



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

To: Margaret Everson, Principal Deputy Director, U.S. Fish and Wildlife Service
From: Peg Romanik, Associate Solicitor, Division of Parks and Wildlife
Re: Coastal Barrier Resources Act
Date: October 30, 2019

Introduction

You have requested our opinion as to whether Section 6(a)(6)(G) of the Coastal Barrier Resources Act ("CBRA" or "Act"), 16 U.S.C. § 3505(a)(6)(G), permits Federal funding for utilizing sand removed from a Coastal Barrier Resources System ("System") unit to renourish beaches located outside the System.

After considering the plain language of the Act, we conclude that the exemption in Section 6(a)(6)(G) is not limited to shoreline stabilization projects occurring within the System. Thus, sand from within a System unit may be used to renourish a beach that is located outside of the System. However, any such project must further the purposes of the Act. That is, the shoreline stabilization project must be consistent with the Act's purposes of minimizing threats to human life and property and encouraging long-term conservation of natural resources associated with coastal barriers, and has to fit within the restrictions of the statutory exception for certain nonstructural projects.

Background

When it enacted the CBRA, Congress found that coastal barriers contain significant cultural and natural resources, including wildlife habitat and spawning areas, and function as natural storm protective buffers. *See* 16 U.S.C. § 3501(a). Congress further found that coastal barriers are generally unsuitable for development. *Id.* § 3501(a)(3). It enacted the CBRA to restrict Federal expenditures that encourage development of coastal barriers, thus minimizing the loss of human life and damage to natural resources within those areas. *Id.* § 3501(b). Section 5(a) of the Act prohibits most new Federal expenditures and financial assistance for activities occurring within the System. *Id.* § 3504(a). Section 6 of the Act sets forth exceptions to the prohibition, including "[n]onstructural projects for shoreline stabilization that are designed to

mimic, enhance, or restore natural stabilization systems,” if such projects are consistent with the purposes of the Act. *Id.* § 3505(a)(6)(G).

A 1994 legal memorandum from then Assistant Solicitor - Branch of Fish and Wildlife interpreting Section 6(a)(6)(G) concluded that the exemption for shoreline stabilization projects applies only to projects designed to stabilize the shoreline of a System unit, and not to projects to renourish beaches outside the System. The 1994 opinion “interpret[s] section 6(a)(6) to refer to projects designed to renourish solely a beach within the [System unit].” We understand that local communities and members of Congress have recently raised concerns about their inability to receive Federal funds for beach nourishment and have asked the Department to revisit this issue

Discussion

Section 6 of the Act sets forth certain exceptions to the limitations on Federal expenditures within the System. The introductory paragraph of the Section provides that a Federal agency, after consultation with the Secretary, “may make Federal expenditures or financial assistance available within the [System]” for certain enumerated activities. 16 U.S.C. § 3505(a). The phrase “within the [System]” must be read in conjunction with the immediately preceding phrase “Federal expenditures or financial assistance.” *See, e.g., Hays v. Sebelius*, 589 F.3d. 1279, 1281 (D.C. Cir. 2009) (applying the “Rule of the Last Antecedent,” which provides that “qualifying phrases are to be applied to the word or phrase immediately preceding and are not to be construed as extending to others more remote.”) (citation omitted). Thus, the phrase applies solely to where the Federal expenditures or financial assistance may be applied. In this case, that means Federal funds associated with removing sand from a unit within the System.

By contrast, Section 3505(a)(6) does not contain language specifying that excepted actions must occur “within the [System].” That section permits certain “actions or projects, but only if the making available of expenditures or assistance therefor is consistent with the purposes of this Act.” *Id.* § 3505(a)(6). Among those actions are “[n]onstructural projects for shoreline stabilization that are designed to mimic, enhance, or restore natural stabilization systems.” *Id.* § 3505(a)(6)(G). The phrase “within the [System]” does not appear either in the introductory language to subsection 6 or in the subpart addressing shoreline stabilization projects. In sum, there is no express limitation on removing sediment from within the System and applying it to areas outside of the System for the purpose of shoreline stabilization.

The statutory language reflects that Congress did not intend to constrain the flexibility of agencies to accomplish the CBRA’s broader purposes of protecting coastal barrier resources by requiring beach renourishment to occur “solely” within the System. Other provisions in Section 3505(a) indicate that Congress envisioned that the excepted activities might occur outside of the System. For example, Section 3505(a)(2) allows for the dredging of existing Federal navigation channels within the System, and the disposal of the dredge materials does not have to occur within the System. The House and Senate Reports specify that the “disposal site need not ... be consistent with the purposes of the Act” as the dredge materials may contain contaminants, and

returning the contaminants to the system would not further the purposes of the CBRA.¹ Within Section 3505(a)(6), subparts (A) and (D) are similar in providing an exception for research for barrier resources, including fish and wildlife, which may require the study site to extend beyond the System to be most effective.

Alternatively, to the extent the statutory language could be viewed as ambiguous, our interpretation is reasonable and it furthers the purposes of the Act. There is no indication that Congress intended to conserve coastal barrier resources only within the System. Indeed, in calling for “coordinated action by Federal, State, and local governments,” Congress appears to have envisioned the protection of broad swaths of coastal land. *Id.* § 3501(a)(1)(5). Our interpretation of Section 6(a)(6)(G) gives Federal agencies more flexibility to permit or undertake shoreline stabilization projects that will protect coastal resources, even if those resources are located outside of the System. These resources, identified in the CBRA’s purpose, are “of significant value to society,”² providing over \$1 billion in 1980 dollars for commercial fisheries, and high recreational value for people participating in sport fishing and waterfowl and duck hunting.³

Our interpretation also allows for projects that indirectly benefit coastal barrier resources within the System. For example, the U.S. Army Corps of Engineers (“Corps”), could use sand from a unit within the System to renourish a beach that is adjacent to that unit, but outside of the System. Stabilizing the adjacent beach could have positive effects on habitat located within the unit. The interpretation of Section 6(a)(6)(G) in the 1994 memorandum would preclude this project despite its beneficial effect on coastal barriers within the System.

Our interpretation does not alter the Service’s (nor the action agency’s) responsibility to consider on a case-by-case basis whether the proposed project is consistent with the purposes of the Act. *See id.* § 3505(a)(6). For example, the removal of the sand from within the System may not frustrate the “long-term conservation of these fish, wildlife, and other natural resources” associated with coastal barriers. *Id.* § 3501(b). Thus, the Service should consider whether the sand could be removed without damage⁴ to the natural resources within the System. Likewise, the project should not encourage development of coastal barriers in a manner that could result in “threats to human life, health, and property.” *Id.* § 3501(a)(4). In addition, the Service should review whether the proposed project meets the limitations of the exception. That is, in order for the project to meet the standards of the exception, the Service should consider whether any beach renourishment outside the system is intended to “mimic, enhance, or restore natural stabilization systems.” *Id.* § 3505(a)(6)(G).

¹ CBRA Senate Report (May 26, 1982) at 7, and CBRA House Report (September 21, 1982) at 16.

² CBRA House Report (September 21, 1982) at 8.

³ CBRA Senate Report (May 26, 1982) at 2, CBRA House Report (September 21, 1982) at 8.

⁴ We note that “damage” here would have to cause more than insignificant impact to the natural resources. That is, it would have to be damage that would frustrate the purposes of the Act in some meaningful manner.

Conclusion

We recognize that our interpretation is a change from the conclusion presented in the 1994 legal memorandum. As noted above, however, that memorandum contained no analysis. After reviewing the legislative history and reading the plain language of the Act, we conclude a more reasoned interpretation is that the exception for shoreline stabilization projects is not expressly limited to projects occurring wholly within the System. And, to the extent the statutory language could be considered ambiguous, it should be interpreted in a way that furthers Congress' stated purpose of protecting coastal barrier resources. Thus, we conclude that sand from units within the System may be used to renourish beaches located outside of the System assuming the project is in compliance with the Act. Specifically, the Service (and the action agency) must continue to review each proposed project to ensure that it meets the specific requirements of section 6(a)(6)(G) and is consistent with the purposes of the Act.