

Appendix 5

Letter from USACE to USFWS requesting an applicability determination on use of the CBRS for the proposed project dated April 28, 2017; determination letter from USFWS to USACE dated July 28, 2017; e-mail correspondence dated October 24, 2017 between USACE and USFWS regarding modifying project and use of CBRS to include addressing impacts from Hurricane Irma.



DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS, CHARLESTON DISTRICT
69A HAGOOD AVENUE
CHARLESTON, SC 29403-5107
APR 28 2017

Programs and Project Management Division

Mr. Thomas McCoy
Field Supervisor
Fish and Wildlife Service
176 Croghan Spur Road, Suite 200
Charleston, South Carolina 29407

Dear Mr. McCoy:

Since 1994, the U.S. Army Corps of Engineers (Corps) has refrained from using the Congressionally-authorized borrow site for periodic nourishment of the Folly Beach Shore Protection Project because of a 1994 reversal in policy by the Department of the Interior (DOI)/Fish and Wildlife Service (FWS). This policy reversal involved the applicability of the shoreline stabilization exception to the Project under the Coastal Barrier Resources Act (CBRA). We are asking that the DOI/FWS revisit this reversal in policy on a project-specific basis and recognize the applicability of the shoreline stabilization exception to the Project. In addition to the continued validity of the original Corps position, we believe that circumstances have changed since the mid-1990s.

By way of background, the Project was formulated by the U.S. Army Corps of Engineers (Corps), and authorized and funded by Congress, in the early 1990's based on utilization of the Folly River as the location of borrow sites for initial construction and periodic nourishment of the Project. During formulation, the Folly River borrow site was determined to be the most suitable and least costly source of nourishment material, while having limited environmental impacts. Prior to Congressional authorization of the Project, the United States Fish and Wildlife Service (FWS) in 1990 confirmed that the shoreline stabilization exception in Section 6(a)(6)(g) of the CBRA allowed use of that portion of the Folly River borrow site that fell within the Bird Key Complex (M-07) of the Coastal Barrier Resources System (CBRS). Initial construction of the Project occurred in 1993 at a cost of \$11.7 million.

In 1994 after the initial construction, DOI/FWS reversed its interpretation of the shoreline stabilization exception, concluding that the exception did not apply to projects to stabilize shoreline outside of the CBRS (sand could not be taken from within the CBRS and placed outside of the CBRS). In February 1995, the Assistant Secretary of the Army for Civil Works requested that DOI/FWS rescind its new interpretation of the statute on a number of grounds. These included: (1) impacts to the CBRS unit were not appreciable; (2) Congressional authorization contemplated use of the Folly River borrow

area; (3) Corps reliance on FWS concurrence; and (4) unexpected financial burdens on both the Federal government and non-federal sponsor. Regarding the financial burden on the Folly Beach Project, the ASA/CW estimated that the "total cost of FWS's interpretation over the remaining life of the Folly Beach renourishment project is expected to equal approximately \$36,000,000." The ASA/CW's letter also noted potential impacts to other USACE projects. However, DoI in 1995 declined to rescind its reinterpretation of Section 6(a)(6)(g) of the CBRA.

Here is why we believe that the applicability of Section 6(a)(6)(g) of the CBRA to the Project should be revisited at this time on a project-specific basis:

First, because FWS's original concurrence that the exception for shoreline stabilization *did* apply was effectively incorporated into the Congressional authorization for the Project (which *included* use of the CBRS portion of the Folly River for Project borrow material), the reversal will have had the questionable result (if followed) of adversely modifying a statutory Congressional authorization.

Second, the economic impact of DoI's reversal in policy on this project was not fully demonstrated in 1994. While it appears that DoI questioned the Corps' estimated economic burden of \$36 million over the life of the Project as a result of the policy reversal (DoI stated that "estimated future financial burdens may be inflated."), it is now abundantly clear that the economic burden was well-*understated* in 1994. Current cost projections estimate the financial burden of the FWS reinterpretation for just the remaining life of the Project (23 years after the 1994 estimate) at \$75 million. Note that the most recent periodic nourishment of the Project in 2014 came at a cost of more than \$32 million, \$15 million or 47% of which can be attributed to the requirement to use offshore borrow sites as an alternative to the authorized Folly River borrow area.¹

Third, there was also no discussion or recognition of the Project's role in mitigating for erosion due to Federal navigation jetties. A Section 111 study which predated the Project authorization determined that the Charleston Harbor jetties were responsible for 57% of the erosion at Folly Beach. This results in a much larger Federal share in the costs of the Project (i.e., 85% Federal/15% non-Federal cost share compared to the normal 65% Federal/35% non-Federal cost share). As a result, the Federal government bears 85% of the increased financial burden due to the CBRA policy restriction stemming from the FWS

¹ Over the past two years, the Corps has conducted a search for additional borrow areas offshore of Folly Beach, while the City of Folly Beach has independently assessed the availability of sufficient sand within the Bird Key Complex. Six potential borrow areas (4 offshore and 2 within the CBRS) have been identified with an estimated 7,300,000 cubic yards of beach quality sand available offshore and 2,000,000 to 3,000,000 cubic yards of beach quality sand readily available in the CBRS. The projected cost difference between using these different borrow areas would be approximately \$50,000,000 per renourishment project for the offshore areas versus approximately \$25,000,000 per renourishment project for borrow areas within the CBRS.

reinterpretation. DoI's conclusion in 1994 that its approach would actually save Federal dollars did not take into account the reality of the 85% Federal cost share would mean that the Federal government would bear almost all of the increased costs.

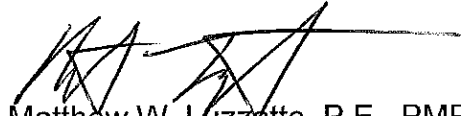
Fourth, we believe that without a project-specific exclusion, the DoI/FWS reinterpretation as applied to the Project will continue to obstruct Congressional intent behind the CBRA, as well as the Project authorization. The legislative history in the House Report to the CBRA includes the statement that "the denial of federal assistance to existing developed communities, many of which have been established for many years, would be inequitable" and was not the intent of the CBRA. *Bostic v. U.S.*, 581 F.Supp. 254 (D.C.N.C., 1984). That denial of Federal assistance is exactly what has now come to pass as an inescapable result of the FWS's policy reversal back in 1994.

Fifth, Folly Island was designated as critical habitat for nesting loggerhead sea turtles in 2014. Without continued renourishment of the beach, the most likely scenario is that additional loss of beach and dunes will occur coupled with that the armoring of more and more of the front beach in response to continued erosion. This loss of front beach and additional beach armoring will result in the loss of critical nesting habitat.

Accordingly, we respectfully request that FWS reconfirm their original position which was incorporated into the authorization for the Project, i.e., that the shoreline stabilization exception to the CBRA *does* apply. Along with the continued validity of the Corps' previously-expressed rationale, we believe that changed circumstances (proven and substantial economic impact, the designation of loggerhead critical habitat, and the lack of recognition of the project's distinctive role in mitigating for navigation impacts in prior coordination on this question) merit revisiting of the issue. We also believe that those same changed circumstances may allow this decision to be made at the local FWS level on a project-specific basis. Certainly, the passage of time has demonstrated the detrimental impact to the Project of following the more restrictive policy in a manner that contravenes Congressional intent for existing developed communities. If this restriction continues to be adhered to for the Project, current projections and recent history indicate that the costs for this Project will become prohibitive.

This issue is of some urgency. Our ability to use available funding to rehabilitate the Project from Hurricane Matthew is dependent upon our ability to use the Folly River borrow site which includes a portion of the CBRS. We will be in touch in an effort to keep this moving toward some resolution. If you have any questions or need additional information about this project, please contact Wes Wilson of my staff by telephone at (843) 329-8054 or by e-mail at wesley.b.wilson@usace.army.mil.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Luzzatto', written over a horizontal line.

Matthew W. Luzzatto, P.E., PMP
Lieutenant Colonel, U.S. Army
Commander and District Engineer

Copy Furnished:
City of Folly Beach



United States Department of the Interior

FISH AND WILDLIFE SERVICE

176 Croghan Spur Road, Suite 200
Charleston, South Carolina 29407



July 28, 2017

Lt. Colonel Jeffrey S. Palazzini
District Engineer
U.S. Army Corps of Engineers
69A Hagood Avenue
Charleston, SC 29403-5107

Attn: Wesley B. Wilson

Re: Folly Beach, Coastal Barrier Resources System, Unit M-07
Folly Beach, South Carolina
FWS Log No. 2017-CPA-0068

Dear Colonel Palazzini:

The U.S. Fish and Wildlife Service (Service) has received both of your letters dated April 28, 2017 and July 19, 2017, where the U.S. Army Corps of Engineers – Charleston District (Corps) formally request an applicability determination of the Coastal Barrier Resources Act [16 U.S.C. 3501 et seq.] (CBRA). The Service reviewed the referenced area for the presence of John H. Chafee Coastal Barrier Resources System (CBRS) units and applicability of an exception proposed by the Corps to use the sand within the Bird Key Unit (M-07) of the CBRS for beach renourishment outside the unit located on Folly Beach, South Carolina. The proposed Folly Beach Shore Protection Project (Project) will place approximately 550,000 cubic yards of sand on the northeast end of Folly Beach from the maintenance dredging of the Folly River navigation channel. This Project is part of the emergency rehabilitation pursuant to the Flood Control and Coastal Emergency Act (P.L. 84-99), 33 USC 701n. In addition, a portion of the dredged material will be placed on Bird Key Stono Seabird Sanctuary (Sanctuary), which is in Bird Key Unit (M-07) of the CBRS to benefit eastern brown pelicans and waterbirds. The Corps believes that the sand use within the Bird Key Unit (M-07) of the CBRS is consistent with the purposes of the CBRA. The Project will minimize the risk of the loss of human life, it is the most cost-efficient use of Federal dollars, and it will not encourage the development of Bird Key Unit (M-07) of the CBRS.

In your letter dated April 28, 2017, the Corps provided below some initial background information.

“The Project was formulated by the Corps, and authorized and funded by Congress, in the early 1990's based on utilization of the Folly River as the location of borrow sites for initial construction and periodic nourishment of the Project. During formulation, the Folly River borrow site was determined to be the most suitable and least costly source of nourishment material, while having limited environmental impacts. Prior to Congressional authorization of the Project, the Service in 1990 confirmed that the shoreline stabilization exception in Section 6(a)(6)(g) of the CBRA allowed use of that portion of the Folly River borrow site that fell within the Bird Key Unit (M-07) of the CBRS. Initial construction of the Project occurred in 1993 at a cost of \$11.7 million.”

“In 1994, the Department of the Interior's (Department) Office of the Solicitor reversed its interpretation of the shoreline stabilization exception, concluding that the exception did not apply to projects to stabilize shoreline outside of the CBRS (sand could not be taken from within the CBRS and placed outside of the CBRS). In February 1995, the Assistant Secretary of the Army for Civil Works requested that the Department rescind its new interpretation of the statute on a number of grounds. These included: (1) impacts to the CBRS unit were not appreciable; (2) Congressional authorization contemplated use of the Folly River borrow area; (3) Corps reliance on the Service's concurrence; and (4) unexpected financial burdens on both the Federal government and non-federal sponsor. However, in 1995, the Department declined to rescind its reinterpretation of Section 6(a)(6)(g) of the CBRA.

AUTHORITY

The CBRS was established by CBRA in 1982 and consists of geographic units along the Atlantic, Gulf of Mexico, Caribbean, and Great Lakes coasts that are delineated in a series of maps. Congress enacted CBRA to minimize the loss of human life, wasteful Federal expenditures, and damage to natural resources on undeveloped coastal barriers. The CBRA accomplishes these goals by prohibiting most Federal expenditures that promote development within the CBRS. CBRA does not prevent development; rather, it restricts Federal subsidies that encourage development within these hazard-prone and ecologically sensitive areas. CBRA imposes no restrictions on development conducted with non-Federal funds.

The Service is responsible for administering CBRA, which includes: maintaining the official maps of the CBRS; consulting with Federal agencies that propose spending funds within the CBRS; and making recommendations to Congress regarding whether certain areas were appropriately included in the CBRS. Aside from three minor exceptions, only new legislation can modify the CBRS boundaries to add or remove land. These exceptions include: (1) the CBRA five-year review requirement that solely considers changes that have occurred to the CBRS by natural forces such as erosion and accretion; (2) voluntary additions to the CBRS by property owners; and (3) additions of excess Federal property to the CBRS.

These comments are provided as technical assistance only; individual Federal agencies have the responsibility to independently ensure compliance with CBRA. Additionally, these comments do not constitute consultation for any project pursuant to section 7 of the Endangered Species Act of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.) or comments afforded by the Fish and Wildlife Coordination Act (48 Stat. 401; 16 U.S.C. 661 et seq.); nor do they preclude comment on any forthcoming environmental documents pursuant to the National Environmental Policy Act (83 Stat. 852; 42 U.S.C. 4321 et seq.).

SERVICE DETERMINATION

The Service reviewed the two letters submitted by the Corps and believes that the Project is *allowable under the CBRA*, which our argument is outlined below:

Section 2(b) of the CBRA states, "*Congress declares that it is the purpose of the CBRA 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 by restricting future Federal expenditures and financial assistance which have the effect of encouraging development of coastal barriers, by establishing a CBRS, and by considering the means and measures by which the long-term conservation of these fish, wildlife, and other natural resources may be achieved*". Regarding the "wasteful expenditure of Federal revenues" component of this Section, the Corps has conducted a cost analysis for beach renourishment projects over the past two years. They found that the projected cost comparison between using different borrow areas would be approximately \$50 million per beach renourishment project using the offshore borrow areas versus approximately \$25 million per beach renourishment project using the borrow area within the CBRS. In addition, there is less beach quality sand available offshore compared to the beach sand readily available within the CBRS. The alternative of using offshore borrow areas cannot be used due to the beach quality sand and the high cost.

Section 5(a)(3) of the CBRA 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 CBRS, including, but not limited to 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 4 on maps numbered S01 through S08 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*". After careful evaluation, the Service accepts the Corps determination that the requirements of this section have been met.

Section 6(a)(6)(E) states, "*After consultation with the Secretary of the Interior, he/she may make Federal expenditures or financial assistance available within the CBRS for the assistance of 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*". The Project is adjacent to the Bird Key Unit (M-07) of the CBRS and could be part

of the same ecosystem due to the fact that the sand placed on Folly Beach in previous beach renourishment projects has moved into the Bird Key Unit (M-07) of the CBRS. In addition, the Project is within the geographic scope of two major disaster declarations: South Carolina Hurricane Matthew (DR- 4286) on October 11, 2016, and South Carolina Severe Storms and Flooding (DR-4241) on October 05, 2015. Emergency response and disaster assistance authority under P. L. 84-99 includes the protection or repair of federally authorized shore protective works threatened or damaged by coastal storms. Shoreline stabilization assistance will be significant in alleviating the current threats to land and property that resulted from these storms, and will diminish the risk of loss of life or public safety issues posed by additional storm damage prior to the next periodic beach nourishment.

Section 6(a)(2) of the CBRA states, “*After consultation with the Secretary of the Interior, he/she may make Federal expenditures or financial assistance available within the CBRS for the maintenance of existing channel improvements and related structures, such as jetties, and including the disposal of dredge materials related to such improvements*”. The Corps’ Project will dredge approximately one half of the CBRS sand by maintenance dredging the Folly River navigation channel to stabilize Folly Beach and Sanctuary shorelines.

Section 6(a)(6)(A) states, “*After consultation with the Secretary of the Interior, he/she may make Federal expenditures or financial assistance available within the CBRS for any of the following actions or projects, but only if the making available of expenditures or assistance therefore is consistent with the purposes of the CBRA such as projects for the study, management, protection and enhancement of fish and wildlife resources and habitats, including, but not limited to the acquisition of fish and wildlife habitats and related lands, stabilization projects for fish and wildlife habitats, and recreational projects*”. Folly Beach (Island) [LOGG-T-SC-09] is designed as critical habitat for loggerhead sea turtles under the Federal Register Vol. 79 No. 132 [published July 10, 2014 (Final Rule)]. Per the Final Rule, “This unit supports expansion of nesting from an adjacent unit [Kiawah Island (LOGG-T-SC-10)] that has high-density nesting by loggerhead sea turtles in South Carolina. The physical or biological features in this unit may require special management considerations or protections to ameliorate the threats of recreational use, beach sand placement activities, in-water and shoreline alterations, coastal development, beach erosion, climate change, artificial lighting, human-caused disasters, and response to disasters. The City of Folly Beach has a beach management plan that includes measures to protect nesting and hatchling loggerhead sea turtles from anthropogenic disturbances (City of Folly Beach 1991, pp. 32-35). These measures apply to both the private and other lands within this critical habitat unit”. Sand placement on Folly Beach would benefit the federally threatened loggerhead sea turtle (*Caretta caretta*).

The Project would also benefit the federally threatened red knot (*Calidris canutus rufa*) and piping plover (*Charadrius melodus*) during their nonbreeding migration season. Without continued sand placement and rehabilitation of Folly Beach, useable habitat for these species is likely to decrease significantly over time as the dry beach at high tide diminishes and additional armoring by sea walls and rock revetments occurs.

In addition, sand placement on the Sanctuary would benefit resident birds located there. The Sanctuary, which encompasses approximately 35 acres in the Stono Inlet and drains the Stono,

Kiawah, and Folly Rivers in Charleston County was established to protect significant nesting habitat of seabirds and shorebirds. The Sanctuary supports the largest number of nesting eastern brown pelicans in the range of the species. Some other waterbirds found on the Sanctuary include (State listed, at-risk species, or federally listed birds): least tern, royal tern, black skimmer, gull-billed tern, sandwich tern, common tern, laughing gull, Wilson's plover, American oystercatcher, willet, great egret, snowy egret, tricolored heron, and ibis. It also includes the federally threatened red knot and piping plovers. This area was designed as critical habitat for piping plovers in 2001 and is proposed critical habitat for red knot. Besides providing nesting habitat, the Sanctuary provides winter loafing and feeding areas for numerous bird species. The colonial nesting behavior of these birds makes them very susceptible to disturbance. Birds are densely packed into breeding sites during the nesting season, rendering the entire colony susceptible to disruption or destruction. Therefore, the Sanctuary is closed to public use from March 15 thru October 15.

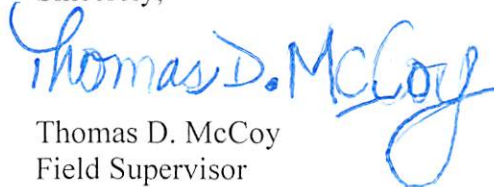
Section 6(a)(6)(G) states, "*After consultation with the Secretary of the Interior, he/she may make Federal expenditures or financial assistance available within the CBRS for nonstructural projects for shoreline stabilization that are designed to mimic, enhance, or restore a natural stabilization systems*". The overall Project (placement and borrow sites) includes areas within and outside of the CBRS unit. Sand movement along the shoreline and into the Bird Key Unit (M-07) of the CBRS from Folly Beach establishes a littoral transport link between the project and Bird Key CBRS Unit M-07. The predominant littoral drift at Folly Beach is towards the south (i.e., towards Stono Inlet) which benefits Stono Inlet, portions of Bird Key Unit (M-07) of the CBRS, and ultimately Kiawah Island. Accordingly, CBRS sand from the Folly River will be used in a manner consistent with the restoration of a natural stabilization system.

CONSULTATION CONDITIONS

The Service recommends that the Corps consult with us and the South Carolina Department of Natural Resources before placing sand at the Sanctuary, so this will not disturb/harm resident birds. We recommend that the Corps not hardpan the north side of the Sanctuary shoreline, because it would affect food source such as horseshoe crab for resident birds. However, we would recommend spoil sand placement periodically on the Sanctuary. In addition, sand placement on Folly Beach should not be during sea turtle season, which ends on October 31st.

The Service appreciates the opportunity to review this Project and your careful consideration for our concerns. If you have further questions or require additional information regarding this letter, please contact me at (843) 727-4707 ext. 227, and reference FWS Log No. 2017-CPA-0068.

Sincerely,



Thomas D. McCoy
Field Supervisor

From: [Thomas McCoy](#)
To: [Shirey, Alan D CIV USARMY CESAC \(US\)](#)
Cc: [Mark Caldwell](#); [Ward, Bethney P CIV USARMY CESAC \(US\)](#)
Subject: [EXTERNAL] RE: Folly Beach
Date: Tuesday, October 24, 2017 6:07:40 PM

Hi Alan,

The U.S. Fish and Wildlife Service does not object to this revision of the project at Folly Beach.

Let me know if you have any other questions or need assistance.

Tom McCoy, Field Supervisor

Department of the Interior - U.S. Fish and Wildlife Service

South Carolina Ecological Services Field Office

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Please visit our Web Page for information about our office: [Blockedwww.fws.gov/charleston](http://www.fws.gov/charleston)
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From: Shirey, Alan D CIV USARMY CESAC (US) [<mailto:Alan.D.Shirey@usace.army.mil>]
<<mailto:Alan.D.Shirey@usace.army.mil>>]
Sent: Monday, October 23, 2017 11:42 PM
To: Thomas_McCoy@fws.gov <mailto:Thomas_McCoy@fws.gov>
Cc: mark_caldwell@fws.gov <mailto:mark_caldwell@fws.gov> ; Ward, Bethney P CIV USARMY CESAC (US)
Subject: Folly Beach

Tom,

As you may have heard, Hurricane Irma caused considerable erosion to Folly Beach, and we are currently working on a new P.L. 84-99 project for potentially performing a partial renourishment on Folly to restore the beach. This work would be in addition to the project we are currently working on to restore the beach for the losses due to Hurricane Matthew and the October 2015 storm related to Hurricane Juquin.

My question for you is the following: What (if anything) do we need to do to obtain your concurrence to borrow additional material from the Bird Key Unit of the CBRS (i.e., additional beyond what is needed to perform the partial renourishment that is discussed in your July 28 letter)? Our preliminary calculations show the need to borrow an additional 500,000 cubic yards; however, this is not a final quantity.

Thanks,

Alan.

Alan Shirey

Environmental Engineer

U.S. Army Corps of Engineers

Charleston District

69A Hagood Avenue

Charleston, SC 29403

(843) 329-8166

Justice: We get what we deserve.
deserve.

Mercy: We don't get what we deserve.

Grace: We get what we do not