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Memorandum

To: Shannon Estenoz
Assistant Secretary for Fish and Wildlife and Parks

From: Sarah Krakoff
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Subject: Coastal Barrier Resources Act

Introduction

Congress passed the Coastal Barrier Resources Act (CBRA), 16 U.S.C. § 3501 et seq., to restrict federal funds from being used on projects that could result in harmful development of coastal barriers. The CBRA delineated the areas subject to the Act's protections by establishing the John H. Chafee Coastal Barrier Resources System (System). 16 U.S.C. §§ 3502(6) and 3503(a). Within the System, CBRA prohibits Federal financial support for the development of coastal barriers, with limited exceptions defined in Section 6 of the Act, including for "[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).

On October 30, 2019, the Associate Solicitor, Division of Parks and Wildlife, issued a memorandum concluding that Section 6(a)(6)(G) of the CBRA, 16 U.S.C. § 3505(a)(6)(G), permits Federal funding for using sand removed from within the System to support shoreline stabilization projects located outside the System. The 2019 memorandum reversed the Department's earlier position, held since 1994, that the exemption allowing Federal funding for shoreline stabilization applies only to projects within the System, and not to projects that rely on resources exported from the System for use outside System boundaries.

The interpretation in the 2019 memorandum was adopted by Secretary Bernhardt as the Department's position¹ and subsequently challenged in *National Audubon Soc'y v. Haaland*, No. 20-5065 (S.D.N.Y.). Pursuant to Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,"² I reviewed the 2019

¹ 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, Nov. 4, 2019.

² Section 1 of Executive Order 13990 states that it is national policy "to improve public health and the environment," and directs that agency heads "shall immediately review all existing regulations, orders, guidance documents, policies, and any other similar agency actions promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, the policy set forth in section 1 of this order."

memorandum and am now rescinding it. As explained below, the better interpretation of CBRA's statutory text is that the exemption in Section 6(a)(6)(G) applies only to projects designed to stabilize shorelines located within the System. This interpretation furthers the Act's goals of minimizing wasteful expenditures of Federal funds and damage to fish, wildlife, and other natural resources, and is supported by the Act's plain language, structure, and legislative history.

Background

When it enacted CBRA, Congress found that coastal barriers contain significant cultural and natural resources, including wildlife habitat and spawning areas, and function as natural protective buffers against storms. *See* 16 U.S.C. § 3501(a). Congress further found that coastal barriers are generally unsuitable for development. *Id.* § 3501(a)(3). It enacted CBRA to restrict Federal expenditures that encourage development of coastal barriers in order to minimize the loss of human life and damage to natural resources within those areas. *Id.* § 3501(b). Section 5(a) of the Act prohibits new Federal expenditures and financial assistance for development activities occurring within the System. *Id.* § 3504(a).³ Section 6 of the Act sets forth exceptions to the prohibition, including for “[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 interpreted Section 6's exemption provision to apply only 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 (“FWS”), at 1 (exemption 6(a)(6)(G) “does not apply to projects to renourish beaches outside the System even if the other requirements of section 6(a)(6)(G) are met”). In October 2019, the Associate Solicitor, Division of Parks and Wildlife, reversed the 1994 opinion. Memorandum from Associate Solicitor, Division of Parks and Wildlife to Principal Deputy Director, FWS (October 30, 2019). I have reviewed the October 2019 opinion and conclude that the better reading of the statutory provision is consistent with the 1994 memorandum, which FWS followed for nearly 25 years.⁴ This memorandum supplements the analysis in the 1994 opinion and supersedes the October 2019 memorandum.

Discussion

The CBRA's plain language indicates that Congress intended the exemption from Federal funding prohibitions to apply only to shoreline stabilization projects within the System, and not to projects that export System resources to stabilize shorelines outside of the System. This reading of the Act is supported by the statutory scheme and consistent with the Act's legislative history.

³ Section 5 lists narrow exceptions for non-development purposes and for emergencies. *See* 16 U.S.C. § 3504(a)(3).

⁴ The U.S. Army Corps of Engineers and other affected Federal agencies were also accustomed to applying that interpretation. We note that FWS does not have authority under the Act to prohibit an agency's proposed action. Rather, the agency proposing to expend Federal funds or provide financial assurance is independently responsible for compliance. Consistency in FWS's interpretation will assist other agencies that are evaluating whether their shoreline-stabilization projects meet the requirements of the exception.

A. The Plain Language of the Statute Exempts Only Shoreline-Stabilization Projects That Occur Within the System.

An analysis of the statutory text is the starting point for determining congressional intent. *See Eagle Pharms., Inc. v. Azar*, 952 F.3d 323, 330 (D.C. Cir. 2020) (“Of the tools of statutory interpretation, “[t]he most traditional tool, of course, is to read the text.”) (citation omitted). CBRA Section 5 imposes limitations on Federal expenditures affecting the System, including shoreline stabilization projects:

Except as provided in section 3505 of this title, no new expenditures or new financial assistance may be made available under authority of any Federal law for any purpose within the System, including, but not limited to—

(3) the carrying out of any project to prevent the erosion of, or to otherwise stabilize, any inlet, shoreline, or inshore area, except that such assistance and expenditures may be made available on units designated pursuant to section 3503 of this title on maps numbered S01 through S08 and LA07 for purposes other than encouraging development and, in all units, in cases where an emergency threatens life, land, and property immediately adjacent to that unit.

16 U.S.C. § 3504(a).

Section 6 of the Act sets forth certain exceptions to the limitations in Section 5, including an exception for shoreline-stabilization projects that meet certain requirements:

Notwithstanding section 3504 of this title, the appropriate Federal officer, after consultation with the Secretary, may make Federal expenditures and may make financial assistance available within the System for the following:

(6) Any of the following actions or projects, if a particular expenditure or the making available of particular assistance for the action or project is consistent with the purposes of this chapter:

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

16 U.S.C. § 3505(a). The introductory paragraph of Section 6 imposes two conditions: (1) the Federal officer must consult with the Secretary and (2) the Federal expenditures or financial assistance must be made “within the System.” The structure of subpart (a), an introductory paragraph ending in a colon followed by a numbered list, indicates that the introductory paragraph should be read in conjunction with each of the paragraphs that follow. The most natural reading of Section 6(a) is that each of the projects and actions described in subparts (1)-(6) must occur “within the System.”

Support for this reading is found in the text of Section 6(a)(6). That provision refers to a “particular expenditure” or “particular assistance,” suggesting that it applies to a subset of the expenditures referenced in the introductory paragraph to Section 6(a). Thus, Section 6(a)(6) also incorporates the phrase “within the System” because that language modifies the expenditures and assistance that may qualify for an exemption.⁵

As a practical matter, the exceptions in Section 6 do not make sense if read in isolation without referring to the introductory paragraph, such that “within the System” refers to the location of the project. Section 5 prohibits expenditures “for any purpose within the System.” “Purpose” is not defined in the Act, but it can reasonably be understood in this context as meaning a project or activity that is occurring within the System. Section 6 then provides exceptions to that prohibition. 16 U.S.C. § 2505(a) (“Notwithstanding section 3504 ...”). Therefore, each activity that may be exempted through Section 6 is one that would otherwise be prohibited by Section 5 (i.e., occurring “within the System”).

A provision that illustrates this point is Section 6(a)(6)(F), which applies to the “maintenance, replacement, reconstruction, or repair, but not the expansion, of publicly owned or publicly operated roads, structures, or facilities.” Section 5 does not restrict Federal funding of projects to expand roads, structures or facilities if the project area is located *outside* of the System. Because those projects would not be prohibited by the Act in the first instance, there is no need to exempt them under Section 6. Therefore subpart (6)(F) makes sense only if it is read to apply to projects occurring “within the System,” a restriction that results from the presence of that phrase in the introductory paragraph of Section 6.⁶

The 2019 opinion reached the opposite conclusion. Based on the “Rule of the Last Antecedent,”⁷ the 2019 opinion concluded that the phrase “within the [System]” must be read in conjunction with the immediately preceding phrase and therefore modifies only “Federal expenditures or financial assistance.” The better reading of the statutory language is that “within the System” in the introductory paragraph applies to each subpart that follows. The last antecedent rule should not be applied here because it leads to a strained reading of the statutory text and does not further the purposes of the Act. *See Lockhart v. United States*, 577 U.S. 347, 352 (2016) (“Of course, as with any canon of statutory interpretation, the rule of the last antecedent ‘is not an absolute and can assuredly be overcome by other indicia of meaning.’”) (citation omitted).

The October 2019 opinion also relied on the absence of the phrase “within the System” in Section 6(a)(6) to conclude that the phrase applies only to where the Federal funds associated

⁵ Subpart (6) of Section 6(a) has the same structure: an introductory paragraph ending in a colon followed by a numbered list. For the same reasons, each of the projects and actions described in subparts (A) through (G) must occur “within the system.”

⁶ This reasoning applies equally to Section 6(a)(3), which exempts projects for “[t]he 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.” 16 U.S.C. § 3505(a)(3). Projects that are not “essential links” must meet the additional requirement in Section 6(a)(6) that they be “consistent with the purposes” of the statute. *See* 16 U.S.C. § 3505(6) and (6)(F).

⁷ *See* October 2019 opinion at 2, citing *Hays v. Sebelius*, 589 F.3d. 1279 (D.C. Cir. 2009) (the “Rule of the Last Antecedent” 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”).

with removing sand may be expended and does not limit where the sand may be applied for the purpose of shoreline stabilization. Interpreting the statute to allow federal funds to be spent within the System for a project occurring outside of the System is a strained reading. Federal funds are not authorized in a vacuum; rather, they are authorized for a particular project. In the context of exemption 6(G), that project is a “nonstructural project for shoreline stabilization.” The exemption is not for sand mining, it is for the *project*. The sand removal and its placement in another location are portions of a single action or project, and “within the System” should be read to limit the location of all components of the project. This interpretation is consistent with the general principle that a statutory exception should be interpreted narrowly. *Knight v. Comm'r*, 552 U.S. 181, 190 (2008) (where “a general statement of policy is qualified by an exception,” the Court is inclined to “read the exception narrowly in order to preserve the primary operation of the provision”).

Other provisions of the Act further support this interpretation. See *U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (“Over and over we have stressed that ‘[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.’”) (citation omitted). Congress did not broadly restrict Federal funding for activities on *all* coastal barriers, which would have accomplished its goal of minimizing damage to the important resources located in those areas. Instead it established the System, 16 U.S.C. § 3503, and limited Federal expenditures that would “affect[] the System.” *Id.* § 3504. It follows that the focus of the limitations in Section 5, and the exceptions thereto in Section 6, apply only to areas within the System.⁸

This interpretation is also consistent with the statutory purposes, which are explicitly referenced in Section 6(a)(6). Unlike the exceptions in Section 6(a)(1)-(5), expenditures for actions or projects exempted by Section 6(a)(6) must satisfy the additional requirement that they are “consistent with the purposes of [the Act].”⁹ The statutory purposes are “to minimize the loss of human life, wasteful expenditure of Federal revenues, and the damage to fish, wildlife, and other natural resources associated with the coastal barriers along the Atlantic and Gulf coasts and along the shore areas of the Great Lakes.” 16 U.S.C. § 3501. These goals are accomplished by “restricting future Federal expenditures and financial assistance which have the effect of encouraging development of coastal barriers.” *Id.* Requiring an entire project—both the sand removal and the placement of the sand elsewhere for shoreline stabilization—to occur within the System is likely to result in fewer projects qualifying for the exemption than the opposite interpretation. This results in less Federal funding for such projects and less sand removal from System units.

Finally, Section 6(d) provides an exception for “Services and facilities outside [the] System.” 16 U.S.C. § 3505(d). The exception allows “expenditures or assistance provided for services or

⁸ The 2019 opinion did not directly address whether the other exceptions in Section 6(a) should likewise be read to apply to activities occurring outside of the System. This led to confusion among FWS staff regarding whether they must consider portions of a project that are located outside of the System when evaluating the other statutory exceptions. Our current interpretation has the advantage of treating the exceptions in a consistent manner and avoiding such confusion.

⁹ See S. Rep. 97-419 at 7 (“[f]unds for other specific projects are also permitted provided they are carried out in a manner consistent with the purposes of the Act”).

facilities and related infrastructure located *outside the boundaries* of [System] unit T-11,” an area on South Padre Island, Texas. *Id.* § 3505(d)(1) (emphasis added). Congress granted a specific exception for this System unit to allow Federal funds to be used for activities outside the boundaries of the unit that “relate to an activity within that unit.” *Id.* This implies that the other exceptions in Section 6 do *not* authorize Federal funding for off-unit activities, such as depositing sand mined from System units.

In light of the plain language of Section 6(a)(6)(G) and the statute as a whole, the better reading of the statutory text is that the exemption is limited to shoreline stabilization projects located within the System. The Act’s legislative history, discussed below, further bolsters this conclusion.

B. The Legislative History Supports the Interpretation that the Shoreline-Stabilization Exception is Limited to Projects Occurring Within the System.

The Act’s legislative history supports the interpretation that shoreline-stabilization projects must occur within the System. As explained above, Section 6 provides limited exceptions to Section 5(a), which prohibits new expenditures or financial assistance “for any purpose” within the System. The legislative history provides examples of the prohibited purposes, which are specific actions or projects such as “the construction of roads and bridges, sewers, or federally guaranteed loans, such as VA or FHA loans for home construction.” S. Rep. 97-419 at 7. The prohibition applies only “within the Coastal Barrier Resource System, as delineated on the maps.” *Id.* Having determined that areas within the System were worthy of protection, it follows that Congress intended the exceptions for activities that might damage these areas—such as shoreline stabilization—to be narrowly construed.

Congress intended to limit Federal funding of projects that result in development of coastal barriers:

Intense development and human use of coastal barriers have also caused diminished productivity in these important natural resource areas. Disposing sewage effluents, dredging canals and channels, filling wetlands, leveling dunes, clearing vegetation, constructing hurricane and erosion control projects, stabilizing inlets, and other activities often spell trouble for the coastal barrier ecosystems that protect and often sustain natural resources of immense aesthetic and economic value The intent of the legislation is that all forms of direct Federal assistance for projects ... be precluded.

House Report 97-841, Part 1; *see also* Coastal Barrier Resources System: Hearing before the Subcomms. on Fisheries and Wildlife Conservation and the Environment and on Oceanography of the House Comm. On Merchant Marine and Fisheries, 101st Cong., 1st Sess. 2 (1989) (statement of Rep. Gerry Studds) (“For decades, the federal government worked against itself, spending millions to acquire and protect some undeveloped coastal barriers and billions to subsidize development on other barriers. The CBRA was intended to stop all that, to establish the principle that those who wish to develop undeveloped coastal barriers shall do so at their own risk and expense and not at the risk and expense of the federal taxpayer.”).

The legislative history shows that Congress viewed beach renourishment as an unwise investment of Federal funds. Such projects were disfavored because removal of sand from a system unit could endanger extant communities, and because replenishing beaches elsewhere could encourage development of vulnerable beachfront areas. The Senate Committee Report explains that, because “[s]torms and other natural processes inevitably undermine the attempt to stabilize [developed areas],” federal outlays for that stabilization will necessarily be “lost and . . . replaced with new Federal investment in a continuing cycle of wasted Federal funds.” S. Rep. No. 97-419 at 2–3 (1982). Likewise, the House Committee Report criticizes the practice of “artificial beach nourishment,” explaining that the CBRA should “preclude” “all forms of direct Federal assistance for projects,” including “[f]ederal assistance for erosion control.” H.R. 97-841, at 9, 15 (1982).

The legislative history reflects that Congress intended to reduce Federal funding of coastal development generally, and shoreline stabilization specifically. Consistent with this, Congress authorized expenditures under very limited circumstances for projects that meet the statutory requirements. *See* 16 U.S.C. § 3505(a)(6)(G) (projects “designed to mimic, enhance, or restore natural stabilization systems” and “consistent with the purposes of the Act”). An interpretation that allows System units to be mined for resources, such as sand and gravel, that would be used for projects outside of the System is inconsistent with congressional intent. By contrast, the interpretation that restricts Federal funds to projects within System units advances Congress’s goals by narrowly construing the exception for nonstructural projects for shoreline stabilization.

Conclusion

The CBRA exception that allows Federal funding of nonstructural projects for shoreline stabilization is limited to projects designed to stabilize shorelines within the System. In the context of a beach-renourishment project, sand from a System unit may not be used to renourish a beach located outside of the System, even if the other requirements of Section 6(a)(6)(G) are met.