

ADMINISTRATIVE APPEAL DECISION
CLEAN WATER ACT (CWA)
Meschi Property
South Padre Island, Texas
Galveston District Denied Permit, File Number 20907(02)

30 January 2009

Review Officer: Thomas J. Cavanaugh, U.S. Army Corps of Engineers (Corps), South Pacific Division, San Francisco, California

Appellant: Gary Meschi, Appellant
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District Representative: John Wong, Regulatory Project Manager
Lloyd Mullins, Unit Leader, Corpus Christi Regulatory Field Office

Authority: Clean Water Act (33 USC 1344)

Receipt of Request for Appeal: Unknown, request dated October 16, 2007

Appeal Meeting and Site Visit Date: 20 March 2008

Summary of Decision: This permit denial is remanded to the District for further evaluation and consideration of information provided by the appellant. In particular, the District must establish a project purpose, which is consistent with the Section 404(b) (1) guidelines for specification of disposal sites for dredged or fill material (40 CFR Part 230) and existing guidance, against which to evaluate alternatives. In its evaluation, the District must clearly distinguish between the public need that the appellant's project would respond to, and the appellant's need that is being considered in the permit evaluation. Additionally, the District must include additional information and engage in further analysis and consideration as described in the paragraphs below under each of the reasons for appeal.

Background Information: The Meschi property is an approximately 4.89 acre site located at 1004 Padre Boulevard, in the Town of South Padre Island, on South Padre Island, Cameron County, Texas. The property is located 380 feet from the Laguna

Madre, Latitude 26°05'33.81", Longitude 097°09'54.82". The topography of the site is generally flat and slopes gently to the west, toward the Laguna Madre. The site is undeveloped and contains grass uplands, saltwater coastal flat wetlands and black mangroves. Immediately to the south of the project site is a paved area and commercial building, to the north is undeveloped land and a tourist attraction, to the east Padre Boulevard and the Make Waves Building. The eastern portion of the site contains halophytic species, mangroves, and some upland. The remainder of the site to the west is sandflat/mudflat/algal flat which, once offsite, contains a band of black mangroves and then seagrass beds. The project site is located within critical habitat for piping plover.

The applicant proposed to build a grocery store on 3.48 acres of the 4.89 acre property. Project implementation would have resulted in impacts to 2.66 acres of waters of the United States. The extent of CWA jurisdiction is not a subject of this request for appeal.

The District reviewed the Appellant's permit application, dated February 27, 2003, which was determined to be complete. On August 16, 2007, the District Engineer denied the appellant's request for a permit after concluding that the project was contrary to the public interest, failed to comply with EPA's 404(b)(1) Guidelines, would have a significant and direct impact on waters of the U.S., and that a Department of the Army permit should not be issued. On October 16, 2007, the Appellant appealed that denial, citing the reasons for appeal that follow:

Appeal Evaluation, Findings and Instructions to the Galveston District Engineer (DE):

ISSUES RELATING TO THE CORPS' ANALYSIS OF ALTERNATIVES PURSUANT TO SECTION 404(B)(1) OF THE CWA AND THE PUBLIC INTEREST REVIEW REQUIREMENTS

REASON FOR APPEAL 1: The analysis of alternatives in the Decision Document arbitrarily ignores the Appellant's purpose and need.

FINDING: This reason for appeal has merit.

ACTION: The District must clearly state a concise, independently established, project purpose against which to analyze alternatives to the proposed project.

DISCUSSION: The District's environmental assessment indicates that "the applicant's stated purpose of the project is "to satisfy the increased tourism, seasonal resident and full-time resident-driven demand for grocery, retail and restaurant services on the southern end of South Padre Island". While the District indicated, in response to questions asked at the appeal conference, that it had analyzed alternatives against the applicant's project purpose, that is not clearly articulated in the environmental assessment. As quoted in the environmental assessment, the applicant's stated purpose is vague, ambitious, and unlikely to be met by any one project. Additionally, the statement appears to more convey the public need to which the applicant is responding,

rather than inform as to the applicant's purpose or need for the proposed project. Project purposes that the District may wish to consider include, but are not limited to, "to construct a small commercial development on South Padre Island", "to construct a grocery store on South Padre Island", or "to construct a small commercial center to serve visitors and residents of South Padre Island".

As the appellant suggested, quoting Louisiana Wildlife Federation v. York, "it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and to substitute a purpose that it deems more suitable". An important point from the cited case was that the wildlife federation was suggesting the applicant's proposed project should be a wildlife refuge, rather than the originally proposed project. The suggested project purpose was regarded by the court as a truly bizarre departure from the project proposed by the applicant.

In the 1990, Old Cutler Bay Elevation Decision, Corps headquarters indicated that "In this regard, as with other aspects of the Guidelines, it is the responsibility of the Corps District to exercise independent judgment. While the Corps needs to consider the applicant's views and information regarding the project purpose and existence of practicable alternatives, this must be undertaken without undue deference to the applicant's wishes." The decision proceeds to conclude that the project purpose "can be neither so broadly defined nor alternatively so narrow as to render the alternatives analysis meaningless or impracticable. The alternatives analysis required under the Guidelines relies on a reasonably defined "project purpose (see 40 CFR 230.10(a)(2) and (a)(3)), and requires substantive evaluations and judgment on the part of the Corps."

Environmental Protection Agency regulations implementing §404 of the CWA ("Section 404(b)(1) Guidelines") provide that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have a less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." This alternative is commonly referred to as the LEDPA (least environmentally damaging practicable alternative). 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 the overall project purposes*." Thus, under the Guidelines, the overall project purpose dictates the range of alternatives that the Corps must consider when determining the LEDPA.

The Section 404(b)(1) Guidelines further provide: "the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under [the Section 404(b)(1) Guidelines]." According to Council on Environmental Quality (CEQ) NEPA regulations, the purpose and need statement "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." Corps regulations add: "[w]hile generally focusing on the applicant's statement [of its project purpose], 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 Corps' Standard Operating Procedures for the Regulatory Program, dated October 15, 1999, explain:

[t]he overall project purpose must be specific enough to define the applicant's needs, but not so restrictive as to preclude all discussion of alternatives. Defining the overall project purpose is the responsibility of the Corps, however, the applicant's needs must be considered in the context of the desired geographic area of development, and the type of project being proposed.

Thus, while the Corps must give some deference to the applicant's needs, the Corps ultimately defines the project purpose so that it can consider a reasonable range of alternatives in its analysis.

REASON FOR APPEAL 2: The Corps abused its discretion by utilizing a series of arbitrary assumptions and unsubstantiated conclusions as bases for rejecting the Appellant's analysis of practicable alternatives.

FINDING: This reason for appeal has merit.

ACTION: The District, unless there are specific reasons to make an independent review, should presume that the appropriate economic evaluations have been done and that there is a need that the proposed project would meet. The District should consider that need in considering projects that would meet its independently determined project purpose.

DISCUSSION: The District rejected the appellant's analysis of practicable alternatives which included economic evaluations of the project and did not conduct an independent economic review. 33CFR 320.4(q) states "When private enterprise makes application for a permit, it will generally be assumed that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the market place. However, the district engineer in appropriate cases, may make an independent review of the need for the project from the perspective of the overall public interest. The economic benefits of many projects are important to the local community and contribute to needed improvements in the local economic base, affecting such factors as employment, tax revenues, community cohesion, community services, and property values." That being said, it would not be appropriate to state the need in such a way as to eliminate consideration of a reasonable range of alternatives.

Defining the overall project purpose is the responsibility of the Corps, however, the applicant's needs must be considered in the context of the desired geographic area of the development, and the type of project being proposed. Defining the overall purpose of a project is critical in its evaluation, and should be carefully considered. For example, a proposed road through wetlands or across a stream to provide access to an upland residential development would have an overall project purpose of "to construct road access to an upland development site." Based on this overall project purpose, the Corps would evaluate other potential access alternatives. However, the Corps would not consider alternatives in any way for the residential community or otherwise

“regulate” the upland housing. The District also limited the alternative analysis to onsite options. It may be more appropriate to also consider a combination of onsite and offsite options that may also fulfill the appellant’s and public’s purpose and need.

REASON FOR APPEAL 3: Having rejected Appellant’s business objectives, the Corps applies an unlawful standard to justify its conclusion that Mr. Meschi’s project is not needed.

FINDING: This reason for appeal has merit.

ACTION: Prior to making its final decision, the District should clarify the statement in the decision document which indicates that “the applicant has failed to establish the need for a new grocery store at this location in order to maintain the tourist based economy of South Padre Island” to reflect whether the Appellant has or has not rebutted the presumption that there are less damaging practicable alternatives to the proposed project that would meet the project purpose.

DISCUSSION: This clarification is necessary to demonstrate that the alternatives to the proposed project were evaluated against the project purpose, rather than against the public need that, to some degree, might be met by the proposed project. Most of the apparent confusion resulting from this statement can be avoided by clearly stating and separating statements of purpose and need. A clear statement of project purpose must be made in order to evaluate alternatives. It is also important to separate the public need from that of the applicant. The District has not clarified that the Appellant’s needs are not the same as those of the residents and tourists of South Padre Island. The Appellant’s needs may include, among other things, proximity to customers, the availability of sufficiently large sites in an area with adequate utilities, proper zoning and other conditions.

REASON FOR APPEAL 4: The Corps arbitrarily rejected the views of qualified local officials regarding the need and viability of Appellant’s project.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: While 33 CFR 320.4(j)(2) indicates that, “ the primary responsibility for determining zoning and land use matters rests with state, local and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance. Such issues would include, but are not necessarily limited to, national security, navigation, national economic development, water quality, preservation of special aquatic areas, including wetlands, with significant interstate importance, and national energy needs. Whether a factor has overriding importance will depend on the degree of impact

in an individual case.”, the permit was denied based on a determination that the project was contrary to the public interest and failed to comply with the Section 404(b)(1) guidelines. The general deference to local land use decisions is only to the particular decision and does not override the various other reasons that might lead to denial of a requested permit, nor can the particular land use decision be used as a basis for failing to consider alternatives to the proposed project. Although the South Padre Island Economic Development Corporation and the South Padre Island Chamber of Commerce adopted resolutions stating that Mr. Meschi’s project will be an asset to the economy of the island because it will stimulate the South Padre Island economy by creating jobs, increasing tax revenues, and providing the tourists and residents with convenience in a variety of goods and services that will improve the quality of life in the community, the proposed project still must comply with the Section 404(b)(1) guidelines and must not be contrary to the public interest prior to a permit being issued.

REASON FOR APPEAL 5: The Corps failed to consider the public’s need for Appellant’s project.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The Appellant indicates that the Blue Marlin Supermarket has been the only grocery store on SPI for 35 years, the island’s population has more than tripled and tourism has increased dramatically. The store, according to the Appellant has been the primary source of food and supplies during emergencies. The Appellant indicates that the existing Blue Marlin location is of insufficient size to meet the growing demand. The appellant’s conclusion is that valid economic data identifies the need for services at that location. As indicated above, there would be no reason to question the public need. However, it would be contrary to existing regulation and guidance to conclude, based on a general statement of public need, that the range of potentially practicable alternatives would be limited to a single design at a particular location.

The Section 404(b)(1) Guidelines (40 CFR Part 230) further provide: “the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, will in most cases provide the information for the evaluation of alternatives under [the 404(b)(1) Guidelines].” According to Council on Environmental Quality (CEQ) NEPA regulations, the purpose and need statement “shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” Corps regulations add: “[w]hile generally focusing on the applicant’s statement [of its project purpose], 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.” Corps Standard Operating Procedures for the Regulatory Program explain:

[t]he overall project purpose must be specific enough to define the applicant’s needs, but not so restrictive as to preclude all discussion of alternatives.

Defining the overall project purpose is the responsibility of the Corps, however, the applicant's needs must be considered in the context of the desired geographic area of development, and the type of project being proposed.

Thus, while the Corps must give some deference to the public's needs, the Corps ultimately defines the project purpose so that it can consider a reasonable range of alternatives in its analysis.

**ISSUES RELATING TO THE CORPS' ANALYSIS OF ENVIRONMENTAL CONDITIONS
AND ANTICIPATED PROJECT IMPACTS**

REASON FOR APPEAL 6: The Corps' conclusions regarding the tidal inundation of the site are based on a fatally flawed analysis.

FINDING: This reason for appeal does not have merit

ACTION: No action is required.

DISCUSSION: While there is disagreement between the District's and the Appellant's analysis and interpretation of tidal data on the site, especially as it relates to the choice of monitoring stations and extrapolation of the respective data from each of these stations, the District's analysis is reasonable. Section 48, referenced by the appellant for the classification system of wetland hydrology, specifically states that the classification system was developed for nontidal areas. The appellant's area is tidal. Even if the appellant's data were used, it is unlikely to have the effect on the permit decision, as suggested by the Appellant, because although inundation can be used to establish sufficient hydrology for a wetland, the manual also uses saturation within the upper 12 inches of soil to establish sufficient hydrology. Furthermore, the duration of inundation alone is not directly related to ecological value of a wetland as suggested by the appellant. Additionally, the Appellant's conclusion that frequency of tidal inundation can be directly related to the hydrology criteria for wetlands from the 1987 Wetland Delineation Manual as a basis for determining extent of jurisdiction is incorrect.

REASON FOR APPEAL 7: The Corps' concurrence with the NMFS finding that the site constitutes Essential Fish Habitat (EFH) is arbitrary and not in accordance with applicable law.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: As with a consultation in accordance with Section 7 of the Endangered Species, a Federal agency is required to consult with NMFS when it determines that one

of its actions would result in adverse effects to essential fish habitat. Actions that affect EFH may include actions that take place outside of EFH. The task of describing and identifying EFH falls to the Regional Fisheries Management Councils and NMFS. An affirmative concurrence by the Corps with a determination that a particular area constitutes EFH is not required for an area to be designated as EFH. In fact, the Corps relies on the findings of the NMFS for all EFH determinations. The District properly consulted with NMFS as was its responsibility under the Magnuson-Stevens Act

REASON FOR APPEAL 8: The Corps' concurrence with the USFWS finding that the site constitutes an ARNI is not supported by the record, and the use of the ARNI finding as a basis to support denial is not in accordance with applicable law.

FINDING: This reason for appeal has merit.

ACTION: Remove reference to District concurrence with the FWS assertion that wetlands on the site of the proposed project constitute aquatic resources of national importance (ARNI) from its decision document.

DISCUSSION: The 1992 MOA between Department of Army and Department of Interior places the final decision as to whether a particular resource constitutes an aquatic resource of national importance (ARNI) with the Assistant Secretary of the Army for Civil Works (ASA(CW)). While it should be noted in the decision document that FWS indicated that they believe the resources on site to be ARNIs, the District cannot presume to provide concurrence with that assertion. Therefore, the concurrence with the ARNI finding should be removed from the document.

ISSUES RELATING TO THE CORPS' ANALYSIS OF CUMULATIVE IMPACTS

REASON FOR APPEAL 9: Parameters of Cumulative Impact Analysis Imposed by Applicable Law and Regulations. The Decision Document is not in accordance with law for at least the following two reasons: (a) the analysis improperly included past, present and future impacts that were for areas that were beyond the scope identified by the Corps; and (b) the future impacts considered were not "reasonable and practical" or "reasonably foreseeable" as required by law.

FINDING: Portions of this reason for appeal have merit.

ACTION: Prior to making its final decision, the District should geographically clarify the precise location of the cumulative impact analysis area, and expand upon the descriptions and locations of projects that it included in its cumulative impacts analysis, to ensure they are within the cumulative impact analysis area. If precise acreages are not available, the District should describe the evaluation in more detail that would support the conclusion that the impacts would cumulatively be approximately 151 acres of waters of

the United States. Furthermore, the District should ensure that the future impacts considered in the cumulative analysis are reasonably foreseeable through documented master plans, as well as local zoning requirements, water supply plans, economic development plans, and or various permitting records, etc., and not merely speculative based on the presence of undeveloped property.

DISCUSSION: The environmental assessment indicates that the geographic area covered by the cumulative impacts assessment is the lower portion of South Padre Island and the immediately adjacent waters of the Laguna Madre. However, the document does not geographically identify the precise area. While the District should, in its final decision, include more detail on the impacts it considered to be cumulative, the geographic scope provided is reasonable. The Environmental Assessment appears to state that the 151 acres of impacts to waters of the United States identified in the cumulative impact analysis does not include areas north of the city limits of South Padre Island. It also appears that the area north of the city limits of South Padre Island is included in the analysis area. However, this is not clear. Further, it was not clear if all of the reasonable foreseeable impacts were documented properly.

REASON FOR APPEAL 10: Inclusion of effects from outside the scope of the analysis. The Corps' analysis of cumulative impacts goes far beyond the "lower portion of [SPI] and the immediately adjacent waters of Laguna Madre". At various points in the analysis, it is clear that the scope has been expanded to cover at least the entirety of SPI. Those particular past, present or potential future impacts that are or may be beyond the appropriate scope are identified in the table attached as Exhibit E.

FINDING: This reason for appeal does not have merit.

ACTION: No substantive action is required.

DISCUSSION: The environmental assessment indicates that the geographic area covered by the cumulative impacts assessment is the lower portion of South Padre Island and the immediately adjacent waters of the Laguna Madre, although the document does not geographically identify the precise area. It is apparent that the District limited the analysis area to the lower portion of South Padre Island. While the District should consider, in its final decision, including more detail on the impacts it considered to be cumulative, the geographic scope is reasonable.

REASON FOR APPEAL 11: The Corps' cumulative impacts analysis is based largely on speculative actions and effects that are not eligible for inclusion under applicable law.

FINDING: This reason for appeal has merit.

ACTION: The District should, in its final decision, include more detail on the impacts it considered to be cumulative.

DISCUSSION: The District should include as much detail as is reasonably available on the reasonably foreseeable impacts it considered in its evaluation of cumulative effects. Describing the specific properties, including those with recently verified delineations, documented master plans, economic development plans, various permitting records, which municipal services are proposed to be provided, and the likely impacts associated with the development of each of those properties, would remedy this reason for appeal.

OTHER ERRORS OR OMISSIONS OF MATERIAL FACT IN THE DECISION DOCUMENT

REASON FOR APPEAL 12: The Corps' statements regarding Mr. Meschi's involvement in Application 20621, and alleging prior knowledge of significant environmental issues associated with the subject site, are incorrect.

FINDING: This reason does not have merit.

ACTION: No action is required. The District should, however, consider the need for statements concerning the appellant's involvement in prior applications before including them in its final decision.

DISCUSSION: Each application for a Department of the Army permit is evaluated on its own merit. An applicant's prior involvement with a particular site or proposed action is, for the most part, not relevant to the decision at hand. There are situations where such prior knowledge and involvement may be relevant, such as in the case of a violation, enforcement action, or the processing of an after the fact permit. In this case, it does not appear that statements of the appellant's involvement with a prior action were part of the basis for denial of the requested permit.

REASON FOR APPEAL 13: The Decision Document mischaracterizes site conditions.

FINDING: This reason for appeal has merit.

ACTION: Prior to making its final decision, the District should include and consider further information concerning surrounding land use and the degree to which human activities have affected, and continue to affect, the ecological value of the proposed project site.

DISCUSSION: The District should include, in its final decision, an indication of the degree to which existing site conditions play a role in its final decision. The District should also include and describe more of the area in the vicinity in addition to the immediate adjacent project site, and how the area affects the ecological value of the project site. While it is not clear that the District's decision to issue or deny the requested permit would be affected by a more extensive description of site conditions and

surrounding uses, a more inclusive description would better demonstrate that all relevant factors are considered in the Districts final decision.

REASON FOR APPEAL 14: Omissions relating to coordination with TCEQ and status of section 401 process. The Decision Document omits certain key facts relating to TCEQ's involvement in the permitting process, particularly with respect to an agreement with the Appellant to grant the required 401 certification, the implementation of mitigation measures, and TCEQ's evaluation of Appellant's analysis of practicable alternatives.

FINDING: This reason for appeal does not have merit

ACTION: No action is required.

DISCUSSION: The Corps cannot issue a permit without a 401 water quality certification from the 401 certifying agency in the state in which a permit is proposed to be issued. The District's obligation would be to incorporate any conditions of certification into an issued permit. While a state certifying agency may incorporate some aspects of the 404(b)(1) guidelines into its decision process, the Corps is required to independently analyze proposed projects and would not be obligated to defer to a 401 certifying agency in its decision as to whether to issue a requested permit. In this case, the District worked independently on their analysis of practicable alternatives and was not required to incorporate the appellant's coordination efforts with the TCEQ, if known, into the decision document and its actions were appropriate.

REASON FOR APPEAL 15: Omissions Relating to Proposed Mitigation. The Decision Document understates the extent of the Appellant's efforts regarding the development of on and off-site mitigation.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: The decision as to what constitutes appropriate and practicable mitigation is made only after a decision to permit a proposed project has been made. The District denied the permit based on non-compliance with the Section 404(b)(1) guidelines and the significant adverse impacts to EFH, wetlands, and other fish and wildlife values. Given that the District's decision was to deny the requested permit, the District would not have reached the point in the evaluation where considering proposed mitigation was either necessary or appropriate. Evaluation of the proposed mitigation would only become necessary should its final decision be to issue the requested permit.

OTHER ISSUES FOR APPEAL

REASON FOR APPEAL 16: The Decision Document states that the pile-supported building area “is considered to have the effect of a discharge of fill material due to the number of piling [*sic*] which are expected to increase sedimentation and trap debris, which in turn would reduce or impair water circulation ... The pile-supported structure is also expected to result in the adverse modification of aquatic functions.” Quoting the portion of its regulations that address pilings does not constitute an explanation of *why* the Corps concluded that the pilings at issue constitute jurisdictional fill. Appellant contends that the pile-supported structures do not constitute jurisdictional fill.

FINDING: This reason for appeal has merit.

ACTION: Prior to making its final decision, the District should further analyze and detail the basis for determining that, in this case, piles proposed by the appellant would constitute fill.

DISCUSSION: 33 CFR 323.3 (c) (1) and (2) indicate that:

“(1) Placement of pilings in waters of the United States constitutes a discharge of fill material and requires a Section 404 permit when such placement has or would have the effect of a discharge of fill material. Examples of such activities that have the effect of a discharge of fill material include, but are not limited to, the following: Projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the pilings themselves effectively would replace the bottom of a waterbody; projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions.

(2) Placement of pilings in waters of the United States that does not have or would not have the effect of a discharge of fill material shall not require a Section 404 permit. Placement of pilings for linear projects, such as bridges, elevated walkways, and power line structures, generally does not have the effect of a discharge of fill material. Furthermore, placement of pilings in waters of the United States for piers, wharves, and an individual house on stilts generally does not have the effect of a discharge of fill material. All pilings, however, placed in the *navigable waters of the United States*, as that term is defined in part 329 of this chapter, require authorization under section 10 of the Rivers and Harbors Act of 1899 (see part 322 of this chapter).”

Therefore, there are instances when pile supported structures would constitute fill and times when they would not. The District has, as the Appellant observed, included the

conclusion that the portion of the project that is pile supported would constitute fill, but did not include its rationale for coming to that conclusion.

REASON FOR APPEAL 17: Appellant contends that the rule upon which the Corps relies as the legal basis for its assertion that the pile-supported structures constitute jurisdictional fill exceeds the scope of regulatory authority provided to the Corps by Congress under section 404 of the Clean Water Act.

FINDING: This reason for appeal does not have merit.

ACTION: No action is required.

DISCUSSION: Objections to Corps regulations are not properly resolved through the appeal process.

REASON FOR APPEAL 18: To the extent that impacts to “special aquatic sites” (as that term is defined at 40 C.F.R. § 230.3(q)(1)) are contemplated by the proposed project for non water-dependent activities, Appellant contends that it carried the burden to “clearly demonstrate” that there are no other practicable alternatives to the proposed discharges, thus rebutting the presumption in favor of the existence of such sites expressed in 40 C.F.R. § 230.10(a)(3).

FINDING: This reason for appeal does not have merit.

ACTION: The District compiled and evaluated the information for 40 CFR Part 230, the Section 404(b)(1) guidelines for the Specification of Disposal Sites for Dredged or Fill Material, as required in the evaluation of a Section 404 of the Clean Water Act permit application.

DISCUSSION: The Appellant indicates that he believes that he has rebutted the presumption that alternatives exist that would allow him to avoid a discharge of dredged or fill material into special aquatic sites. Further the Appellant believes that he has demonstrated that his project, as proposed, is the least environmentally damaging practicable alternative (LEDPA). The District compiled the available information and determined that there are alternatives that are less damaging to the to the aquatic environment, the proposed project did not comply with the Section 404(b)(1) guidelines and that the cumulative impacts will have a significant impact of EFH, wetlands, and other fish and wildlife values. The District conducted the alternative analysis in accordance with the Section 404(b)(1) guidelines. However, refining the appellant’s purpose and need and the publics need will further refine the Section 404(b)(1) guideline analysis of alternatives.

Information Received and its Disposition During the Appeal Review: The administrative appeal was evaluated based on the District's administrative record, the Appellant's Request for Appeal, and the Appellant's and District's written responses to the appeal agenda items, and discussions at the appeal meeting. Information which was received during and after the appeal conference was considered to the extent it clarified information in the existing administrative record. New information was not considered in the appeal, but is available to the District, should it choose to utilize it in its reconsideration.

Conclusion: I conclude the District must further evaluate and reconsider its decision to deny the requested permit. As indicated in comments upon each of the specific reasons for appeal, above, the District must clearly state the project purpose against which it will evaluate alternatives to the proposed project. The District must clearly separate in its evaluation the public need that the appellant's project would respond to and the appellant's need that is being considered in the permit evaluation. Additionally, the District must include additional information and engage in further analysis and consideration as described in the above paragraphs under each of the reasons for appeal.



KENDALL P. COX
Brigadier General, USA
Commanding