CONTROL; AND TO REPEAL SECTION 48‑39‑290(D)(2).

SECTION 1. Section 48‑39‑130(D)(1) of the 1976 Code, is amended to read:

“(D)(1) The accomplishment of emergency orders of an appointed official of a county or municipality or of the State, acting to protect the public health and safety, upon notification to the department. However, with regard to the ~~beach/dune~~ beach and dune critical area, ~~only the use of sandbags, sandscraping, or renourishment, or a combination of them~~ the following techniques, in accordance with guidelines provided by the department ~~is~~ are allowed pursuant to this item~~.~~:

(a) sandbags, provided that a bond is supplied to reasonably estimate and cover the cost of removal;

(b) sand scraping;

(c) renourishment;

(d) any other technology, methodology, or structure allowed by the board or the Office of Ocean and Coastal Resource Management pursuant to Section 48‑39‑320(C), provided that a bond is supplied to reasonably estimate and cover the cost of removal; or

(e) a combination of these techniques.”

SECTION 2. Section 48‑39‑280 of the 1976 Code is amended to read:

“Section 48‑39‑280. (A) A forty‑year policy of retreat from the shoreline is established. The department must implement this policy and ~~must~~ utilize the best available scientific and historical data in the implementation. The department must establish a baseline ~~which~~ that parallels the shoreline for each standard erosion zone and each inlet erosion zone. Subject to Section 48‑39‑290(D), the baseline established pursuant to this section must not move seaward from its position on July 1, 2015.

(1) The baseline for each standard erosion zone is established at the location of the crest of the primary oceanfront sand dune in that zone. In standard erosion zones in which the shoreline has been altered naturally or artificially by the construction of erosion control devices, groins, or other manmade alterations, the baseline must be established by the department using the best scientific and historical data, as where the crest of the primary oceanfront sand dunes for that zone would be located if the shoreline had not been altered.

(2) The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the department as the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position. In collecting and utilizing the best scientific and historical data available for the implementation of the retreat policy, the department, as part of the State Comprehensive Beach Management Plan provided for in this chapter, ~~among other factors, must~~ shall consider, among other factors: historical inlet migration, inlet stability, channel and ebb tidal delta changes, the effects of sediment bypassing on shorelines adjacent to the inlets, and the effects of nearby beach restoration projects on inlet sediment budgets.

(3) The baseline within inlet erosion zones that are stabilized by jetties, terminal groins, or other structures must be determined in the same manner as provided for in item (1). However, the actual location of the crest of the primary oceanfront sand dunes of that erosion zone is the baseline of that zone, not the location if the inlet had remained unstabilized.

~~(4)~~ ~~Notwithstanding any other provision of this section, where a department‑approved beach nourishment project has been completed, the local government or the landowners, with notice to the local government, may petition an administrative law judge to move the baseline as far seaward as the landward edge of the erosion control structure or device or, if there is no existing erosion control structure or device, then as far seaward as the post project baseline as determined by the department in accordance with Section 48‑39‑280(A)(1) by showing that the beach has been stabilized by department‑approved beach nourishment. If the petitioner is asking that the baseline be moved seaward pursuant to this section, he must show an ongoing commitment to renourishment which will stabilize and maintain the dry sand beach at all stages of the tide for the foreseeable future. If the administrative law judge grants the petition to move the baseline seaward pursuant to this section, no new construction may occur in the area between the former baseline and the new baseline for three years after the initial beach nourishment project has been completed as determined by the department. If the beach nourishment fails to stabilize the beach after a reasonable period of time, the department must move the baseline landward to the primary oceanfront sand dune as determined pursuant to items (1), (2), and (3) for that section of the beach. Any appeal of an administrative law judge’s decision under this section may be made pursuant to Title 23 of Chapter 1.~~

(B) To implement the retreat policy provided for in subsection (A), a setback line must be established landward of the baseline a distance ~~which~~ that is forty times the average annual erosion rate or not less than twenty feet from the baseline for each erosion zone based upon the best historical and scientific data adopted by the department as a part of the State Comprehensive Beach Management Plan.

(C) The department, before July 3, 1991, must establish a final baseline and setback line for each erosion zone based on the best available scientific and historical data as provided in subsection (B) and with consideration of public input. The baseline and setback line must not be revised before July 1, 1998, nor later than July 1, 2000. After that revision, the baseline and setback line must be revised not less than every eight years but not more than every ten years after each preceding revision. Nothing in this section allows the seaward movement of the baseline after July 1, 2015. In the establishment and revision of the baseline and setback line, the department must transmit and otherwise make readily available to the public all information upon which its decisions are based for the establishment of the final baseline and setback line. The department must hold one public hearing before establishing the final baseline and setback lines. Until the department establishes new baselines and setback lines, the existing baselines and setback lines must be used. The department may stagger the revision of the baselines and setback lines of the erosion zones so long as every zone is revised in accordance with the time guidelines established in this section.

(D) In order to locate the baseline and the setback line pursuant to subsections (A), (B), and (C), the department ~~must~~ shall establish monumented and controlled survey points in each county fronting the Atlantic Ocean. The department ~~must~~ shall acquire sufficient surveyed topographical information on which to locate the baseline. Surveyed topographical data typically must be gathered at two thousand foot intervals. However, in areas subject to significant near‑term development and in areas currently developed, the interval, at the discretion of the department, may be more frequent. The resulting surveys must locate the crest of the primary oceanfront sand dunes to be used as the baseline for computing the forty‑year erosion rate. In cases where no primary oceanfront sand dunes exist, a study conducted by the department is required to determine where the upland location of the crest of the primary oceanfront sand dune would be located if the shoreline had not been altered. The department, by regulation, may exempt specifically described portions of the coastline from the survey requirements of this section when, in its judgment, the portions of coastline are not subject to erosion or are not likely to be developed by virtue of local, state, or federal programs in effect on the coastline which would preclude significant development, or both.

(E) A landowner claiming ownership of property affected who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error, upon submittal of substantiating evidence, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three. The requests must be forwarded to the department board in accordance with Section 44‑1‑60, and the final decision of the board may be appealed to the Administrative Law Court, as provided in Chapter 23, ~~of~~ Title 1.”

SECTION 3. Section 48‑39‑290(A) of the 1976 Code, as last amended by Act 259 of 2011, is further amended to read:

“Section 48‑39‑290. (A) No new construction or reconstruction is allowed seaward of the baseline except:

(1) wooden walkways no larger ~~in width~~ than six feet in width;

(2) small wooden decks no larger than one hundred forty‑four square feet;

(3) fishing piers and associated amenity structures ~~which are~~ open to the public. Those fishing piers with their associated amenity structures including, but not limited to, baitshops, restrooms, restaurants, and arcades, which existed September 21, 1989, may be rebuilt if ~~they are~~ constructed to the same dimensions and utilized for the same purposes and remain open to the public. In addition, those fishing piers with their associated amenity structures ~~which~~ that existed on September 21, 1989, and that were privately owned, privately maintained, and not open to the public on ~~this~~ that date also may be rebuilt and used for the same purposes if ~~they are~~ constructed to the same dimensions;

(4) golf courses for repair and maintenance;

(5) normal landscaping, sandfencing, revegetation of dunes, minor beach renourishment and dune construction;

(6) structures specifically permitted by special permit as provided in subsection (D);

(7) pools, ~~may be reconstructed~~ if they are landward of an existing, functional erosion control structure or device;

(8) existing groins, which may be reconstructed, repaired, and maintained. New groins may ~~only~~ be allowed only on beaches that have high erosion rates with erosion threatening existing development or public parks. In addition to these requirements, new groins may be constructed, and existing groins may be reconstructed, only in furtherance of an ongoing beach renourishment effort which meets the criteria set forth in regulations promulgated by the department and in accordance with the following:

(a) The applicant shall institute a monitoring program for the life of the project to measure beach profiles along the groin area and adjacent and downdrift beach areas sufficient to determine erosion/accretion rates. For the first five years of the project, the monitoring program must include, but is not ~~necessarily~~ limited to:

(i) establishment of new monuments;

(ii) determination of the annual volume and transport of sand; and

(iii) annual aerial photographs.

Subsequent monitoring requirements must be based on results from the first five‑year report.

(b) Groins may ~~only~~ be permitted only after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas. The applicant shall provide a financially binding commitment, such as a performance bond or letter of credit that is reasonably estimated to cover the cost of reconstructing or removing the groin and/or restoring the affected beach through renourishment pursuant to subitem (c).

(c) If the monitoring program established pursuant to subitem (a) shows an increased erosion rate along adjacent or downdrift beaches that is attributable to a groin, the department ~~must~~ shall require either that the groin be reconfigured so that the erosion rate on the affected beach does not exceed the preconstruction rate, that the groin be removed, and/or that the beach adversely affected by the groin be restored through renourishment.

(d) Adjacent and downdrift communities and municipalities must be notified by the department of all applications for a groin project.

(e) Nothing in ~~the~~ this section ~~shall be construed to create~~ creates a private cause of action~~, but nothing in this section~~ ~~shall be construed to limit~~ or limits a cause of action under recognized common law or other statutory theories. The sole remedies, pursuant to this section, are:

(i) the reconstruction or removal of a groin; ~~and/or~~

(ii) restoration of the adversely affected beach and adjacent real estate through renourishment pursuant to subitem (c), or both.

An adjacent or downdrift property owner ~~that~~ who claims a groin has caused or is causing an adverse impact shall notify the department of ~~such~~ the impact. The department shall render an initial determination within sixty days of ~~such~~ notification. Final agency action ~~shall~~ must be rendered within twelve months of notification. An aggrieved party may appeal the decision pursuant to the Administrative Procedures Act.

A permit must be obtained from the department for items (2) through (8). However, no permit is required ~~under~~ pursuant to this chapter for associated amenity structures constructed on fishing piers if local governmental bodies having responsibility for the planning and zoning authorize construction of those amenity structures. Associated amenity structures do not include those employed as overnight accommodations or those consisting of more than two stories above the pier decking. Associated amenity structures, excluding restrooms, handicapped access features, and observation decks, may occupy no more than thirty‑five percent of the total surface area of the fishing pier or be constructed at a location further seaward than one‑half of the length of the fishing pier as measured from the baseline. The department, in its discretion, may issue general permits for items (1), (2), and (5) where issuance of the general permit would advance the implementation and accomplishment of the goals and purposes contained in Sections 48‑39‑250 through 48‑39‑360.”

SECTION 4. Section 48‑39‑290(D)(2) of the 1976 Code is amended to read:

“(2) The department’s ~~Permitting Committee~~ Coastal Division ~~is the committee to~~ shall consider applications for special permits.”

SECTION 5. Section 48‑39‑320 of the 1976 Code is amended by adding a new subsection to read:

“(C) The board, upon the recommendation of the Office of Ocean and Coastal Resource Management, may allow the use of any technology, methodology, or structures, whether or not referenced in this chapter, if it is anticipated that the action will be successful in addressing an erosional issue in a beach area.”

SECTION 6. Section 48‑39‑290(B)(2)(f) of the 1976 Code is repealed effective July 1, 2025.

SECTION 7. This act takes effect upon approval by the Governor; however, Section 48‑39‑130, as amended, remains subject to the repeal provision pursuant to Section 5, Act 41 of 2011.

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