



United States Department of the Interior

OFFICE OF THE SOLICITOR

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Memorandum

To: J. Shirley
Principal Deputy Director, Fish and Wildlife Service

From: Dondrae N. Maiden
Associate Solicitor for the Division of Parks and Wildlife

Subject: Coastal Barrier Resources Act

Congress enacted the Coastal Barrier Resources Act (CBRA or Act), 16 U.S.C. §§ 3501-3510, to restrict federal funds and other financial assistance from being used on projects that could lead to the harmful development of coastal barriers, thus minimizing the loss of human life and damage to natural resources within those areas. 16 U.S.C. § 3501(b). The CBRA defined the coastal areas under its protection by creating the John H. Chafee Coastal Barrier Resources System (System). 16 U.S.C. § 3503(a). Section 6 of the Act provides exceptions to the limitation on federal expenditures within the System, which include “[n]onstructural projects for shoreline stabilization that are designed to mimic, enhance or restore a natural stabilization system.” 16 U.S.C. § 3505(a)(6)(G).

In October 2019, the Associate Solicitor, Division of Parks and Wildlife issued a legal memorandum (2019 memorandum), which concluded that the CBRA Section 6(a)(6)(G) exemption was not limited to shoreline stabilization projects occurring within a System unit.¹ 16 U.S.C. § 3505(a)(6)(G). The 2019 memorandum allowed sand from within a System unit to be used to renourish beaches located outside of the System, while also recognizing that any such project must further the purposes of the Act to minimize threats to human life and property and encourage the long-term conservation of natural resources associated with coastal barriers. The 2019 memorandum was adopted by Secretary Bernhardt² and subsequently challenged in *National Audubon Society v Bernhardt*,³ No. 20-05065 (S.D.N.Y. 2020).

¹ The 2019 memorandum reversed a 1994 legal memorandum from then Assistant Solicitor - Branch of Fish and Wildlife, which interpreted Section 6’s exemption provision to only apply to projects designed to stabilize the shoreline of a System unit. See Memorandum from Assistant Solicitor, Fish and Wildlife to Assistant Director, U.S. Fish and Wildlife Service.

² See Memorandum from Secretary Bernhardt to Rob Wallace, Assistant Secretary for Fish and Wildlife and Parks, and Margaret Everson, Principal Deputy Director, U.S. Fish and Wildlife Service, November 4, 2019.

³ Plaintiff, National Audubon Society, challenged the Department’s 2019 legal interpretation of the CBRA, which determined that federal funds could be used for certain shoreline stabilization projects outside of the CBRA System. Plaintiff challenged the 2019 memorandum under the Administrative Procedure Act and the National Environmental

In 2021, the Deputy Solicitor for Parks and Wildlife issued a memorandum (2021 memorandum) rescinding the 2019 memorandum. The 2021 memorandum concluded that the Section 6(a)(6)(G) exemption applied only to projects designed to stabilize shorelines located within a System unit. Secretary Haaland adopted that 2021 memorandum, ending the legal challenge in the *National Audubon Society* case.⁴ I have reviewed both opinions and find the rationale contained in the 2019 memorandum to be the more persuasive interpretation. The 2019 memorandum contains the best reading of the CBRA. The CBRA's text indicates that Congress intended to permit federal funding for projects that minimize threats to human life and property and promote long-term conservation of coastal barrier resources, without restricting these projects to within the System. I am adopting the legal analysis contained in the 2019 memorandum and restate it below.

Discussion

Section 6 of the Act sets forth certain exceptions to the limitations on Federal expenditures within the System. The introductory paragraph of Section 6 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

Policy Act, categorizing the 2019 memorandum and Secretarial concurrence as a final rule issued without public notice and comment. The Department filed a motion to dismiss, and the parties filed cross motions for summary judgment that also addressed the Department's motion to dismiss. Plaintiff's lawsuit was voluntarily dismissed after the Biden Administration rescinded the 2019 memorandum and replaced it with the 2021 memorandum.

⁴ *See* Memorandum from Assistant Secretary for Fish and Wildlife and Parks to Principal Deputy Director, U.S. Fish and Wildlife Service with concurrence from Secretary Haaland, July 15, 2021.

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.⁵ 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)(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,"⁶ 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.⁷

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 damage⁸ 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, 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).

⁵ CBRA Senate Report (May 26, 1982) at 7, and CBRA House Report (September 21, 1982) at 16.

⁶ CBRA House Report (September 21, 1982) at 8.

⁷ CBRA Senate Report (May 26, 1982) at 2, CBRA House Report (September 21, 1982) at 8.

⁸ We note that "damage" here would have to cause more than an 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

The legislative history and plain language of the Act make clear that the exception for shoreline stabilization projects is not limited to projects occurring entirely within the System.

Accordingly, sand from units within the System may be used to renourish beaches located outside of the System, provided the project complies with the Act. The Service and action agencies must continue to evaluate each proposed project to ensure it satisfies the specific requirements of Section 6(a)(6)(G) and remains consistent with the purposes of the Act.