ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT
Conroe Municipal Management District #1
SWG-2015-00328
GALVESTON DISTRICT

September 3, 2020

Division Engineer: Christopher G. Beck, Brigadier General, U.S. Army Corps of Engineers, Southwestern Division, Dallas, Texas.

Review Officer (RO): Melinda M. Larsen, U.S. Army Corps of Engineers, Northwestern Division, Portland, Oregon. Administrative review of this specific appeal was delegated to the Northwestern Division Review Officer while the decision authority remained with the SWD Division Engineer.

Appellant: Conroe Municipal Management District (CMMD) #1[1]

Permit Authority: Section 404 of the Clean Water Act (33 USC 1344 et seq.)

Receipt of Request for Appeal: October 24, 2018

Site Visit/AJD Appeal Meeting: January 30, 2019

Summary of Appeal Decision: CMMD #1 (Appellant) is challenging the decision of the U.S. Army Corps of Engineers (USACE) Galveston District (District) to deny a permit for discharge of fill material into 42.30 acres of jurisdictional wetlands and 545 linear feet of jurisdictional stream, for the construction of infrastructure for future development. The project site is located within a 234.36-acre project area, in Silverdale Creek and wetlands adjacent to Silverdale Creek, located at 11322 Interstate Highway 45 (I-45), Conroe, Montgomery County, Texas. The Appellant submitted five reasons for appeal (with several associated subordinate reasons), asserting that the District incorrectly applied law, omitted key facts, and committed procedural errors when concluding that it was unable to find that the permit action would not have a significant impact on the quality of the human environment, and that the proposal was not in compliance with the Clean Water Act (CWA) Section 404(b)(1) guidelines.

For reasons detailed in this document, the Appellant's reasons for appeal 1.C., 3.C.1., 3.C.2., 3.C.3., 4, and 5 are found to have merit. Reason for appeal 3.B. is a harmless error that the District should correct on remand. The permit decision is remanded to the Galveston District Engineer for reconsideration, additional evaluation, and documentation sufficient to support the decision. The final Corps decision regarding this matter remains with the Galveston District Engineer.

[1] In some places in the Administrative Record (AR), the word District is used in reference to the CMMD. For clarity and consistency, this document uses District to refer to the Galveston District Regulatory Division, and CMMD or Appellant in reference to the Conroe Municipal Management District. Noted exceptions are located in direct quotes from the AR.

Background Information: The District received an application on May 1, 2015, proposing to "...impact 56.24 acres of wetlands, excavate 0.41 acres of wetlands, excavate 0.12 acres of jurisdictional water (503 LF), and avoid 18.10 acres of wetlands and 4,690 LF of stream. The proposed project would restore 3,374 LF of Silverdale Creek in its current location and would restore 1,699 LF of its original alignment to IH 45[*sic*], resulting in a net increase of restored stream within the project area (Pre project 8,567 LF: Post project 10,266 LF)."[2] The District published a public notice (PN) describing the proposal on July 14, 2015.[3] Comments were received from various federal and state agencies and local organizations; these comments were conveyed along with the District's concerns to the Appellant, by letter dated September 25, 2015.[4] The Appellant modified the project and provided a response to comments by letter on August 9, 2017[5] and provided additional information and revisions on January 31, 2018.[6] The District finalized and conveyed its decision to deny the permit to the Appellant on August 27, 2018.[7]

Information Received and its Disposition During the Appeal Review:
The Administrative Record (AR) is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form. Pursuant to 33 CFR part 331.2, no new information may be submitted on appeal. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the AR, because the District Engineer did not consider it in making the permit decision. However, in accordance with 33 CFR part 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal review, and its disposition, is as follows:

1) The USACE Southwestern Division (SWD), received the Appellant's request for appeal on October 24, 2018.

2) SWD requested RO assistance from NWD, and NWD accepted, on October 31, 2018.

3) The District provided a copy of the AR to the RO and the Appellant on December 11, 2018. Due to an error that was not immediately discovered, the copy of the AR received by the Appellant was missing the required numbering.

4) An Appeal Conference and site visit was held on January 30, 2019. The District provided the Appellant the correct numbered copy of the AR at this meeting. After

[2] AR 0001.
[3] AR 0401-0424.
[4] AR 0496-0498.
[5] AR 0638-1248.
[6] AR 1305-1527.
[7] AR 1653-1726.

the appeal conference, by email dated February 26, 2019, the Appellant submitted a list of citations to specific page numbers of documents that were discussed in the Appeal Conference. These citations were not deemed new information and were considered as part of the appeal.

Topics discussed during the appeal conference and site visit are summarized in a memorandum for record (MFR). The draft Appeal Conference MFR was distributed to the appeal conference attendees via email on April 24, 2019. There were no corrections or edits received, and the draft was finalized on May 15, 2019, and provided to conference participants.

5) During the Appeal review, the RO identified two documents that were absent from the AR. The first missing document was a letter from the Strake family dated May 21, 2018. This letter was attached to the Appellant's Request for Appeal and available for RO review. The second missing document was a letter from the State Historic Preservation Officer ("SHPO") dated July 16, 2018. The District confirmed that both documents were reviewed and considered during the application process, but that the documents had been inadvertently omitted from the AR. Therefore, the District determined these documents do not constitute new information. Because these documents were not deemed new information, they were considered as part of this appeal. The RO requested and received the July 16 letter from the District on January 6, 2020. Both documents are addressed in the fourth reason for appeal.

APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE GALVESTON DISTRICT ENGINEER

Appellant's Reasons for Appeal (RFAs):

First Reason for Appeal: The District incorrectly applied the law and omitted key facts when it arbitrarily ignored the purpose and need for the Silverdale Creek Project, and challenged CMMD as "the appropriate applicant."

This RFA is divided into three parts (1.A, 1.B., and 1.C). Part 1.A. has two sub-parts (1.A.1. and 1.A.2.). For the reasons discussed below, RFA 1.C. is found to have merit.

1.A. The District's rejection of CMMD as an applicant is an improper rejection of the relevant Texas statutory program for municipal management districts.

FINDING: RFA 1.A.1. does not have merit; RFA 1.A.2. is not an acceptable reason for appeal.

ACTION: No further action

DISCUSSION: In this RFA, the Appellant asserts that 1) the District improperly rejected relevant Texas statutory authority by rejecting CMMD as an applicant (see discussion in RFA 1.A.1. below); and 2) the District has issued permits to other entities that also lack authority on property decisions (see discussion in RFA 1.A.2. below).

1.A.1. Corps regulations at 33 CFR parts 320.4(g)(6) and 325.1(d)(7) state that a permit application must be signed by the person (or authorized representative) who wishes to undertake the proposed work. The regulation further requires that an applicant "...possesses or will possess the requisite property interest to undertake the activity proposed in the application." By signature on the application form, the Appellant confirmed that it has the requisite property interest to undertake the activity as proposed.[8] However, the Appellant has indicated that its role is limited to infrastructure, and it does not have authority to make changes to the proposed project that would involve land use decisions without prior approval from the landowner.[9]

The District's statement in the decision document, titled "Department of the Army Environmental Assessment and Statement of Findings for the Above-Referenced Standard Individual Permit Application" (EA/SOF)[10] that CMMD may not be the appropriate applicant[11] is reflective of statements made by CMMD regarding its decision-making role.[12] The District did suggest during a meeting that the landowner may need to participate in the process, since it has the ability to determine the viability of the overall project when presented with potential alternatives,[13] but there is no evidence that the District rejected, or attempted to reject CMMD as the applicant. In the same meeting, the District also recounted a past success with an entity similar to the CMMD, where District concerns were resolved by bringing the land developer to the table.[14]

There is no evidence in the AR that the District rejected the Appellant, attempted to require a different applicant, or discounted or otherwise acted in a way contrary to state statutes. The District addresses the role of local authorities in its EA/SOF:

> "The Corps accept(*sic*) that the locality has zoning authority, as the applicant has stated, and that the Corps typically recognizes that state, local and tribal entities typically have responsibility for land use matters. When those activities occur in waters of the US, including wetlands, the Corps must apply those laws implemented by Congress to regulate those areas in accordance with Federal laws and statutes."[15]

There is no evidence to suggest, nor reason to believe the District's suggestion to include the landowner as another applicant may be more appropriate was an abuse of

[8] AR 0007
[9] AR 1265-1270.
[10] AR 1658-1722
[11] AR 1692.
[12] AR 1689.
[13] In person meeting between Appellant and District representatives 31 October 2017 1:47:50 – 1:53:00.
[14] AR 1266.
[15] AR 1685.

discretion, or plainly contrary to a requirement of law, regulation, Executive Order, or officially promulgated Corps policy guidance. For these reasons, RFA 1.A.1. does not have merit.

1.A.2. The Appellant presents several examples of pending and authorized permit actions in which it asserts the applicant was not a landowner or otherwise did not have authority over property decisions.

The regulation at 33 CFR part 331.7(f) describes the review procedures associated with the Corps administrative appeal process. Specifically, it states "The appeal of an approved JD, a permit denial, or a declined permit is limited to the information contained in the administrative record by the date of the NAP for the application or approved JD, the proceedings of the appeal conference, and any relevant information gathered by the RO as described in §331.5. Neither the appellant nor the Corps may present new information not already contained in the administrative record, but both parties may interpret, clarify or explain issues and information contained in the record."

Although districts strive for consistency in decision making, each individual request contains unique facts, circumstances, and site conditions that drive the decision-making process. While there may be similarities between the subject appeal and the projects cited by the Appellant, the facts and circumstances associated with decisions on those projects are unique to them, are not a part of this AR., and are thus outside the context of this appeal process. For these reasons, RFA 1.A.2. is not an acceptable reason for appeal, and is not considered further in this document.

1.B. CMMD's project purpose has been, and remains, infrastructure for the Silverdale Creek watershed; the District omits three key facts, in incorrectly determining that the purpose is "narrowly defined."

FINDING: RFA 1.B. does not have merit

ACTION: No further action

DISCUSSION: In RFA 1.B., the Appellant states that it has consistently defined the project purpose, and that the District omitted important facts. The three key facts the Appellant asserts that the District omitted are: 1) The applicant does not need another Section 404 permit to complete infrastructure in the rest of the 2,046-acre municipal management district; 2) That there are three independent watersheds within the CMMD boundary, and the Silverdale Creek watershed is the only one that requires a 404 permit for public infrastructure for development; and 3) That part of the project purpose is the creation of an employment core or corridor. (Note: Key Facts 1 and 2 , above, also serve as the reason for appeal addressed in RFA 2.

The Appellant asserts that the District's statements in the EA/SOF that the applicant "has not consistently defined their purpose"[16] and the "purpose and need for the proposed project has varied through the evaluation process"[17] are unfounded. The Appellant also asserts that articulation of the purpose has varied in an effort to satisfy requests from the District and other entities, but that different articulations do not amount to different purposes.

Project purpose is central to the evaluation of alternatives under both the National Environmental Policy Act (NEPA) and the Clean Water Act 404 (b)(1) Guidelines[18] (Guidelines). In order to undertake these analyses, the District must identify the purpose and need, basic project purpose, and overall project purpose.

Regarding purpose and need, Council on Environmental Quality (CEQ) NEPA regulations[19] indicate that "The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." The Corps' NEPA implementing regulations[20] provide more detail; section 9.b.(4) states, in part:

> "Normally, the applicant should be encouraged to provide a statement of his proposed activity's purpose and need from his perspective (for example, "to construct an electric generating plant"). However, whenever the NEPA document's scope of analysis renders it appropriate, the Corps also should consider and express that activity's underlying purpose and need from a public interest perspective (to use that same example, "to meet the public's need for electric energy"). Also, while generally focusing on the applicant's statement, the Corps, will in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective."

The stated project purpose in the May 1, 2015 application was centered around the purpose of the CMMD's creation, and included "drainage facilities and services, including floodplain reclamation."[21] The Appellant most recently defined the project purpose in January of 2018 as:

> "The purpose of the Silverdale Creek project is the development of public infrastructure, including drainage and flood protection, in the Silverdale Creek watershed."[22]

The District acknowledged in the purpose and need section of its EA/SOF[23] that variations have occurred partially as a result of Corps requests for clarification at various points in the process. The District also discussed various iterations of the

[16] AR 1684.
[17] AR 1662.
[18] 40 CFR part 230.10.
[19] 40 CFR part 1502.13.
[20] 33 CFR part 325 Appendix B.
[21] AR 0008
[22] AR 1307.
[23] AR 1662

Appellant's stated project purpose, demonstrating that it did evolve throughout the permit process. Therefore, there does not appear to be a disagreement between the Appellant and the District regarding the currently defined purpose and need.

Basic project purpose is used in the context of the Guidelines to determine if the proposed activity is water dependent and requires access or proximity to, or siting within, a special aquatic site in order to fulfill its basic purpose. For projects that are not water-dependent, "practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise."[24] There is little variation between the Appellant's stated project purpose and the District determined basic project purpose, "to provide infrastructure for the completion of a mixed-use, residential and commercial development."[25] There does not appear to be any disagreement between the Appellant and the District over whether the proposed project is water dependent.

The overall project purpose is determined by the Corps after considering the applicant's stated purpose. Overall project purpose is used in the alternatives analysis required by the Guidelines to identify the Least Environmentally Damaging Practicable Alternative (LEDPA).[26] It also establishes the geographic area within which the District will consider alternatives, while still respecting the applicant's intent. The geographic area of consideration is an important component of the alternatives analysis required by the Guidelines, which state:

> "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered."[27]

In a November 13, 2017 meeting, the District expressed concern regarding the Appellant's identified project area, which essentially encompasses the aquatic resources proposed for impact.[28] The District identified "hundreds of acres of contiguous uplands" within the CMMD that are not proposed for development.[29] When the Appellant was asked why the project area was limited, rather than include the entire 2,046 acre boundary of the CMMD; the Appellant indicated that the boundary was drawn based on where work in jurisdictional waters is necessary. The District reminded the Appellant that even with the project area drawn in such a way, "the Guidelines clearly state that offsite properties currently not owned by the applicant that would reduce impacts should be considered as practicable alternatives." The District also reminded the Appellant that compliance with the Guidelines was not optional; if the District cannot determine that the

[24] 40 CFR part 230.10 (a)(3).
[25] AR 1663.
[26] *Id.* at (a)(2).
[27] *Id.*
[28] e.g. AR 15-16; AR 1342.
[29] AR 1273.

proposal is the Least Environmentally Damaging Practicable Alternative (LEDPA), the Guidelines require that a permit not be authorized.[30]

Similar concerns about project purpose and alternatives were expressed in comments received in response to the public notice from federal and state agencies. For example, the US Fish and Wildlife Service stated their belief that the applicant is attempting to avoid the evaluation of practicable alternatives required for a phase of a "non-water dependent, master planned community already being developed on other parts of the larger Camp Strake tract.,[31] and the Texas Parks and Wildlife Department (TPWD) stated that the purpose and need were unclear and that information is necessary to appropriately evaluate avoidance and minimization alternatives.[32]

The AR reflects that the District explained to the Appellant that it is the District's responsibility to determine overall project purpose, and that it must not be so narrowly defined as to eliminate the consideration of otherwise practicable alternatives as required by the Guidelines.[33] Overall project purpose is discussed further in RFA 1.C., below.

The Appellant asserts that the project purpose should be limited to the Silverdale Creek watershed, since there is no need for 404 CWA permitting for public infrastructure in the other two watersheds within the CMMD boundary. There is no law, regulation, Executive Order, or officially promulgated Corps policy guidance which associates watershed boundaries with project purpose. Lack of a need for further CWA permitting within or outside of a watershed does not preclude the consideration of those areas as part of the overall project purpose and the subsequent evaluation of alternatives under the Guidelines.

The Appellant asserts that the District ignored the portion of the Appellant's stated project purpose that refers to an 'employment core'. The Appellant's most recent stated project purpose (see above) also does not address employment core. The Appellant has contended that the commercial development/employment core needs to take place along the I-45 frontage.[34] The District also acknowledges that the I-45 frontage is important, indicating it was "sensitive to the applicant's desire to utilize the I-45 corridor"[35] and it recognized the applicant's emphasis on "I-45 frontage property [as] the most valuable property on the site."[36] Although the Appellant's position is that I-45 frontage is necessary for the commercial component and those impacts cannot be avoided, the District expressed concern in at least two meetings with the Appellant that a substantial portion of the proposed wetland impacts occur more than one-half mile away from I-45, and impacts in that area appear to be from proposed housing.[37] This implies that the project purpose is not limited to the employment core and is not limited

[30] *Id.*
[31] AR 0492.
[32] AR 0487.
[33] AR 1270.
[34] See e.g. AR 1266 and 1273.
[35] AR 1776.
[36] AR 1786.
[37] AR 1265-66 and 1272-73.

to the I-45 frontage. However, the District's identification of the overall project purpose as "development of a mixed, multi-use, residential and commercial master-planned community within the boundaries of the 2,046 acre MMD 1" does not preclude the employment core aspect of the project that the Appellant states is a necessary component.

The Appellant also contends that by identifying nineteen alternate sites based on 6 siting criteria, it has not foreclosed a NEPA analysis of offsite alternatives. There is no evidence in the AR that the District took such a position with regard to alternate sites outside the 2,046 acre CMMD boundary. The AR reflects that the District reviewed the offsite alternatives provided by the Appellant in sections 5.2.2 and 5.3 of the EA/SOF.[38] However, in section 5.4, the District also points out that there appear to be additional offsite opportunities to minimize impacts by utilizing additional uplands within the CMMD geographic boundary, but outside of the Appellant's preferred project boundary. In the absence of offsite alternatives within the CMMD boundary, the District concluded that avoidance and minimization of impacts has not been accomplished to the maximum extent practicable.

The District acted in accordance with regulations and guidance when it defined the geographic area associated with the overall project purpose to include the entire CMMD boundary rather than the Appellant's preferred Silverdale Creek watershed boundary. Lack of need for another CWA section 404 permit within the boundaries of the CMMD or drawing project area boundaries based on watershed boundaries are not relevant factors in the determination of the overall project purpose or the evaluation of alternatives. Further, there is no evidence that the District ignored the Appellant's desire for creation of an employment core. For these reasons, RFA 1.B. does not have merit.

1.C. Under existing law, the Corps has a duty to take into account the applicant's objectives.

FINDING: RFA 1.C. has merit

ACTION: For the reasons discussed below, RFA 1.C is remanded to the District for further evaluation, analysis, and documentation. Specifically, the remand to the District is to re-evaluate and fully consider the basic project purpose when establishing the overall project purpose, and fully document its determinations in accordance with existing regulation, policy, and guidance.

DISCUSSION: In RFA 1.C., the Appellant objects to the District's statement that the project "purpose and scope is ultimately a government determination."[39] The Appellant states that this is an error that overstates the Corps' authority and cites three court cases in which the decision purportedly addressed the Corps' responsibility to take into account the applicant's objective in the context of the geographic area of development

[38] AR 1774.
[39] AR 1797.

and the type of project.[40] The Appellant also states that the District has failed to take into account CMMD's objectives for the project actually proposed in the application, and instead appeared to advocate for a different project purpose.

As discussed above in RFA 1.B., project purpose is a key concept under both NEPA and the Guidelines. The Appellant is correct that the District must take into account the Appellant's stated purpose. However, the District's statement that purpose and scope is ultimately a government determination is correct. The Corps' NEPA implementing regulations state, in part, that: "Also, while generally focusing on the applicant's statement, the Corps, will in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective."[41] The District clearly included the Appellant's stated purpose when discussing purpose and need in section 2 of the EA/SOF.[42]

In terms of overall project purpose, relevant guidance can be found in the Regulatory Standard Operating Procedures (SOP[43]), which states that:

> "Defining the overall project purpose is the district's responsibility. However, the applicant's needs and the type of project being proposed should be considered. The overall project purpose should be specific enough to define the applicant's needs, but not so restrictive as to constrain the range of alternatives that must be considered under the 404(b)(1) Guidelines."[44]

The District expressed concerns throughout the permit process that the Appellant was defining the project purpose too narrowly, specifically as it related to the geographic boundary, and the record reflects that the District did consider the Appellant's needs[45] while still attempting to evaluate compliance with the Guidelines. The District defined the overall project purpose as:

> "the development of a mixed, multi-use residential and commercial master-planned community within the boundaries of the 2,046-acre MMD1[*sic*]".[46]

As described in RFA 1.B., above, the District acted appropriately in defining the geographic boundary associated with overall project purpose to include the entire boundary of the CMMD. However, in defining the overall project purpose, the District neglected to include consideration of "infrastructure", which is the Appellant's basic project purpose. The AR reflects that the District was aware of and considered the Appellant's needs throughout the review process. However, in deciding to define the overall project purpose to include the entire mixed-use development, the District did not incorporate the Appellant's basic project purpose, which is construction of infrastructure

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[40] *Louisiana Wildlife Federation v. York,* 761 F.2d 1044, 1048 (5th Cir. 1985); *Town of Abita Springs,* 153 F. Supp. 3d at 920; *Gouger v. US. Army Corps of Eng'rs,* 779 F.Supp.2d 588,605 (S.D. Tex. 2011).
[41] *Id.*
[42] AR 1738.
[43] Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program July 1, 2009.
[44] *Id.* at p. 15.
[45] *Id.*
[46] AR 1741.

for that development. The District did not clearly articulate its rationale in the EA/SOF for neglecting to include the infrastructure element. For this reason, RFA 1.C. has merit.

Second Reason for Appeal: The District incorrectly applied the law and omitted key facts when it concluded the Silverdale Creek project is not a "single and complete project" and lacks "independent utility."

In this RFA, the Appellant addresses the District's concern about improper segmentation.[47] The Appellant states that contrary to District concern, the proposed project is a single and complete project with independent utility.

This RFA consists of two parts (2.A. and 2.B.).

2.A. The District omitted the material facts that the Applicant does not need another Army Corps Section 404 permit and that there are three distinct watersheds within CMMD's borders.

FINDING: RFA 2.A. does not have merit.

ACTION: No further action

DISCUSSION: In reason 2.A, the Appellant restates the position that the District ignored information regarding the watersheds onsite and the fact that the Appellant will not be seeking another Section 404 permit. Both of these assertions are discussed above in RFA 1.B.

The Appellant also indicates that it provided watershed maps to the District, including a map of jurisdictional resources within the 2,046-acre boundary to establish the independent utility of the project. The Appellant asserts that the AR contains no facts to support a contrary conclusion by the District.

In the EA/SOF, the District provides the following discussion regarding its analysis of independent utility:

> "From a regulatory perspective, a project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility. The Corps has received contradicting statements regarding the interdependent nature of the MMD 1 [*sic*] defined permit area and the remainder of the project. The Corps has been told the I-45 frontage area is the economic engine that drives the entire project and that the loss, or reduction in size, of this

[47] AR1797.

> 234.36-acre project area would have ripple effects throughout the whole development. However, the applicant has proceeded in developing the residential component of the project, and the TX 336 loop retail area without including it in the proposed project application. The applicant has insisted that the single and complete project is the 234.36-acre permit area."[48]

In its letter, dated January 31, 2018, the Appellant asserts that the proposal has independent utility:

> "Plainly, the development of drainage within a watershed has logical starting and stopping points, that is, the watershed boundaries within the CMMD. Equally clearly, the drainage and flood protection improvements serve only areas within the watershed. Economic development will flow from the creation of the Infrastructure, and each development project, be it an office building or any other specific project, will be designed to meet its owners purposes."[49]

The Appellant goes on in RFA 2.A., quoting a case from the 5th Circuit: "[i]f proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the projects should be evaluated together."[50]

The Appellant's watershed maps, and assertions that because it will not be seeking any other 404 permits for infrastructure within the CMMD boundary, do not establish independent utility. Infrastructure, by definition, is an underlying framework that supports some other development. It is reasonable for the District to assume that construction of infrastructure would not take place absent the development that is intended to rely on it. At a minimum, residential and commercial development within the Silverdale Creek watershed is likely to be dependent upon the Appellant's proposed infrastructure. With additional information, such as a complete plan of development, the District may or may not have been able to ascertain whether some phases of the project outside of the watershed did indeed have independent utility.

As the definition above states, "A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area." The Appellant relies on language from the Fifth Circuit, which stated that functional and economic dependence are some of the factors a District considers when considering whether a project has independent utility. As stated by the Appellant in the January 31, 2018 submittal, there are "large contiguous parcels that are required to create the employment core."[51] The Appellant also states elsewhere that part of the overall purpose includes the "infrastructure needs of the entire District"[52] This demonstrates that elements of the overall development may affect the placement and/or configuration of the proposed infrastructure, which amounts to functional dependence.

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[48] AR 1691.
[49] AR 1308.
[50] *Fritiofson v. Alexander,* 772 F.2d 1225, 1241 n. 10 (5th Cir.1985).
[51] AR 1317.
[52] AR 0647 District in this case referring to CMMD.

Further, the Appellant's own statements establish economic dependence:

> "As a result, CMMDs infrastructure financing is inexorably linked to design and layout that results in sufficient private improvements that are sufficient to both i) generate sufficient taxable value to service CMMDs debt, AND ii) provide sufficient overall return to the private sector to support both the initial investment in infrastructure, in addition to the investment in the land and vertical improvements (e.g., buildings). If either of these two feasibility tests are not met, the CMMD project is not feasible."[53]

And

> "The feasibility analysis that is the basis of the creation of the CMMD must focus on, and be feasible based upon, sufficient commercial development pods to produce the taxable values anticipated for the District's creation."[54]

The District's statement that the project as proposed did not have independent utility is reasonable in light of the information provided by the Appellant. Additionally, there is no law, regulation, Executive Order, or officially promulgated Corps policy guidance which associates watershed boundaries with independent utility or single and complete project. The AR reflects that the District acted in accordance with existing regulations and guidance when considering whether the proposal had independent utility. For these reasons, RFA #2.A. does not have merit.

2.B. Under existing law, independent utility is established because the Silverdale Creek project has logical termini; and because the Silverdale Creek project is not dependent upon development in the other two watersheds, nor is development of the other two watersheds dependent on it.

FINDING: RFA 2.B. does not have merit.

ACTION: No further action

DISCUSSION: In this RFA, the Appellant quotes a multi-part test for 'improper segmentation' from the Fifth Circuit:

> "whether "the proposed segment (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects."[55]

[53] AR 1313.
[54] AR 0648.
[55] O'Reilly v. US. Army Corps of Engineers, 477 F.3d 225, 236 (5th Cir. 2007).

The Appellant indicates that the project meets the test because it is confined in a watershed and thus has a logical termini, has independent utility, and does not foreclose the opportunity to consider alternatives.

As mentioned above in RFA 2.A., there is no association between watershed boundaries and independent utility. The terms "independent utility", "logical terminus" and "improper segmentation" are interrelated and are things a district considers when determining whether a particular proposal constitutes a single and complete project. The Appellant's own information indicates the project is functionally and economically dependent on other aspects of the overall development. For these reasons, RFA #2.B. does not have merit. A discussion regarding the foreclosure of alternatives is located below in the third reason for appeal.

THIRD REASON FOR APPEAL: The aforementioned errors infected the District's analysis and led to the erroneous conclusion that the "proposed discharge does not comply with the 404(b)(1) guidelines."

This RFA consists of three parts (3.A., 3.B., and 3.C.).

3.A. Neither the applicant, nor the project purpose, foreclose alternatives.

FINDING: RFA 3.A. does not have merit

ACTION: No further action

DISCUSSION:

The Appellant states that 1) the fact that it reconfigured the proposal from the original preferred alternative shows willingness to undertake a rigorous alternatives analysis; 2) the District's position that a wider range of alternatives exist stems from an incorrect belief that the proposal is not a single and complete project; 3) a different applicant would not lead to a different alternatives analysis; The purpose and need remain the desired infrastructure to support commercial development along I-45 in an employment corridor; and 4) The District's confusion regarding the financing of the proposed project has affected its consideration of alternatives.

The Appellant further argues that any alternatives analysis will involve various configurations for dredge and fill in the Silverdale Creek watershed.

The District and the Appellant have disagreed throughout the process over the boundaries of the permit area, project purpose, and independent utility. All of these concepts are addressed in RFAs 1 and 2, above, and reflect a general disagreement between the Appellant and the District regarding facts found and their level of significance.

The Appellant's submittal of the 'minimization alternative' does support a willingness to consider alternatives but does not address the basic premise of the Guidelines, which is the presumption that an alternative exists which does not impact a special aquatic site. When evaluating a proposal that shows what appears to be ample acreage of uplands that the Appellant has avoided while proposing non water-dependent projects in wetlands,[56] the District's conclusion that the project as proposed fails to consider alternatives that would avoid or minimize wetland impacts was not unreasonable.[57]

The Appellant has stated that the proposal is focused on commercial development along the I-45 frontage. However, the Appellant does not provide an explanation for the over 25 acres of the proposed fill in an area that does not front I-45 and does not appear to be associated with infrastructure for commercial development, rather it appears to be associated with residential construction.[58]

The Appellant asserts that "Any alternatives analysis will involve various configurations for dredge and fill in the Silverdale Creek watershed, as the record shows." It would be incorrect to presume an outcome that would occur if the District determined it had enough information to perform an adequate alternatives analysis. Regardless of project size or applicant, the District is bound by the Guidelines that explicitly prohibit it from authorizing a discharge until it has been determined through an alternatives analysis that the proposal is the LEDPA.

The Appellant asserts that the District misunderstands the funding mechanisms associated with the CMMD and its statutory obligations under state law.

> "District's misunderstanding is also reflected on page 32 of the EA/SOF, which states that "no bonds have been needed for the extensive construction completed to date." This conclusion is based on erroneous, or at least out of date, data. On the contrary, as of the date of this response, CMMD has issued bonds in the principal amount of $10,285,000 to pay for various public water, sewer, drainage, and road infrastructure projects."

The Appellant's recounting of the District's statement in the EA/SOF is incomplete. The complete statement is as follows:

> "In our 13 November 2017 meeting with the applicant's agent and counsel, the Corps was told that, to date, no bonds have been needed for the extensive construction completed to date."[59]

This statement does not reflect erroneous or outdated information as the Appellant asserts, rather it recounts information that was provided to the District by representatives of the Appellant, in an in-person meeting.

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[56] See, e.g. AR 1366
[57] AR 1719
[58] AR 1361-62
[59] RFA 1767.

The Appellant is correct that economics is one of the factors to be considered in accordance with the Guidelines when determining practicable alternatives.

> "The term practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[60]

Identifying practicable alternatives is inextricably tied to identification of the overall project purpose and is the responsibility of the District. The Regulatory SOP states "...a practicable alternative must be capable of achieving the overall project purpose, as reasonably and objectively determined by the Corps."[61] After reviewing updated project plans and response to public notice comments, the District was still concerned that it did not have all of the information necessary to demonstrate compliance with the Guidelines: "The applicant has narrowly defined its project purpose and alternatives, so as to preclude an alternatives analysis commensurate with the proposed project."[62] The District cannot fully consider cost of all practicable alternatives if it has determined that all practicable alternatives have not been presented.

The Appellant states that "...CMMD, like any applicant, must be mindful that the economics of the project are viable and successful." Consideration of cost is a required element of the 404(b)(1) analysis, but it is not the only limiting factor. In order to determine the practicability of a proposal (and thus consider cost, technology and logistics), the District must identify the overall project purpose. Identifying overall project purpose is the Corps' responsibility. Once overall project purpose has been identified, it is reasonable for the District to rely on the best professional judgement of its staff in determining the significance of cost in the analysis.

Consideration of cost in the alternatives analysis required by the Guidelines is not a consideration of the applicant's ability to finance a project, but a consideration of whether the cost of an alternative is practicable. Therefore the District should have a reasonable understanding of the cost of constructing a typical project in its area, but having a complete understanding of how a project is funded is not a requirement in making decisions regarding practicable alternatives. The preamble to the Guidelines discusses the role of cost[63] in the alternatives analysis.

> "First, we emphasize that the only alternatives which must be considered are practicable alternatives. What is practicable depends on cost, technical. and logistic factors. We have changed the word "economic" to "cost". Our intent is to consider those alternatives which are reasonable in terms of the overall scope/cost of the proposed project. The term economic might be construed to include consideration of the applicant's financial standing, or investment, or

[60] 40 CFR part 230.3(q)
[61] *Id.*at p. 20.
[62] AR 1762.
[63] Federal Register/Vol.45, No. 249/ Wednesday, December 24, 1980, p.85339

market share, a cumbersome inquiry which is not necessarily material to the objectives of the Guidelines."

The Appellant reiterates in the RFA its assertions that no alternatives have been foreclosed:

> "As noted, the District does admit that the "Corps is sensitive to the applicant's desire to utilize the I-45 corridor, because of the visibility, to develop a commercial component to the applicant's plan" (EA/SOF page 41). So even while criticizing the allegedly limited alternatives, the District also implicitly concedes that there is a reason the alternatives were focused on how to best provide infrastructure to support the desired employment corridor in the Silverdale Creek watershed. Nor does the District do other than speculate as to the existence of the alternatives that the District says were foreclosed."

The Appellant's reference to the EA/SOF page 41 discussion regarding the I-45 corridor is incomplete. The District provided additional information in the same section, which demonstrates that it did in fact consider at least one additional alternative to what the Appellant had proposed to date, as well as the no-action alternative:

> "In two meetings with the applicant, on 31 October 2017 and 13 November 2017, the Corps had, for purpose of discussion, pointed out that well over half of the proposed wetland impacts occur more than one-half mile away from I-45, and that impacts proposed in this area were from housing. The applicant did not waiver in their position that this area, also referred to as Grassy Lake, was I-45 frontage area which could not be avoided."[64]

The District further addresses Grassy Lake in the next paragraph of the analysis:

> "Avoidance of the "Grassy Lake" wetland area would reduce wetland impacts by 15.6 acres, and would offer an area where the applicant could do some planting of forested wetlands to improve the on-site mitigation plan. Based on the presence of additional opportunities to avoid and minimize impacts to waters of the US, On-site Alternative 2 was determined to not be the LEDPA for the proposed project."[65]

The Appellant summarizes the discussion in RFA 3.A. by stating that the "alternative analysis was consistent with the project's purpose and need, and other considerations that any applicant properly takes into account in configuring a project plan (such as cost and logistics)", and states that the District could have requested additional alternatives.

This statement is reflective of the disagreement over the Appellant's defined project purpose, which has been discussed at length above. The District followed established Corps processes when determining that the Appellant's submitted alternatives analysis

[64] AR 1776.
[65] *Id.*

did not adequately demonstrate the LEDPA. The District clearly explained its position that avoidance of the "Grassy Lake" area was a viable onsite alternative that would still meet the Appellant's stated desire to utilize the I-45 corridor, and because there was a viable alternative with less impacts, the District concluded the proposal was not the LEDPA. For this reason, RFA 3.A. does not have merit.

3.B. In its discussion of the 404(b)(1) Guidelines, the District mis-cites the law.

The Appellant asserts that the District mis-cited the law in the discussion of the 404(b)(1) guidelines on page 28 of the EA/SOF, by attributing a quote to EPA's CEQ regulations rather than the Corps' implementing NEPA regulations. Specifically, the District states that the CEQ regulations provide that:

> "while generally focusing on the applicant's statement, the Corps will in all cases exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective."[66]

FINDING: RFA 3.B. is a harmless error.

ACTION: The District should correct this citation error upon remand, ensuring the correct laws, regulations, policy and guidance are properly cited and applied.

DISCUSSION:

According to the Appellant, this error in citation is relevant because scope is "a NEPA concept and governs the nature of the assessment of impacts that the Corps is to evaluate under NEPA." The District also states this position in section 11 of the EA/SOF where it states that "purpose and scope is ultimately a government determination."

The Appellant asserts that this is an overstatement of the Corps authority and creates confusion by incorrectly attributing NEPA authority to 404(b)(1) guideline review. Further, the Appellant states that "By tying the concept of NEPA "scope" to that of the Guidelines, and stating that these are "governmental determinations," the Corps seems to suggest that it can ignore the facts in the record and the applicants' explanations for its project's purpose."

The Appellant correctly points out that the citation the District used is incorrectly attributed to CEQ regulations at 40 CFR part 1502.12. The citation is in fact from Appendix B of 33 CFR part 325,[67] which are the Corps implementing NEPA regulations. In either case, the section the reference is drawn from is NEPA related and is not directly related to the Guidelines.

However, scope is not entirely a NEPA concept. Scope, or 'Scope of Analysis' can generally be described as a determination of what parts of a proposal and its

[66] AR 1685.
[67] 33 CFR part 325 Appendix B(9)(a)(4)

alternatives will be evaluated for direct, indirect, and cumulative impacts when evaluating a permit application. Although it is specifically discussed in a NEPA context at 33 CFR part 325 Appendix D, establishing a scope is also necessary when identifying and evaluating potential alternatives under the Guidelines. The geographic extent established by the overall project purpose and the level of analysis varies, based on the extent of impact and the extent of federal control and responsibility.

In the context of the Guidelines, Agency guidance located at section 3.b. of the "US Environmental Protection Agency Department of Defense, Army Corps of Engineers MEMORANDUM TO THE FIELD SUBJECT: Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements" reads (in part) as follows:

> "b. Relationship between the Scope of Analysis and the Scope/Cost of the Proposed Project:
>
> The Guidelines provide the Corps and EPA with discretion for determining the necessary level of analysis to support a conclusion as to whether or not an alternative is practicable. Practicable alternatives are those alternatives that are "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[68]

Scope of analysis under NEPA is discussed in the Corps' NEPA implementing regulations as follows:

> "The district engineer should establish the scope of the NEPA document (e.g., the EA or EIS) to address the impacts of the specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review."[69]

Under both the NEPA implementing regulations and the Guidelines, decisions regarding determination of scope rest with the federal agency. As discussed above in RFA 1.B., while taking the applicant's needs into consideration, defining overall project purpose is also a District responsibility. Determining the purpose and scope is required for establishing the extent of the alternatives analysis.

Although the District incorrectly cited NEPA implementing regulations in its discussion of the Guidelines, there is no evidence in the AR that the District incorrectly applied the NEPA implementing regulations or the Guidelines. Stating that purpose and scope are ultimately government determinations is not incorrect in the context of either regulation. Therefore, the mis-citing of the regulation is a harmless error and the District should correct it on remand.

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[68] 40 CFR part 230.10(a)(2).
[69] 33 CFR part 325 Appendix B.

3.C: CMMD's proposed mitigation is entirely consistent with the regulations.

This reason for appeal consists of four parts (3.C.1., 3.C.2, 3.C.3 and 3.C.4.)

FINDING: RFAs 3.C.1., 3.C.2., and 3.C.3. have merit. RFA 3.C.4. does not have merit.

ACTION: For the reasons discussed below, RFAs 3.C.1., 3.C.2., and 3.C.3. are remanded to the District for further evaluation, analysis, and documentation. The District should re-evaluate and fully document its determination relative to the adequacy of the proposed mitigation, in accordance with the regulations at 33 CFR part 332, and in conjunction with existing policy and guidance.

DISCUSSION:

In this RFA, the Appellant asserts that 1) The District was incorrect in concluding that the Appellant's proposed mitigation deviates from the order of options in 33 CFR part 332.3; 2) That the Appellant properly demonstrated that preservation was a viable option using the tools accepted by the District; 3) The District relied on marketing materials that are labeled as not binding and subject to change when evaluating whether the proposed preservation area was under threat from development; and 4) That the Appellant appropriately avoided and minimized impacts, then presented mitigation options, in accordance with the Guidelines. Each assertion is addressed individually in paras 3.C.1. through 3.C.4., below.

3.C.1. The Appellant states that it followed the order of preference by first determining whether there were mitigation bank credits available, and: "CMMD's proposed mitigation met the hierarchy of the 2008 rule, and a robust qualitative and quantitative analysis was provided."

The District acknowledges in the EA/SOF at section 8.3.1 that no mitigation bank credits or in-lieu fee credits are available.[70] Therefore, the Appellant's proposal of permittee-responsible mitigation is the next step in the mitigation hierarchy. Regulations at 33 CFR part 332.3(b)(2)-(6) require districts to consider mitigation options in the following order:

1) Mitigation Bank Credits
2) In-Lieu fee program credits
3) Permittee-responsible mitigation under a watershed approach
4) Permittee-responsible mitigation through on-site and in-kind mitigation
5) Permittee-responsible mitigation through off-site and/or out-of-kind mitigation.

The District states in section 8.3.4 of the EA/SOF that the Appellant's proposed compensatory mitigation option deviates from the order of options presented in 33 CFR part 332.3(b)(2)-(6).[71] However, preservation alone is not one of the options (listed

[70] AR 1790.
[71] *Id.*

above) presented in the regulation. According to 33 CFR part 332.2, preservation is an activity that falls into the definition of permittee-responsible mitigation. The District makes general statements in section 8.3.4. about the quality of the wetlands and streams proposed for impact but provides no direct information or AR references to any discussion of a watershed approach or any other information that supports the conclusion that the proposed permittee-responsible mitigation deviates from the hierarchical order described in the regulations. Further, no quantitative analysis is included that supports the statement that the Appellant's proposed wetland mitigation plan is insufficient to replace the direct or indirect functions that would be lost as a result of the proposed project. For this reason, RFA 3.C.1. has merit.

3.C.2. The Appellant asserts that it properly demonstrated that preservation was a viable option, using District approved tools.

33 CFR part 332.3(h)(1) provides guidance on when it is appropriate to accept preservation as compensatory mitigation, identifying five criteria that must be met:

(i) The resources to be preserved provide important physical, chemical, or biological functions for the watershed;
(ii) The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the ecological sustainability of the watershed, the district engineer must use appropriate quantitative assessment tools, where available;
(iii) Preservation is determined by the district engineer to be appropriate and practicable;
(iv) The resources are under threat of destruction or adverse modifications; and
(v) The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust).

All five of the above factors must be met in order for a district to consider preservation as compensatory mitigation. The District did not provide an analysis of all five factors, but concluded that the proposed preservation was not appropriate, in part because the regulation at 33 CFR part 332.3(h)(2), states:

> "Where preservation is used to provide compensatory mitigation, to the extent appropriate and practicable the preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. This requirement may be waived by the district engineer where preservation has been identified as a high priority using a watershed approach described in paragraph (c) of this section, but compensation ratios shall be higher."

Criterion (iii) above provides the District with discretion in determining whether the proposed mitigation is appropriate. The District's conclusion that the proposed

preservation was inadequate was not supported in the record as discussed above in RFA 3.C.1.

Regarding the tools used by the Appellant to support its analysis of the preservation area as compensatory mitigation:

Regulations at 33 CFR part 332.3(f) state:

> "If the district engineer determines that compensatory mitigation is necessary to offset unavoidable impacts to aquatic resources, the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions. In cases where appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required. If a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used."

In its January 31, 2018 submittal, the Appellant provided an analysis of the impacted areas using the Interim Hydrogeomorphic Analysis (HGM) model on the wetlands proposed for impact, and a temporal loss evaluation, as required by the District. This quantitative analysis concludes that the proposed mitigation would result in a net gain of functional capacity.[72] The District's discussion of the proposed mitigation in section 8.3.4 of the EA/SOF includes the statement that "conservation of an existing wetland to replace the lost functions of another large tract of wetland still results in a substantial net loss of wetland function."[73] However, the District offers no quantitative information regarding the proposed wetland impact, or any measurable data to compare or contrast with the Appellant's analysis of the preservation site. Instead, the District provides qualitative statements regarding the size and quality of the proposed impacts. The qualitative information is relevant but in the absence of quantitative analysis, it does not support the District's "substantial net loss of wetland function" conclusion. For this reason, RFA 3.C.2. has merit.

3.C.3. The District relied on marketing materials that are labeled as not binding and subject to change when evaluating whether the proposed preservation area was under threat from development.

The District states that the threat of development has been removed from the proposed preservation area by the developer labeling it as greenspace. As mentioned by both the Appellant and the District, this statement is based on publicly available development plans. These plans are clearly labeled as conceptual.[74] The Appellant submitted an "Imminent Threat Analysis"[75] in its January 31, 2018 materials, indicating that the area

[72] AR 1324 – 1325.
[73] AR 1790.
[74] See, e.g. AR 2049.
[75] AR 1378.

is under threat of unregulated logging or mining operations. The District makes a statement in its analysis of the Appellant's submittal that "the Corps does not think that the applicant would wish to spoil this highly touted green space that has existed in marketing brochures and master plan posted on Johnson Development's webpage and distributed by other means."[76] This opinion has no basis in fact. It is not uncommon for development plans to change over time due to economics or a number of other factors. There are no facts to support the idea that the area would remain protected as green space in the future in the absence of some kind of binding commitment. For this reason, RFA 3.C.3. has merit.

3.C.4. The Appellant states that it followed the 404(b)(1) guidelines by first avoiding as many jurisdictional impacts as practicable, minimizing impacts, and preparing options for mitigation. As discussed above in RFAs 1A and 1B, the District concluded that the Appellant had not properly avoided or minimized impacts to jurisdictional aquatic resources, and the proposed project was therefore not in compliance with the Guidelines. The District shared these concerns regarding avoidance and minimization with the Appellant on multiple occasions.[77] It is the District's responsibility to determine whether a proposed discharge is compliant with the Guidelines (i.e. whether the proposed discharge represents the LEDPA), and in this case, the District, was unable to make that determination with the information available. The Appellant's statement that it avoided as many jurisdictional impacts as possible is again reflective of the disagreement between the Appellant and the District regarding the facts in this case and their significance. The process and rationale applied by the District in defining the overall project purpose led to the determination that other potentially less damaging alternatives may exist (i.e. adequate avoidance and minimization was possible). For these reasons, RFA 3.C.4. does not have merit.

FOURTH REASON FOR APPEAL: The District omits key facts, and related documents, in concluding that the applicant's project would have an adverse effect on an area eligible for inclusion in the National Register of Historic Places.

FINDING: RFA 4 has merit.

ACTION: This RFA is remanded to the District for further evaluation, analysis, and documentation. The District should fully document its historic property determinations, including the current status of the property's listing or potential for listing on the NRHP, in accordance with existing regulation, policy, and guidance.

DISCUSSION: The Appellant asserts that the District's conclusion in Section 10.2 of the EA/SOF that the "proposed project would have an adverse effect to the Camp Strake Boy Scout Camp" is unsupported by facts. The Appellant states that this conclusion ignores four key documents:

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[76] AR 1771.

[77] Letter from the District to the Appellant dated September 25, 2018 (AR 0496-0498); Meeting notes from October 31 and November 13, 2017 (AR 1265-1274); December 12, 2017 letter from District to the Appellant (AR 1275-1278).

(1) a letter from the Strake family dated May 21, 2018[78] stating that their family recognized, even in the conveyance documents, that "Camp Strake" could move, and that the family never intended the land underlying the camp to be forever associated with the Strake name;

(2) a letter from the Boy Scouts of America Sam Houston Area Council ("SHAC") dated May 21, 2018[79] stating that only the Boy Scouts SHAC can determine whether the property is recognized as a landmark;

(3) a letter from the State Historic Preservation Officer ("SHPO") dated July 16, 2018[80] acknowledging that any historically significant areas would need to be geographically limited, and acknowledging that even those historically significant areas have been moved or altered; and

(4) two reports,[81] prepared by the applicant's consultant, HRA Gray and Pape, stating that the site did not meet the criteria for eligibility to the National Register of Historic Places.

The Appellant asserts the District ignored the above-mentioned documents. The first two referenced letters, from the Strake family and from the SHAC, discuss the intent of the family that the Strake name would relocate along with the camp rather than stay with the property. The Appellant states that imposing historical significance to a particular tract of land is not well founded, and that many of the potentially historic artifacts have been relocated to the new camp site. The Appellant also reiterates SHAC's belief that it's organization alone should make any determination whether the land has significance for the Boy Scouts."[82]

Both the Strake family and the SHAC indicated that the Strake name was never intended to stay with the property, and actions were taken through deed restrictions[83] to prevent the name from being used in the future. As the Appellant stated, some artifacts were relocated to the new Boy Scout camp. Neither the deed restrictions nor the partial relocation of artifacts eliminates the District's responsibility to demonstrate that the proposed permit action is compliant with the National Historic Preservation Act (NHPA). Section 106 of the NHPA requires that Federal agencies take into account the effects of their undertakings on historic properties listed, or eligible for listing on the NRHP. Undertaking is defined as "the work, structure, or discharge that requires a Department of the Army permit pursuant to the Corps regulations at 33 CFR 320-334."[84]

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[78] Request for Appeal dated October 24, 2018, Tab 9
[79] AR 1568-1603.
[80] As discussed in the section above titled "**Information Received and its Disposition During the Appeal Review**" This document is not present in the AR but was included in the District's permit review and received by the RO on January 6, 2020.
[81] AR 0048-00107 and AR 1406-1524.
[82] *Id.*
[83] *Id.*
[84] 33 CFR part 325 Appendix C.

SHAC's belief that only the Boy Scouts should determine the historical significance of the site is incorrect in the context of regulatory permitting and the NHPA. Procedures that districts are required to follow in order to fulfill the requirements of the NHPA and other historic preservation laws when processing permit applications are located in the Advisory Council on Historic Preservation (ACHP) regulations at 36 CFR part 800 and the Corps implementing regulations at 33 CFR part 325 Appendix C (Appendix C). According to Appendix C, part 6. Eligibility Determinations, when a district determines that a property that may be eligible for listing will be directly affected by the proposed undertaking, the district will treat the historic property as a designated historic property if both the SHPO and the district engineer agree that it is eligible for inclusion in the NRHP. If the SHPO and the district disagree, a determination of eligibility will be requested from the Keeper of the National Register.[85]

The July 16, 2018 letter from the SHPO[86] was not in the AR prior to the RO's January 6, 2020 request, nor was it included as an attachment with the Appellant's RFA. There is also no discussion in the AR regarding the conclusions of this letter, which include concurrence with the District's determination that the property is historically significant for its association with the Boy Scouts, but recommends that large areas of development less than fifty years of age be excluded from any proposed NRHP boundary.

The Appellant submitted a March 6, 2015 summary of an architectural survey of the property with its initial 2015 application materials. By letter dated July 14, 2015, the District requested additional archaeological field work and historic research in order to complete the Section 106 review.[87] The SHPO concurred with this request on August 19, 2015[88], and also responded to the Public Notice by letter dated July 31, 2015, concurring with the District's determination that more archaeological work was necessary and requested "an intensive pedestrian survey of the previously un-surveyed, high-probability portions of the project area".[89]

The Appellant completed additional cultural resource investigations and submitted a report to the District, dated January 31, 2018.[90] The AR reflects that the District reviewed this information and conveyed it to the SHPO via letter dated April 25, 2018.[91] The District concluded, based on this report, that the identified prehistoric sites and structures were not eligible for inclusion in the NRHP, but that the overall Camp Strake was eligible as a historic district due to its association with the Boy Scouts and with George Strake. According to the EA/SOF,[92] the SHPO did not respond within 30 days to the District's determination that Camp Strake was eligible for inclusion in the NRHP, and

[85] *Id.*
[86] Letter from Texas Historical Commission to Tony Scott, Gray & Pape, Inc.
[87] AR 0394-0397.
[88] AR 1253.
[89] AR 0452.
[90] AR 1406-1524.
[91] AR 1535-1536.
[92] AR 1795.

according to the ACHP regulations,[93] the District has the option of presuming concurrence if the SHPO does not respond within the 30 day timeframe.

The District acknowledged, during the 30 January 2019 Appeal conference, that there were errors in section 10.2 of the EA/SOF[94], as it relates to conclusions regarding compliance with NHPA. The District stated that the portion of the Effect Determination in section 10.2.2 '*would have an adverse effect*' should have read '*may have an adverse effect*' and in the Basis for Determination the statement '*could substantially alter*' should have read '*could occur if constructed as proposed*'. The District further clarified that, at the time of the permit decision, an adverse effect determination regarding historic properties had not yet been made. Section 10.2.3 also contains conflicting statements regarding the site's eligibility for inclusion in the NRHP, stating that the outcome of consultation with the SHPO was that Camp Strake is eligible for inclusion in the NRHP, yet also stating that the section 106 process is underway pending resolution of the site's eligibility for inclusion in the NRHP. It is not clear from the EA/SOF discussion what the status is regarding the site's eligibility for listing. The District stated in the Appeal conference that the errors in section 10.2 did not influence the reasons for permit denial. However, because the statements in section 10.2 did not accurately reflect the District's conclusions with regard to compliance with section 106, this reason for appeal has merit.

FIFTH REASON FOR APPEAL: Procedurally, the District neglected to circulate the applicant's redesigned project plans to the resource agencies, resulting in outdated agency comments, which the District then relied upon to deny the permit; those outdated comments may or may not still reflect ongoing agency concerns.

FINDING: RFA 5 has merit.

ACTION: For the reasons discussed below, this RFA is remanded to the District. The District should work with the applicant to ensure the most current proposed plans are available and publish a revised public notice. The District should fully document its analysis of comments received in response to the updated public notice prior to making a final decision.

DISCUSSION:

The Appellant asserts that the District committed a procedural error when it relied in part on public and agency comments received in response to the public notice as a basis to deny the permit. Since the public notice comments are reflective of the proposal as advertised, the Appellant believes that stated concerns may or may not remain if commenters were given the opportunity to review the revised proposal.

[93] 36 CFR part 800.3(c)(4).
[94] AR 1795-1796.

Section 4 of the EA/SOF[95] describes comments received in response to the public notice dated July 14, 2015. The Appellant states that the District's decision not to re-circulate the revised project plan is a departure from common agency practice and this error affected the District's analysis and decision.

Specifically, the Appellant cites two specific areas where it believes the District relied on comments that were not reflective of the most current proposal.

- On page 61 of the EA/SOF, under "Corps Wetland Policy," the District cites to the EPA's statements "during the PN" regarding "unacceptable impacts to an ARNI."[96]
- On page 62, the District explicitly states that it considered the "concerns raised by federal and state resource agencies" in order to reach the conclusion that the permit action [*sic*] will not have a significant impact on the quality of the human environment.[97]

The Appellant misstates the District's statement on page 62. The direct quote reads:

> "Having reviewed the concerns raised by federal and state resource agencies and interested parties, as well as applicant's response to those comments, combined with our assessment of the environmental impacts associated with this project, **the Corps was unable to find** that this permit action will not have a significant impact on the quality of the human environment." (emphasis added).

The Appellant indicates that the District's failure to recirculate the revised project plan is critical, because EPA asserted that Silverdale Creek was an Aquatic Resource of National Importance, or ARNI, based on the former project configuration. The Appellant further states that the District does not have any support in the record to indicate whether EPA would still find the impacted jurisdictional resources to constitute ARNI, given the revised project plans.

In response to the public notice, the EPA expressed the opinion that "this project may have substantial and unacceptable impacts to aquatic resources of national importance. Therefore, the EPA recommends that the Department of the Army deny the permit, *as proposed*."(emphasis added)[98] There is no indication that the ARNI designation was specific to Silverdale Creek; in fact, in a follow-up letter, dated September 18, 2015, the EPA states that "Based on the observed quality of forested wetlands, and biological diversity and productivity of the entire stream/wetlands system at the site, the EPA considers these to be aquatic resources of national importance."[99]

The ARNI designation is a resource-based threshold, not an impact-based threshold. A reduction in impacts is not likely to alter the EPAs conclusion that the resources on site

[95] AR 1741-1773.
[96] AR 1796.
[97] AR 1797.
[98] AR 0479-0480.
[99] AR 0493.

represent an ARNI. However, the AR contains no evidence that the EPAs other conclusions, such as that the proposal represented 'substantial and unacceptable impacts' would have remained the same had it been given the opportunity to evaluate the revised/minimized proposal.

Regulatory Guidance Letter (RGL) 83-11[100] provides guidance on processing procedures when a permit applicant modifies the project during processing. This guidance generally states that it is the District Commander's decision whether to issue a revised public notice, after consideration of the scope of the project modifications. However, section 3, written to address situations where the application has been withdrawn and resubmitted, suggests that if a new application is submitted within a reasonable time (defined as normally not to exceed 6 months), issuing a new public notice may not be necessary. This statement in the RGL can be interpreted to mean that if it has been more than six months, a new public notice may be necessary. Section 3 goes on to say that "If, however, the resubmission effectively would deprive the public of the opportunity to actually or sufficiently present its views on critical concerns regarding that particular permit application, then the District Commander will issue a new public notice." Although in CMMD's case the application was not withdrawn, the proposed impacts were substantially reduced in the final revised application that was submitted more than two years after the public notice date, causing it to be substantially different than the previous submission. Because of the extended time between the public notice and the permit decision, and because the District appears to have based its decision, in part, on comments from EPA that were not based on the current proposal under review, this reason for appeal has merit.

Conclusion: After reviewing and evaluating the Appellant's reasons for appeal, the District's AR, and recommendation of the RO, and for the reasons stated above, I find that portions of the appeal have merit, as indicated above. Therefore, the permit decision is being remanded to the Galveston District Engineer for further analysis and documentation in accordance with 33 C.F.R. 331.10(b). The District Engineer's decision made pursuant to this remand becomes the final Corps permit decision. This concludes the Administrative Appeals Process.

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Brigadier General, U.S. Army
Commanding

[100] Per RGL 05-06, RGL 83-11, although expired, is generally still applicable.