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To: Assistant Regional Director
Fish and Wildlife Enhancement
FWS, Atlanta, Georgia

From: Charles P. Raynor
Assistant Solicitor
Fish and Wildlife

Subject: Coastal Barrier Resources Act Consultation on Sewer
Service to South South Beaches Area in Brevard County,
Florida

Brevard County, Florida proposes to extend the service area of an existing Federally-funded sewage treatment plant both to and across a unit of the Coastal Barrier Resources System (CBRS) established by the Coastal Barrier Resources Act (CBRA). You have concluded, and we agree, that the CBRA prohibits extending the service area to the CBRS unit. You have also asked whether the CBRA would allow an extension of service across the CBRS unit if (1) construction through the CBRS unit were limited to the existing U.S. highway right-of-way through the unit, and (2) no connections or service were allowed to support any development within the unit. In our view, as explained in more detail below, service could be extended through the unit only if (1) no federal funds are used to cover the costs of the sewer line through the unit, including not only construction costs, but future costs such as maintenance and repairs, and (2) service from the Federally-funded plant to the CBRS unit is absolutely prohibited.

BACKGROUND

Brevard County, Florida proposes to extend the service area of the existing Federally-funded South Beaches Regional Wastewater Facility south to serve the South South Beaches area, which includes the Coconut Point Unit (PO-9A) of the CBRS. The Coconut Point Unit lies between the existing wastewater facility and the major portion of the South South Beaches area. The U.S. Environmental Protection Agency (EPA) has asserted that, since the existing facility is supported by EPA grant funds, the CBRA prevents the EPA from approving any extension of service to the CBRS unit or that would support or encourage development within the unit. This position is consistent with that adopted by this office. See letter dated May 23, 1986 from Gale A. Norton, Associate Solicitor to Ruth M. Fountain, Farmers Home Administration concluding that section 5 of the CBRA, 16 U.S.C.

3504, prevents Federal agencies from funding or assisting activities outside of a CBRS unit that have as their purpose serving the unit. The County contends, however, that development of the South South Beaches area is likely to proceed whether or not sewer service is extended to the area and that it is economically unsound to serve the area south of the Coconut Point Unit with a separate wastewater treatment facility. Moreover, the County asserts that development in the absence of sewer service will be based on septic tanks or package plants, which will have significant adverse effects on water quality and shellfish. For these reasons, the County wishes to extend the service area of the existing facility both to and across the CBRS unit.

The EPA agreed with the County to consult with the Fish and Wildlife Service on a compromise sewer service plan. Under this plan, Brevard County would be authorized to provide sewer service from the existing wastewater facility to the area south of the CBRS unit subject to two principal conditions:

1. Construction of the sewer line through the CBRS unit will be limited to the existing right-of-way for U.S. Highway 1A.
2. No connections will be made to the sewer line through the unit and no service will be provided to support any existing or future development within the unit.

Although the EPA has not requested consultation on serving the CBRS unit itself, the County clearly is still interested in this issue. We therefore will consider it as well.

DISCUSSION

Section 5(a) of the CBRA provides, in pertinent part:

[e]xcept 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

These purposes include, but are not limited to "the construction or purchase of any structure, appurtenance, facility or related infrastructure," section 5(a)(1), and clearly include sewage facilities such as sewage lines, H.R. Rep. No. 841, 97th Cong., 2d Sess. 15 (Sept. 21, 1982). Section 5 clearly prohibits Federal funding of the construction or purchase of structures or facilities within the CBRS, Sen. Rep. No. 419, 97th Cong., 2d Sess. 6-7 (May 26, 1982), but also prohibits Federal funding of activities outside the CBRS that have purposes within the CBRS, see May 23, 1986, letter from Gale A. Norton to Ruth M. Fountain, supra. Section 5 in no way prevents private or State or local government funding of activities with purposes within the CBRS. Sen. Rep. No. 419, 97th Cong., 2d Sess. 7 (May 26, 1982). Section 5 applies without regard

to whether a particular project is designed to benefit an area outside the CBRS. H.R. Rep. No. 928, 97th Cong., 2d Sess. 13 (Oct. 1, 1982).

Section 6 provides that, notwithstanding the general prohibition in section 5, a Federal agency may make Federal funds available for projects having purposes within the CBRS if the agency consults with the Secretary of the Interior and if the activity to be funded is covered by one of the specific exceptions set forth in section 6. Only two of the exceptions are directly applicable to the proposed extension of sewer service to the South South Beaches area. Section 6(a)(3) provides an exception for:

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.

The section 6(a)(6)(F) exception is similar, except that it applies to roads, structures, or facilities whether or not they are essential links in a larger system and applies only if Federal funding of the activity would be consistent with the purposes of the CBRA.

Extension of Sewer Service to the Coconut Point Unit

Extension of sewer service from the existing Federally-funded facility to the Coconut Point Unit clearly would constitute Federal financial assistance for a purpose within the CBRS and therefore would be generally prohibited by section 5. Moreover, since the extension of service would constitute an expansion of a publicly-owned or operated structure or facility, it could not qualify under either section 6(a)(3) or 6(a)(6)(F) for an exception from the section 5 prohibition. Furthermore, no other section 6 exception covers the proposed extension of sewer service to the CBRS unit.

Brevard County has asked the Service to consider whether the environmental benefits that may ensue from the proposed extension could nonetheless justify an exception from the funding prohibition. The County contends that the South South Beaches area, including the CBRS unit, will be developed based upon septic tanks and package plants if sewer service is not extended to the area. These can result in detrimental environmental impacts, including water pollution and shellfish contamination. The County asserts that an exception from the CBRA Federal funding prohibition is warranted, because these adverse environmental impacts would be avoided if the South South Beaches area were linked up to the existing wastewater facility.

We acknowledge that such an exception might be sensible and even consistent with the purposes of the CBRA. The CBRA does not, however, contain such a general environmental cost-benefit

exception to the general funding prohibition. The only exceptions are those in section 6, and, as discussed above, none applies to the County's proposal.

Extension of Service Through the Coconut Point Unit to the South South Beaches Area

The EPA's request for consultation assumes correctly that service from the existing Federally-funded wastewater facility may not extend to the Coconut Point Unit. The EPA has instead asked whether a sewer line may be built through the Coconut Point Unit to serve the area south of the Unit. The EPA would require that the line be constructed on the existing right-of-way of U.S. Highway AIA and that no connections or service be allowed to the Unit.

This proposal may be implemented under CBRA only if no Federal funds or financial assistance are made available for the construction and future maintenance, replacement, reconstruction or repair of that portion of the line that is located within the boundaries of the Coconut Point Unit. Section 5 of the CBRA explicitly prohibits Federal expenditures or financial assistance for construction of facilities such as sewer lines within the CBRS. That the sewer line would serve or benefit only areas outside the CBRS is irrelevant. H.R. Rep. No. 928, 97th Cong., 2d Sess. 13 (Oct. 1, 1982).

The CBRA would not, however, prevent the County from serving the area south of the Coconut Point Unit via a non-Federally funded sewer line across the Unit. Such a scheme would involve neither Federal financial assistance within the CBRS nor Federal financial assistance to an activity for the purpose of serving development within a CBRS unit, each of which would be prohibited under section 5. Accordingly, the proposal referred to the Service by the EPA would not violate the CBRA prohibition on Federal funding, if EPA imposes a further condition requiring that no Federal funds will be made available for construction and future maintenance of the portion of the sewer line that would cross the CBRS unit.

Conclusion

The Coastal Barrier Resources Act prohibits the Environmental Protection Agency from allowing service from the existing Federally-funded South Beaches Regional Wastewater Facility to be extended to the Coconut Point Unit of the Coastal Barrier Resources System. The CBRA also prohibits the EPA from making Federal funds available for construction and maintenance of a new sewer line across the Unit. The EPA may, however, allow and fund extension of

service to the area south of the Unit, provided that no service is allowed from the new line to the Unit and provided further that no Federal funds are used for construction and maintenance of the portion of the line within the Unit.

For further advice please contact David Gayer (343-2172).

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