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Part III

Department of the Interior

Fish and Wildlife Service

**Coastal Barrier Resources Act; Advisory
Guidelines; Final Rule**

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****43 CFR Subtitle A****Coastal Barrier Resources Act;
Advisory Guidelines****AGENCY:** Fish and Wildlife Service,
Interior.**ACTION:** Rule-related notice

SUMMARY: This document sets forth the Department of the Interior's (Department) general statement of policy and advisory guidelines regarding the provisions of the Coastal Barrier Resources Act (Act, CBRA) that address limitations on Federal expenditures and financial assistance, and exceptions to the limitations.

DATES: These guidelines are effective upon publication. The prohibitions on new Federal financial expenditures and assistance other than flood insurance were effective upon enactment of CBRA (October 18, 1982). The prohibition on the sale of new Federal flood insurance for new structures or substantial improvements will be effective October 1, 1983. The Federal Emergency Management Agency, which administers the National Flood Insurance Program, issued a final rule on this provision on August 16, 1983 (48 FR 37036).

FOR FURTHER INFORMATION CONTACT: Mr. Frank McGilvrey, Coastal Barriers Coordinator, U.S. Fish and Wildlife Service, U.S. Department of the Interior, Washington, D.C. 20240 (202-343-2618).

SUPPLEMENTARY INFORMATION: On October 18, 1982, President Reagan signed the Coastal Barrier Resources Act (CBRA) into law (Pub. L. 97-348). The law establishes the Coastal Barrier Resources System as referred to and adopted by Congress, and prohibits all new Federal expenditures and financial assistance within the units of the System, except that a Federal agency may, after consultation with the Secretary of the Interior, effect such expenditures or assistance according to the specific exceptions of Section 6 of CBRA. These provisions of the Act became effective upon it being signed into law. The Act also amends and conforms the Federal flood insurance provisions of the Omnibus Budget Reconciliation Act of 1981 (OBRA) pertaining to undeveloped coastal barriers. The statutory ban on the sale of new Federal flood insurance for new construction or substantial improvements in these areas will go into effect on October 1, 1983.

The Department published proposed guidelines in the *Federal Register* on

April 25, 1983 (48 FR 17592). Changes in these final guidelines result from comments received concerning the proposed guidelines. Secretarial Order 3093 delegated responsibility for Section 6 to the Fish and Wildlife Service (Service) on April 28, 1983.

The guidelines elaborate on the definitions of expenditures and financial assistance and "new" expenditures and financial assistance and prescribe guidelines for consultation with the Service. As stated by the Director of the Office of Management and Budget in a letter dated March 7, 1983, to the Secretary: "OMB fully agree(s) that questions regarding the limitations on financial expenditures be interpreted by all agencies in a consistent manner. Therefore OMB will look to the Department to develop guidelines and definitions which all agencies, including OMB, can use."

The Service intends that the final advisory guidelines will direct agencies in limiting expenditures and financial assistance within the System in conformance with the dictates of Section 5 and 6 of CBRA. The Service is aware, though, that the guidelines cannot address each particular question that may arise in implementing CBRA with respect to particular activities within the System. The Service expects that the more general directives of the guidelines will be supplemented as a result of bilateral discussion that should be held between each affected agency and the Service as to the particular activities each agency is responsible for and as to the procedures for consultation on future activities.

Discussion of Comments Received

In response to the notice of proposed advisory guidelines, written comments were received from eleven respondents. All were considered in the final guidelines. The following is a discussion of these comments and the Department's responses.

Two respondents were of the opinion that the prohibition on Federal financial assistance should include income tax deductions for casualty loss and interest on Federal mortgages.

We disagree. There is absolutely no indication in the legislative history of CBRA that Congress had any intention of effecting such change in the tax treatment of activities within the System. Congress would not have made such a change in the tax laws without discussion. Moreover, the basic scheme of CBRA, evidenced clearly in the Section 6(a) consultation process, is intended to affect particular decisions by Federal agencies to provide expenditures and financial assistance

for activities within the System. These decisions are different from the general grant by the Federal government of income tax deductions for various items.

Section 6(a)(3) of the Act excepts "... the maintenance, replacement, reconstruction or repair, but not the expansion, of publicly-owned or publicly-operated roads, structures, or facilities that are essential links in a larger network or system ..." from the prohibitions on Federal expenditures or financial assistance. In the proposed guidelines, we interpreted "facilities" to be limited to facilities related to roadworks. Five commentators are of the opinion that the "or facilities" separated roads from utilities, and that it was not the intent of Congress, as evidenced in the legislative history, to exclude repair or replacement of utility systems already in place. After reviewing the comments and further evaluation of the legislative history and Congressional intent, we agree that utilities should be included as part of Sections 6(a)(3) and 6(a)(6)(F).

Several commentators questioned whether the proposed guidelines gave the Department of Defense too much leeway in its determinations of which expenditures are "essential to national security" and therefore exempt from the section 5 prohibitions. The legislative history of Section 6(a)(4) specifically provides that "this exemption should be read broadly and that the Department of Defense should be the judge of the essentiality of the action" (House Report 97-841). Moreover, the Conference Report (97-928) states that: "the determination as to whether military activities are essential to national security must be made in accordance with existing law and procedure." Thus, Congress intended no expansion of current statutory and regulatory standards for determining what is essential to the national security. In addition, Section 6(a) of CBRA does not exempt the Department of Defense from consulting with the Service prior to making expenditures or financial assistance available within the System. The Department of Defense will, however, be the judge of which military activities are essential to national security and therefore excepted from the general prohibition in Section 5 of CBRA.

The section on the consultation process also generated some comment. Two Federal agencies interpret the Act to require only a single consultation with the Service covering the whole range of their activities impacted by CBRA. We are of the opinion that this was not the intent of Congress. A

blanket exemption would not adequately satisfy the oversight responsibilities of the Department to ensure the minimum necessary impact on coastal barriers. The final guidelines are clarified to emphasize the need for consultation prior to expenditures or financial assistance for each excepted activity.

Five commenters contended that consultation with the Department was mandatory and took exception to the position in the proposed guidelines that Federal agencies "should" consult with the Department with respect to expenditures and assistance under Section 6 of CERA. Additional review of the legislative history supports the view of these commenters. For instance, the Conference Report states, "The Conferees agreed to accept the House provision which requires the appropriate Federal officer to consult with the Secretary before making any Federal expenditures or financial assistance available under Section 6 H.R. Rep. No. 928, 97th Cong., 2nd Sess. 13 (1982) (emphasis added). We therefore agree that consultation itself with the Department with respect to expenditures and financial assistance according to the Section 6 exceptions criteria is mandatory and have so changed the final guidelines. But while consultation itself is mandatory, that does not mean that it must be conducted in any particular manner. Thus, these guidelines leave it up to the various Federal agencies to develop acceptable consultation procedures with the Service that best fit their various programs. Such procedures may vary from agency to agency.

1. *Environmental Effects:* These guidelines establish a general framework within which Federal agencies can satisfy their consultation responsibilities with the Service prior to making an expenditure on, or providing assistance to, activities excepted under Section 6 of CBRA. The guidelines merely establish a general framework for the exchange of information and advice among Federal agencies in order to insure compliance with the requirements of CERA. The guidelines, in and of themselves, therefore, will not create substantive impacts upon the human environment. As for the activities that will be the subject of consultation, such activities generally continue the status quo or provide localized environmental benefits or localized emergency disaster assistance. Moreover, to the extent that an activity does affect the quality of the human environment, appropriate NEPA documentation will be prepared by the

responsible Federal agency for that particular activity. Therefore, the Department has determined that the consultation process addressed by these guidelines will have no significant impact on the quality of the human environment which would require the preparation of an environment impact statement.

2. *Statement of Effects:* The Department of the Interior has determined that these interpretive guidelines are not a major rule under E.O. 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act. These guidelines will result in minimal cost to Federal agencies and some economic effects on local firms and businesses to the extent that they are engaged in activities excepted by section 6 of CBRA and paid for or assisted by Federal funds.

3. *Paperwork Reduction Act:* These interpretive guidelines do not contain information collection requirements and thus the requirements of the Paperworks Reduction Act do not apply. This is because all information required in the consultation process is to be submitted to the Service by the Federal agency involved.

4. *Authorship Statement:* This document has been prepared by Frank McGilvrey of the U.S. Fish and Wildlife Service.

5. *Identification of Subjects:* An identification of subjects is not necessary because this document is not designed to be codified in the Code of Federal Regulations.

Coastal Barrier Resources System: Prohibition on New Federal Expenditures and Procedures for Consultation

I. Definitions and Limitations

Financial Assistance

The Act, with certain exceptions, prohibits Federal expenditures and financial assistance for development within the Coastal Barrier Resources System.

Section 3(3) of CBRA defines "financial assistance" as: "any form of loan, grant, guaranty, insurance, payment, rebate, subsidy, or any other form of direct or indirect Federal assistance." On October 1, 1983, this definition will also include Federal flood insurance.

Section 5(a) of the Act provides the general prohibition on new Federal expenditures and financial assistance in System units and provides a listing of specifically prohibited expenditures or assistance. Section 5(a) states:

Except as provided in Section 6, no new expenditures or new financial assistance may be made available under authority of any Federal law for any purpose within the Coastal Barrier Resources System, including, but not limited to:

- (1) Construction or purchase of any structure, appurtenance, facility or related infrastructure;
- (2) Construction or purchase of any road, airport, boat landing facility on, or bridge or causeway to, any System unit;
- (3) Assistance for erosion control or other stabilization of any inlet, shoreline, or inshore area, except in certain emergencies.

The Department has identified additional specific examples of Federal program expenditures and financial assistance prohibited in units of the Coastal Barrier Resources System. We interpret the Act to include, but not be limited to, the following programs:

Department of Agriculture

Farmers Home Administration

—Loans for rural disaster relief, water systems, wastewater systems, commercial development, community services, and subdivision development.

Rural Electrification Administration

—Loans for new or expanded electrical systems that would encourage development.

Department of Commerce

Economic Development Administration

—Grants for planning and administering local economic development programs.

Office of Coastal Zone Management

—CEIP grants (coastal energy improvement program).

Department of Defense

U.S. Army Corps of Engineers

—Construction and financial assistance involving beach erosion control, hurricane protection, flood control works, and new or expanded navigation projects.

Department of Energy

—Energy development programs.

Department of Housing and Urban Development

- Block grants for community development.
- Mortgage insurance, housing assistance or rehabilitation subsidy programs.
- Urban Development Action Grants.

Department of the Interior*National Park Service*

—Grants to States for historic preservation, survey, and planning, land acquisition and development of protected areas, and for preparation of State Comprehensive Outdoor Recreation Plans through the Land and Water Conservation Fund (where development of coastal barriers is addressed). (See discussion of Section 6 for exceptions.)

Department of Transportation*Federal Aviation Administration*

—Grants for airport planning and development.

Federal Highway Administration

—Federal assistance to States for highway construction

Urban Mass Transportation Administration

—Capital improvement and operating grants.

Environmental Protection Agency

—Grants for wastewater treatment construction (Sec. 201 grants), water quality management planning (Sec. 208 grants).

Federal Emergency Management Agency

—Federal National Insurance Program.
—Disaster assistance program.

Federal Home Loan Administration

—Guaranteed housing loans.

General Services Administration

—Construction or reconstruction of Federal property.
—Exchange or sale of Federal property for development purposes.

Small Business Administration

—Loans to small businesses for disaster relief, upgrading of water treatment systems, and other purposes.
—Disaster assistance to homeowners.

Veterans Administration

—Guaranteed housing loans.

This list may not be all inclusive. Each Federal agency is responsible for review of its programs to assure compliance with CBRA.

"New" Expenditures

CBRA's limitations on Federal expenditures and financial assistance are only applicable to "new" expenditures or "new" financial assistance. Section 5(a) specifically provides that:

Except as provided in Section 6, no new expenditures or new financial

assistance may be made available under authority of any Federal law for any purpose within the Coastal Barrier Resources System . . .

Section 5(b) articulates when an expenditure or financial assistance is established to be "new" and therefore precluded. Section 5(b) provides:

(b) An expenditure or financial assistance made available under authority of Federal law shall, for purposes of this Act, be a new expenditure or new financial assistance if—

(1) In any case with respect to which specific appropriations are required, no money for construction or purchase purposes was appropriated before the date of the enactment of this Act; or

(2) No legally binding commitment for the expenditure or financial assistance was made before such date of enactment.

As further established by the legislative history, this subsection creates a dual definition. The concept of new expenditures or new financial assistance is defined in terms of actions that require specific appropriations and actions that do not require specific appropriations.

First, a Federal expenditure or financial assistance that does not rest upon a specific appropriation is new, and therefore precluded, unless a legally binding commitment for the site-specific expenditure or financial assistance was made before October 18, 1982, when the President signed the bill into law. The applicable date for Federal flood insurance is October 1, 1983. General intentions, statements of intent or policy are not adequate. A legally binding commitment is one that establishes a right to the funds in question as a matter of law; that is, the right must be an obligation against the United States. Necessarily, such an obligation must rest upon the availability of appropriations in existence prior to the cut-off date of October 18, 1982, or on specific contract authority to obligate funds of the United States in advance of appropriations. There is no general authority to obligate funds of the United States absent the availability of appropriations from the Congress. Such an obligation would be in violation of the Anti-Deficiency Act.

Second, expenditures or financial assistance with respect to which specific appropriations are required are self-evident. These are discrete Federal expenditures—not operating on a general program appropriation as provided above—that are funded by individual line item reference directly within a specific appropriation act. This is typically done by recitation of a

specific project name. Such a specific appropriation prior to October 18, 1982, permits the Federal expenditure of financial assistance to continue. Absent such a specific appropriation of the funds in question, however, the expenditure or financial assistance would be "new" and would be precluded.

II. Exceptions and Consultation

Section 6 of the Act outlines the specific exceptions to the general prohibition on new Federal expenditures or financial assistance. The law grants exceptions for energy projects which can only be carried out within the System; maintenance of channel improvements; maintenance of roads, structures or facilities that are essential links to a larger network or system; military activities essential to national security; and Coast Guard facilities. In addition to these five specific exceptions, Section 6(a)(6) outlines seven other activities that may be excepted if the activity is consistent with the purposes of the Act.

Section 6(a) of the Act requires the appropriate Federal officer to consult with the Secretary of the Interior before making any Federal expenditures or financial assistance available under the provisions of Section 6. Procedures for consultation follow the discussion of exceptions.

Exceptions

(1) *Energy projects (Section 6(a)(1)).* Federal assistance may be made available for energy projects in or adjacent to coastal areas for "any use or facility necessary for the exploration, extraction, or transportation of energy resources which can be carried out only on, in, or adjacent to coastal water areas because the use or facility requires access to the coastal water body." The legislative history (House Report 97-841) states that "this provision is intended to be read broadly in terms of energy projects. However, the provision should not be interpreted to allow assistance for projects primarily designed to encourage development but which might be carried out in the guise of energy development."

(2) *Channel improvements (Section 6(a)(2)).* Maintenance of existing channel improvements and related structures, such as jetties can continue. The use of disposal sites for dredge materials is included under this exception, so long as the sites are related to, and necessary for, the maintenance of an existing project. Section 6(b) requires that an existing channel improvement or an existing

related structure be funded, in part or totally, before the date of enactment; i.e., the channel must have existed or have had funds appropriated for construction before October 18, 1982. According to the legislative history, this is not a license or authority for construction of new channels.

The legislative history also states that "the criterion for determining whether Federal assistance would or would not be precluded is the existence of the channel at the time of enactment of the legislation. If it is in existence, or if money has been appropriated for its construction, then any Federal financial assistance for activities to maintain it, including, for example, the complete reconstruction of jetties or other structures, would be permitted. It is also the Committee's intent that, because of the unstable nature of barrier islands, existing channels can be relocated periodically." (House Report 97-841 at page 16).

(3) *Roads, Structures or Facilities (Section 6(a)(3)).*

Maintenance, replacement, reconstruction, or repair, but not expansion, of publicly owned or publicly operated roads, structures, or facilities that are *essential links in a larger network or system* can continue. This exception differs from that of Section 6(a)(6)(F), which pertain to roads, structures or facilities that may not be essential links in a larger system or network.

The legislative history indicates the Congressional intent to include drains, gutters, curbs and other related roadworks under this exception. The House Report also emphasizes that financial assistance will not be provided for the expansion of such structures, roads or facilities. (House Report 97-840).

The Service interprets "structures or facilities" to include public utilities. Section 6(a)(6)(F) is also applicable to public utilities that are not essential links in a larger system.

(4) *Military activities (Section 6(a)(4)).* Military activities *essential to national security* are *excepted* from the ban on Federal expenditures, but not from the requirement to consult. The Defense Department will be the judge of what is essential to national security, but, as stated in Conference Report 97-928, its "determination as to whether military activities are essential to national security must be made in accordance with existing law and procedures." The Defense Department still has the responsibility to consult with the Service with respect to any expenditures or financial assistance within the System

(5) *Coast Guard (Section 6(a)(5)).* Expenditure of funds or provision of financial assistance for the construction, maintenance, operation and rehabilitation of Coast Guard facilities can continue.

(6) *Conservation, navigation, recreation, scientific research, disaster relief, roads, shoreline stabilization (Section 6(a)(6)).* The following actions or projects are *excepted, providing the expenditure is consistent with the purposes of the Act*, which are detailed in Section 2(b) (i.e., to minimize loss of human life, wasteful Federal expenditures and damage to fish, wildlife and other natural resources):

(A) Projects for the study, management, protection and enhancement of fish and wildlife resources and habitats, including, but not limited to, acquisition of fish and wildlife habitats and related lands, stabilization projects for fish and wildlife habitats, and recreational projects.

The legislative history states: "This exception recognizes the value of System units as fish and wildlife habitats and is in complete conformity with the purposes of the legislation. It is intended that the full range of Federal financial assistance authorized for protecting and managing fish and wildlife habitats will continue to be available. This includes, where necessary, assistance for stabilization projects to protect valuable habitats. Federal funds for projects involving facilities for fish and wildlife-related recreation would also be allowed. It is intended by the Committee that any development of recreational facilities be consistent with the purposes of the legislation." (House Report 97-841.)

(B) The establishment, operation, and maintenance of air and water navigation aids and devices, and for access thereto.

The legislative history indicates that, in almost every instance, placement and use of such aids and devices on undeveloped coastal barriers would be appropriate. (House Report 97-841.)

(C) Projects under the Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601-4 through 11) and the Coastal Zone Management Act of 1972 (16 U.S.C. 1451, et seq.)

Clearly the legislative history applied to Section 6(a)(6)(A) would be generally applicable to this provision as well. Recreational use of system units should be encouraged so long as it is accomplished consistent with the purposes of the Act.

(D) Scientific research, including but not limited to aeronautical, atmospheric, space, geologic, marine, fish and wildlife

and other research, development and applications.

The Department interprets this part to include archeological surveys undertaken pursuant to existing law and procedures.

(E) Assistance for emergency actions essential to the saving of lives and the protection of property and the public health and safety, if such actions are performed pursuant to Sections 305 and 306 of the Disaster Relief Act of 1974 (42 U.S.C. 5145 and 5146) and Section 1362 of the National Flood Insurance Act of 1968 (42 U.S.C. 4103) and are limited to actions that are necessary to alleviate the emergency.

Section 305 of the Disaster Relief Act authorizes the President, in a declared emergency, to provide any or all of the assistance available under the Act as the President deems appropriate.

(F) The maintenance, replacement, reconstruction, or repair, but not the expansion, of publicly owned or publicly operated roads, structures, or facilities. There is a distinction between this exception, which may be applied if the action is consistent with the purposes of the Act, and the exception cited in Section 6(a)(3), which requires that the road, structure or facility be one that is an essential link in a larger network or system. Thus a road which otherwise qualifies for a Section 6(a)(3) exemption need not satisfy the additional requirement that its construction is consistent with the purposes of CBRA.

(G) Nonstructural projects for shoreline stabilization that are designed to mimic, enhance, or restore natural stabilization systems.

The legislative history cites the planting of dune grass or other beach nourishment activities as examples of these projects.

III. Consultation

Federal agencies must consult with the Fish and Wildlife Service and allow the opportunity to provide written comment prior to making Federal expenditures or financial assistance available for an action excepted under Section 6 of CBRA within a CBRS unit. Compliance with this provision of the law rests initially on the Federal officer responsible for making the funds or financial assistance available for a permitted action. The Service's responsibility is to respond to a consultation request by providing technical information and comments on the question of consistency with CBRA. The final determination whether action permitted under this section is consistent with the purposes of the Act rests with the consulting agency.

Consultation Process

The consultation process should be carried out at two operational levels.

First, discrete projects identified in an agency's budget proposal should be submitted to the Fish and Wildlife Service, Department of Interior, for comment at least 45 days prior to transmittal to OMB. The Fish and Wildlife Service will acknowledge receipt of the transmittal, review the project, consult with the agency as necessary and provide a written response within 30 days.

On projects that are subject to provisions of The National Environmental Policy Act, consultation should be accomplished early enough to permit the results to be included in the draft environmental impact statement or other appropriate environmental documents.

Second, consultation requests for projects such as channel maintenance or highway repair or other expenditures that are managed by agency field-level officials should be made through the appropriate Regional Director of the Fish and Wildlife Service. (Regional Office addresses are appended).

The Act provides for two levels of exception. Section 6(a)(1-5) clearly allows certain designated Federal activities. When consulting on these activities, the Service will provide technical information and register an opinion as to whether the activity is one which the clause allows.

Section 6(a)(6) provides an additional caveat for the included list of exceptions that require that the action "... is consistent with the purposes of this Act."

For activities falling under this subsection, the Service will also comment on the consistency of the proposed action with the purposes of CBRA as stated in Section 2(b): "... to minimize the loss of human life, wasteful expenditure of Federal revenues, and damage to fish, wildlife and other natural resources associated with coastal barriers along the Atlantic and Gulf coasts."

The requirements of Sections 305 and 306 of the Disaster Relief Act make prior consultation impractical in responding to a national disaster. However, the Service will participate in Regional Task Forces for disaster and emergencies. Permanent replacement activities related to Section 6(a)(1)-(5) will require consultation prior to commitment of funds.

Several Federal agencies have requested clarification of certain exceptions or have rendered an opinion as to their interpretation. Bilateral discussions between each affected agency and the Fish and Wildlife Service should be initiated to clarify these concerns and to establish procedures for the conduct of consultations. The Service's consultation officer is Mr. Frank McGilvrey, (202) 343-2618. Each agency that anticipates proposing expenditures

or financial assistance within the System under the Section 6 exceptions should have its consultation officer contact Mr. McGilvrey at its earliest convenience to establish consultation procedures.

Dated: September 29, 1983.

G. Ray Arnett,

Assistant Secretary for Fish and Wildlife and Parks.

Appendix 1—Pertinent Regional Offices

U.S. Fish and Wildlife Service, Post Office Box 1306, Albuquerque, New Mexico 87103: Assistant Regional Director—Habitat Resources; Telephone: 505-766-2324, FTS: 8-474-2324, CBRA jurisdiction—Texas.

U.S. Fish and Wildlife Service, Richard B. Russell Federal Building, 75 Spring St. S.W., Atlanta, Georgia 30303: Assistant Regional Director—Habitat Resources; Telephone: 404-221-6343, FTS: 8-242-6343; CBRA Jurisdiction—Louisiana, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina.

U.S. Fish and Wildlife Service, One Gateway Center, Newton Corner, Massachusetts 02158: Assistant Regional Director—Habitat Resources; Telephone: 617-965-5100 ext. 9217, FTS: 8-829-9217; CBRA Jurisdiction—Virginia, Delaware, New York, Connecticut, Rhode Island, Massachusetts, Maine.

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