

ADMINISTRATIVE APPEAL DECISION

PERMIT DENIAL

B & C WESTSIDE DEVELOPMENT (OCEANVIEW)

FILE NUMBER 2001-6163

JACKSONVILLE DISTRICT

DATE: MARCH 18, 2007

Review Officer: Michael F. Bell (RO), US Army Corps of Engineers (Corps), South Atlantic Division (SAD), Atlanta, Georgia.

Appellant: Rudy Rowe of B & C Westside Development, LLC.

Receipt of Request for Appeal (RFA): December 12, 2006.

Appeal Accepted: February 8, 2007.

Appeal Conference/Site Visit: March 9, 2007.

Summary of Decision: This appeal does not have merit. I find that the District did comply with applicable laws, regulations, and policies in reaching their permit denial decision and did provide adequate documentation to support the determination.

Background Information: On July 3, 2002, B & C Westside Development, LLC, submitted a Department of the Army (DA) permit application to the Jacksonville District to construct thirty-nine (39) multi-family housing units on the project site. The project site consists of 13.47 acres, of which 0.92 acres are primarily vegetated with Brazilian Pepper, 3.12 acres are open water, 7.66 acres are mangrove swamp, and 1.77 acres are spoil areas (uplands) Blue Hole Creek and associated tributaries run through the parcel. Due to setback requirements from the adjacent Highway A-I-A, only 0.23 acres of uplands are available for development without a DA permit. The Appellant's project will impact and/or fill 1.62 acres of mangrove swamp and other wetlands dominated by exotics.

After consulting with the South Florida Water Management District (SFWMD), the Appellant submitted revised permit drawings and a mitigation plan to the District on March 11, 2005. The Appellant also sent the District the original application on March 16, 2005. The Appellant further minimized impacts by eliminating some amenities and submitted revised permit drawings, a revised mitigation and monitoring plan, and the SFWMD permit to the District on November 21, 2005. The District issued the public

notice on January 23, 2006. In response to the public notice, the US Environmental Protection Agency (EPA) and the National Marine Fisheries Service (NMFS) requested the District deny the permit. Other concerned agencies furnished comments to the District. The District forwarded the EPA and NMFS letters to the Appellant to allow the opportunity to address concerns. The Appellant sent letters to the District responding to agency concerns.

The District Engineer denied the permit request by letter November 24, 2006, stating the project is not in the public interest and does not comply with the Section 404 (b)(1) Guidelines. The Appellant disagreed with the decision and appealed the permit denial to the South Atlantic Division Commander. The South Atlantic Division Administrative Appeal Review Officer (RO) accepted the appeal on February 8, 2007.

Site Visit: On March 9, 2007, the RO conducted an on-site visit with the Appellant and his consultants to review and discuss the permit area and surrounding environment. During the site visit, the RO found that the subject area compared favorably with the existing site conditions described in the District's Environmental Assessment and Statement of Finding (EA/SOF).

The site visit included a walk to Blue Hole Creek and an associated tributary where the Appellant proposes to construct his housing units. Spoil areas from historic mosquito ditch excavation exist on both sides of the creek. These spoil areas are designated as the site's upland areas. The upland areas appear to be slowly reverting to wetland status as saturated areas and fiddler crab holes are common. The mangrove wetlands on the fringe of the spoil sites appear to exhibit extremely high wetland functions. Historic disturbances have removed daily tidal flushing from the remaining mangroves and the exotic Brazilian pepper invades the site.

The 13.47-acre parcel the Appellant owns is bounded to the north by Queen's Island Preserve, to the west by the Queen's Cove Subdivision, to the east by Highway A-1-A, and to the south by undeveloped mangrove wetlands. The project site is due west of Highway A-1-A. A condominium development exists to the east of Highway A-1-A.

The RO concluded the field investigation and the attendees adjourned to Fort Pierce for the appeal conference.

Appeal Conference Participants: Michael Bell, (RO)
Rudy Rowe, Appellant
I. Todd Sumner, Esq., Appellant Representative
Freda Posin, Appellant Representative
Robert Weigt, Appellant Representative
Terry Rice, Appellant Representative
Penny Cutt, Jacksonville District, (PM)
John Studt, Jacksonville District

APPEAL EVALUATION, FINDINGS and INSTRUCTIONS to the Jacksonville District Engineer (DE):

Reasons for the Appeal as Presented by the Appellant:

Appeal Reason I: The District Engineer's Decision Is Not Supported by Substantial Evidence in the Administrative Record:

The RFA states that during the five years of permit application processing, the District has misplaced the files on various occasions. The District also had multiple project managers assigned to this proposed project.

FINDINGS: This reason for appeal has no merit.

ACTION: None required .

Discussion: During the Appeal Conference, the Appellant explained that misplacing the file and multiple project managers contribute to Appeal Reason I. The Appellant stated that substantial evidence in the Administrative Record must have been lost from the different project managers handling the file.

The District stated that the original file had been located and not lost. Having multiple project managers is the cost of doing business in South Florida due to the high turnover rate. The Appellant did provide the administrative record for the appeal conference to expedite the process. When the Appellant sent the Administrative Record to the Division and the District, the RO asked the PM to review the submitted information to determine if anything was missing. Neither the Appellant nor the District supplied any missing information. This reason for appeal does not have merit.

Appeal Reason I (A): Other than the final permit decision itself, the Administrative Record wholly lacks any documentation reflecting the District Engineer's deliberations.

The RFA states that the Appellant supplied numerous materials and documents to the District to assist in the permit evaluation. The Appellant states they were never given any indication that the materials were insufficient or otherwise flawed. The Appellant and the Appellant's consultants were not afforded an opportunity to understand the concerns of the District Engineer prior to the denial so they could respond.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: After receiving the permit application, the District sent a letter to the Applicant dated September 18, 2002, stating that the proposed project is located in a special aquatic site and is not water dependent [Record, OV000051]. Alternatives that

do not include filling in special aquatic sites are presumed to be available. The Appellant replied to the letter with a May 2002 *404(b)(1) Compliance* report that was included in the Administrative Record [Record, OV000224]. The District evaluated the material in the *404(b)(1) Compliance* report and discussed the findings in the Department of the Army Environmental Assessment and Statement of Findings (EA-SOF).

The EA-SOF states that the District issued a public notice for the proposed project on January 23, 2006 [Record, OV000998]. The US Environmental Protection Agency (EPA), US Fish and Wildlife Service, State Historic Preservation Officer, National Marine Fisheries Service (NMFS), and State and local agencies responded to the public notice by providing letters to the District. The EPA and NMFS recommended permit denial. The District forwarded the comment letters to the Appellant's authorized agent on February 24, 2006.

During the Appeal Conference, the Appellants admitted they received comments from the EPA and NMFS and responded to the issues. The Appellant sent copies of the response letters to the District. The District received the comments and reviewed the responses before making any permit decision. The District had also reviewed all comments sent to the State agencies from the Appellant.

Corps Regulations at 33 CFR 325.2(a) (3) Processing of Permits, state:

The district engineer will consider all comments received in response to the public notice in his subsequent actions on the permit application. *** If the district engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant will be given the opportunity to furnish his views.

As discussed above, the District did receive and review the Appellant's and agency comments before making a permit decision [Record, OV001003]. The EA/SOF states on page 23:

The Corps has analyzed all responses to the public notice and agrees with the National Marine Fisheries Service and the Environmental Protection Agency that DA authorization should not be granted.*** [Record, OV001020].

There is no indication in the record that the District did not consider the Appellant's submitted materials before making a permit decision, therefore, this reason for appeal has no merit.

Appeal Reason 1 (B): Administrative Record is Inconsistent with the District Engineer's Decision.

The Administrative Record fails to provide documentation of the rationale underlying the District Engineer's decision. Further, the Administrative Record reflects that the District

Engineer was preparing for issuance of a permit not a denial based on the communications with the Appellant's environmental consultants. *** While the EA-SOF provides explanation, the Administrative Record does not document the District Engineer's shift to recommend denial to the Appellant's Application.

FINDINGS: This reason for appeal has no merit.

ACTION: None required .

Discussion: This reason for appeal appears to reference the substantial evidence standard. The Corps Administrative Appeal Regulations state:

The division engineer will disapprove the entirety of or any part of the district engineer's decision only if he determines that the decision on some relevant matter was ... not supported by substantial evidence in the administrative record" [33 CFR 331.9(b)]. The RO will also conduct an independent review to verify that facts of analysis essential to the district engineer's decision have not been omitted from the administrative record" [33 CFR 331.1(b)(2)].

The RFA states that the District was preparing to issue the permit then shifted positions to deny the permit. During the Appeal Conference, the RO required the Appellant to identify these contradictions in the Administrative Record. The Appellant and the District reviewed correspondence and the numerous electronic messages in the Administrative Record [Record, OV000845 to OV000965]. The RO discovered no evidence that the District informed the Appellant that a permit would be issued. The District did inform the Appellant that they had enough information to make a permit decision. The District's decision is based on substantial evidence in the administrative record.

Appeal Reason I (C): Impact Avoidance and Minimization.

The RFA states that there is nothing in the Administrative Record that demonstrates if or how the District Engineer evaluated the Appellant's impact avoidance and minimization documentation and reports. The RFA further states that the District made a statement that the project impact avoidance and minimization was acceptable.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: During the appeal conference, the Appellant stated how the project had avoided and minimized impacts throughout the permitting history. The Appellant discussed a chronology of avoidance and minimization efforts and stated that the District did not evaluate the material submitted by the Appellant. The District acknowledged that minimization had occurred, however, just because the Appellant had minimized to some degree did not necessarily mean that the Appellant had taken all

appropriate and practicable steps to minimize potential adverse impacts of the discharge on the aquatic environment.

There are several examples where the District reviewed and evaluated the avoidance and minimization materials submitted by the Appellant. The District had “evaluated the agency comments and agreed with the NMFS and EPA that DA authorization should not be granted” [Record, OV001002]. Many of the NMFS and EPA comments concerned impact minimization and avoidance. The EA/SOF states on page 6:

The Applicant responded to the EPA comments by letter dated 19 April 2006. The Agent provided a summary of compliance with 404(b)(1) Guidelines and a cumulative impacts analysis, as well as original drawings and the project as permitted by SFWMD ***The EPA had suggested options such as sharing recreational facilities with an adjacent project and the agent indicated that would not be possible. The agent also responded that placing the pool on the rooftop would require reengineering the entire building and that reconfiguration of the project layout is not possible given setbacks from A-I-A required by St. Lucie County***The agent stressed that revisions to the plans have been made and that no further revisions will be made [Record, OV001003].

The District discussed how they evaluated the Appellant’s avoidance and minimization efforts in the alternative analysis discussion on page 7 of the EA/SOF [Record, OV001004]. The District’s avoidance and minimization decisions are supported by substantial evidence in the Administrative Record.

Appeal Reason I (D): Cumulative Impact Analysis.

The RFA states that the District used the projects cumulative impacts as a reason for permit denial. The Appellant believes the Corps can not determine what will happen in the future. To have future impacts on the Indian River Lagoon mangrove system the District must permit all future wetland impacts and there is no guarantee that future Applicants will be able to purchase the mangrove wetlands or have the money to build housing projects. To summarize the Appellant’s concerns, he believe the Districts’ analysis of cumulative impacts is not supported by substantial evidence in the administrative record. The Appellant had also provided a *Cumulative Impact Analysis* for the District for review [Record, OV000771].

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: The Corps’ public interest review requires that “all factors which may be relevant to the proposal must be considered including the cumulative effects thereof.” 33 CFR 320.4(a)(1). The Council on Environmental Quality (“CEQ”)’s National Environmental Policy Act (“NEPA”) implementing regulations define cumulative impacts as:

... the impact on the environment which results from the incremental impact of the action when added to other past, present, and **reasonably foreseeable** future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time [emphasis added]. [40 CFR 1508.7].

The District did receive and review the Appellant's *Cumulative Impact Analysis* as discussed in appeal reason I (C) above, and in pages 8 through 17 of the EA/SOF. The EA/SOF thoroughly discusses the past, present, and reasonably foreseeable future consequences of the proposed action on the Indian River Lagoon system [Record. OV001015-OV001014]:

The South Florida Water Management District's website states that the delicate balance of life in the Indian River Lagoon is threatened by increasing residential and commercial development, industry, agriculture, and human negligence. The combined effects of waste and stormwater runoff, drainage, navigation, loss of essential marshland and agricultural and urban development have severely affected the lagoon's water, sediment and habitat quality. The lagoon system has lost over 75 percent of its emergent wetlands through destruction and impoundment, isolating marsh and mangrove communities from the lagoon***

Although a particular alteration of a wetland may constitute a minor change, the cumulative effect of numerous piecemeal changes can result in a major impairment of wetland resources. The Corps believes that with the substantial loss of mangrove wetlands historically, that substantial further loss, together with existing cumulative losses of the mangrove wetlands in the Indian River Lagoon watershed, would adversely affect the overall structure of the ecosystem, the water quality of the Indian River, and the success of the Indian River Lagoon South Restoration project. Although mitigation is available to compensate for the mangrove wetlands lost, the Corps believes maintaining most of the existing mangrove wetlands is critical to continued health of the Indian River Lagoon. These mangrove wetlands are irreplaceable. Furthermore, this project, if authorized, would likely induce further development on the remaining undeveloped mangrove parcels along A-1-A on Hutchinson Island and possibly similar properties within the Indian River Lagoon that have similar wetland functions and values. While each permit application must be evaluated on a case by case basis, we have determined in this case that the loss of 1.62 acres of mangrove wetlands would lead to unacceptable direct impacts to mangrove wetlands and substantial cumulative loss of mangrove wetlands in the Indian River Lagoon, which would lead to irretrievable environmental harm.

The District identifies numerous privately owned lots in the Indian River Lagoon system that have not been developed. The Appellant stated in the Appeal Conference that the lot owners might not have developed their lots due to lack of economic resources.

It is unlikely that the lots were not developed due to economic reasons. The Florida housing market is highly funded and robust. The difficulty in obtaining permits to fill tidally influenced mangrove wetlands for non-water dependent activities is the more likely reason the lots have not been filled. As was discussed at the Appeal Conference, most of the upland lots near the ocean or adjacent to the Lagoon have been filled.

The statement the District makes is that if it is permissible to fill mangrove wetlands along a tidal river at this location, other developers would want permits to fill tidally influenced mangroves for housing developments. While the Corps must reevaluate each permit on its own merits, it is reasonable to conclude that allowing fill for housing in tidally influenced mangrove wetlands would set a precedent for similar developments.

It is reasonable for the District to be concerned with the precedent that would be set by its decision-making, since decisions on similar projects with similar circumstances should, in general, reflect similar conclusions. For the District to approve a permit in a situation where it has generally denied or discouraged permits in the past, the District would have to identify and explain the basis for that apparent difference in the administrative record. The District has stated that its experience has been that generally permit requests such as the one under appeal here must be denied because they do not comply with the 404(b)(1) Guidelines. The District did not identify any reason why this particular permit action in this type of aquatic habitat should be issued. The cumulative and secondary impacts of the proposal on the aquatic environment are one reason for denial stated by the District. Another important reason for denial is non-compliance with the 404 (b)(1) Guidelines of the Clean Water Act. The residential development does not need to occur within the Indian River Lagoon mangrove system to achieve the overall purpose of the project.

This analysis along with the discussion of the importance of the Indian River Lagoon system in the EA/SOF constitutes substantial evidence in the Administrative Record to support the Districts' decision.

Appeal Reason I (E): Indian River Lagoon-South (IRL-S) Restoration Project.

The Appellant stated in the RFA that several portions of the EA-SOF find the Appellant's project is inconsistent with the Federal IRL-S Restoration project. The RFA further states, "nowhere in the Administrative Record is the Federal IRL-S project ever referenced or discussed."

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: The above statement is contradictory. The Appellant states that the EA-SOF concludes the Appellant's project is inconsistent with the Federal IRL-S project and at the same time, the Appellant states the Federal IRL-S project is not discussed in the

Administrative Record. The EA/SOF references the Indian River Lagoon-South CERP project on pages 11, 14, 15 and 23 of the EA/SOF [Record OV001008, OV001011, OV001012 and OV001020]. The District discusses the goals of the IRL-S Federal Project and states that filling mangroves adjacent to the Indian River Lagoon would be inconsistent with these goals. During the Appeal Conference, the Appellant stated that the District denied the proposed project, in part, because it was inconsistent with a non-funded project. This statement is true, however the affects on the IRL-S project was only a minor consideration in the reasons to deny the project.

The project was denied because of non-compliance with the 404 (b)(1) Guidelines of the Clean Water Act, and because the project was determined to not be in the public interest. The District believes, and the record demonstrates, that the Appellant has not taken all available practicable steps to avoid and minimize impacts to the aquatic resources within the Indian River Lagoon. A residential development can be constructed without destroying tidally influenced mangrove wetlands. The District also determined the project would adversely affect twelve public interest factors that are used to make a public interest determination. The possible impacts to the Indian River Lagoon South civil works project was discussed as part of one of the public interest factors that could be negatively affected by the proposed project, and not as the deciding factor.

Substantial information exists in the Administrative Record to support the District Engineers decision to deny the project and to state that the proposed project would have a negative affect on the Indian River Lagoon.

Appeal Reason II: The District Engineer's Decision Is Plainly Contrary To Requirements of Law, Regulation, An Executive Order, Or Officially Promulgated Corps Policy and Guidance:

Appeal Reason II (A): 404(b)(1) Guidelines:

The RFA states that the Appellant submitted avoidance and minimization measures for the project design to the District. However, the District did not cite avoidance and minimization concerns to the Appellant during the five-year history of the project.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: The Appellant's RFA discusses three main topics in the 404(b)(1) Guidelines section. The first topic is repeated frequently throughout the RFA. The Appellant sought to have the District to reply to every letter, report, or submission of information and advise him if the submitted information was acceptable. To impose such a requirement would unduly burden and delay the permit process. This topic is also subsumed in the discussion of Appeal Reason 1 (A).

The second topic is a citation of several paragraphs of the Section 404 (b)(1) Guidelines. However, the citation does not discuss how the Districts' decision is plainly contrary to requirements of law, regulation, an Executive Order, or officially promulgated corps policy and guidance, in regard to the Guidelines..

The third topic the Appellant discusses is the purpose and need for the project. The ES/SOF states the basic purpose of the project is housing. The overall purpose of the project is to provide multi-family housing in eastern St. Lucie County [Record, OV000999]. The Appellant wanted the purpose and need to state:

Provide a multi-family housing development with modest recreational amenities but also with aesthetic views of the Atlantic Ocean.

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 [40 CFR 1502.13]. A full range of alternatives must be available to the PM to properly conduct National Environmental Policy Act and Section 404(b)(1) compliance. Permit Applicants may not provide a purpose and need statement so restrictive that only a limited number of alternatives will meet the purpose and need for the project. The Corps' guidance in the Plantation Landing 404(q) Elevation Decision states that:

The Corps will not conclude that housing, restaurants, cafes, bars, retail facilities, or convenience stores are water dependent; they are essentially non-water dependent activities. Moreover, they do not gain the status of water-dependent activities merely because the applicant proposes to "integrate" them with a marina, or proposes that any of these non-water-dependent facilities should be "waterfront" or built on waterfront land. The concepts of "integration," "contiguity," and "waterfront" must not be used to defeat the purpose of the "water dependency" and "practicable alternatives" provisions of the Guidelines, or to preclude the existence of practicable alternatives.

The Appellant's desired purpose and need statement is too restrictive.

The housing purpose and need statement in the EA/SOF will provide a full range of alternatives for the PM to consider. The purpose and need statement urged by Appellant of "Multi-family housing with modest amenities and views of the Atlantic Ocean," would severely limit the full range of alternatives required by federal Law. The District's decision that multi-family housing units could be constructed in eastern St. Lucie County without impacting mangrove wetlands adjacent to tidal rivers (i.e., that there are practicable alternatives to the proposed project) is not plainly contrary to requirements of law, regulation, an Executive Order, or officially promulgated Corps policy and guidance.

Appeal Reason II (B): Cumulative Effects on the Aquatic Ecosystem:

The RFA states that the lack of information in the Administrative Record to support various EA-SOF assertions raises numerous questions that must be answered to reveal the rationale behind the District Engineer's denial decision and to enable the Appellant to address the District Engineer's concerns.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: At the administrative appeal conference, the issues discussed under Appeal Reason 1 (D) were re-visited when discussing this appeal reason. No new information was discovered. Accordingly, Appeal Reason 1 (D), addressed this issue.

Appeal Reason II (C): Secondary Effects:

The SFWMD would not have issued its permit if it had determined the project would cause a degradation of the onsite wetlands.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: The RFA states the measures to treat water quality after the project is constructed will improve water quality from the site. Therefore, there should be no negative secondary impacts on the aquatic environment.

The EA/SOF states:

Issuance of the South Florida Water Management District permit ensures that the project would meet State water quality standards. However, the cumulative loss of this and similar mangrove wetlands on privately owned property would degrade the overall water quality of the Indian River Lagoon. This would result because of loss of nutrient uptake of the mangrove wetland system. ***
Contaminant loading on the Indian River Lagoon from sources such as parking lot run-off, herbicides, and pesticides would increase over time and grow with the cumulative rate of development. [Record, OV001018].

The EA/SOF continues:

The scope of the project is to construct a multi-family residential development with recreational facilities and associated infrastructure. Some of the secondary wetland impacts because of development on the parcel have been considered for this proposal and would be minimized through the use of best management practices. Best Management Practices could include the installation of silt

fencing and/or hay bales along the interface between the development and the remaining wetlands,***However, secondary impacts of the extensive human activity associated with such a multi-family residential development would be substantial in the mangrove wetlands that are adjacent to the proposed development. [Record, OV001019].

The Appellant has minimized to some degree the secondary impacts. However, the District Engineer's decision that the housing development will cause impacts from human activity on the adjacent and filled mangrove wetlands is not contrary to law, regulation, an Executive Order, or officially promulgated Corps policy and guidance.

Appeal Reason II (D): Public Interest Evaluation:

The RFA states the District Engineer has indicated in the Permit Denial letter that the project is contrary to the public interest. The Appellant's consultant submitted a Public Interest Report when the application was submitted [OV000973-976]. The RFA then addresses the 13 public interest factors.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: The Appellants interpretation of the public interest factors were discussed at the Appeal conference. Few specific statements were made in the RFA or at the Appeal Conference, which identified how the District Engineer's decision on the project's public interest evaluation was alleged to be contrary to requirements of law, regulation, an executive order, or officially promulgated Corps policy and guidance. Many of the statements made in the RFA concerning the public interest factors were either supportive of the District's evaluation or have been discussed under the other reasons for appeal.

The few specific statements mentioned in the paragraph above involve the District's discussion of the projects effects on aesthetics, environmental concerns, wetlands and fish and wildlife.

Appeal Reason II (D) (1.) Aesthetics:

The RFA states the Brazilian pepper population on the project site is not sparse but rather significant. The higher quality wetlands will be further enhanced through eradication of exotics. In addition, the Appellant is proposing to preserve most of the property in perpetuity.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: The EA/SOF states on page 18:

The site is adjacent to County owned lands to the north *** and undeveloped lands to the south *** The proposed project includes a multifamily residential development, associated infrastructure, and recreational facilities, which is inconsistent with the aesthetics of the immediately adjacent areas. [Record, OV001015].

The evaluation of the projects effect on aesthetics is reasonable and is plainly not contrary to requirements of law, regulation, an executive order, or officially promulgated Corps policy and guidance:

Appeal Reason II (D) (2.) Environmental Concerns:

The Appellant believes the environment will improve with the implementation of the project. The water quality will improve and the Appellant is preserving 82 percent of the site. The Appellant will also remove all the exotics from the site. The RFA states the District Engineer has not provided any documentation to support the statements, conclusions, and beliefs concerning the cumulative effects of the proposed project.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: The Administrative Record contains an EA/SOF and supporting material that discusses the District's position on General Environmental Concerns:

The overall environment on the site would be substantially degraded with the development. The overall environment in the surrounding mangrove area will also be substantially degraded if further future development is allowed. The Corps believes that issuing this permit would encourage remaining landowners of undeveloped parcels that also contain mangrove systems, to propose similar construction. These cumulative effects would have a substantial negative impact on the general environmental concerns of Hutchinson Island and the Indian River Lagoon. [Record, OC001015].

The Districts evaluation of the projects effect on general environmental concerns is reasonable and is plainly not contrary to requirements of law, regulation, an executive order, or officially promulgated Corps policy and guidance:

Appeal Reason II (D) (3.) Wetlands:

The RFA states that since the project has a water quality permit, all water quality concerns are alleviated. The Appellant will preserve 82 percent of the onsite wetlands and remove exotic vegetation. Therefore, the overall function of the wetlands on the Appellant's property will improve.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: The EA/SOF states on page 18:

The discharge of dredged or fill material into mangrove wetlands, as proposed herein, is likely to damage and destroy habitat and adversely affect the biological productivity of the wetlands ecosystems by smothering, dewatering, permanently flooding, and altering substrate elevation and/or periodicity of water movement. The addition of dredged or fill material would destroy wetland vegetation and may result in advancement of succession to dry land species on the wetland fringes*** [Record, OV001015].

The Appellant states that the overall functions on the property will improve. The Appellant does not take into consideration the impacts of the project on the wetlands they want to fill or on the secondary impacts of the proposal. Mitigation does offset some impacts of the proposal. However, the District properly evaluated the proposal and reasonably determined that a residential development on top of tidally influenced mangrove wetlands would be a negative impact.

Appeal Reason II (D) (4.) Fish and Wildlife:

The Appellant supplied information from the US Fish and Wildlife service that the proposed project will not affect endangered species and the overall quality of the wetlands will increase with the implementation of the project. The proposed project also has a 401 permit so the project will not have a negative impact on water quality or fish and wildlife resources.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: The projects impact on fish and wildlife resources is discussed in Appeal Reasons II (D) (1.), (2.) and (3.) above, with the same conclusion.

Appeal Reason II (E): Significant National Issues of Overriding Importance.

The RFA states the Appellant's perception that the District is describing a link between this project and the IRL-S project. Since the IRL-S project is not funded, it should not be used as a decision making factor.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: The District discusses the goals of the IRL-S Federal Project in the section entitled *Significant National Issues of Overriding Importance* in the EA/SOF. Many of those goals mesh with general environmental concerns applicable to the Indian River Lagoon. This issue is discussed in other sections of this Appeal Decision Document and will not be further repeated here. The District discussed issues of overriding national importance because the State issued a permit for this proposed project. The District denied the permit due to non-compliance with the Clean Water Act and also that the project was not in the public interest. Since the project was denied because of non-compliance with the Clean Water Act, this reason for appeal has no merit.

Appeal Reason III: The District Engineers Decision Was Arbitrary and Capricious:

The Appellant provided a court case and the definition of arbitrary and capricious in the RFA to support his position that the District's decision on how impacts from the Federal IRL-S project were evaluated was arbitrary and capricious. The Appellant used the same material to support his position that the District evaluated factors that Congress did not intend the District Engineer to consider. The Appellant determined that the District's evaluation of the cumulative effects of the proposed project was also arbitrary and capricious.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: Cumulative impact and Federal project issues are discussed under Appeal Reasons I and II with relation to the substantial evidence standard. At the appeal conference, the RO discovered no evidence or information to illustrate how the District Engineer's decision concerning cumulative and Federal project impacts was arbitrary and capricious. The "arbitrary and capricious" standard is a stringent standard to meet for a party challenging agency action. Agency decision-making is entitled to a presumption of regularity. The focus of this standard is on the agency's process of reasoning. Where there is a rational connection between the facts found and the choice made, and the agency relied on appropriate factors in analyzing those facts, the agency decision should be upheld. As noted under Appeal Reasons I and II, above, there is substantial evidence to support the District Engineer's decision. The Appellant did not produce any other evidence of bias or other improper motive as a determining factor in the permit denial.

The project was denied because of non-compliance with the 404 (b)(1) Guidelines of the Clean Water Act, and because the project was determined to not be in the public interest. The District believes, and the record demonstrates, that the Appellant has not taken all available practicable steps to avoid and minimize impacts to the aquatic resources within the Indian River Lagoon. A residential development can be constructed without the necessity of destroying tidally influenced mangrove wetlands.

The District also determined the project would adversely affect twelve public interest factors that are used to make a public interest determination. The possible impacts to the Indian River Lagoon South civil works project was discussed as part of one of the public interest factors that could be negatively affected by the proposed project.

Under this Reason for Appeal, the RFA next discusses how the District Engineer's explanations for the permit denial run counter to the evidence. The Appellant believes the District has characterized the mangroves to be filled as ranging from healthy to disturbed, low quality, and supporting exotics. In other words, the District does not characterize the mangroves to be filled consistently throughout the document. The Appellant believes the proposed project; with mitigation, will positively impact marine fisheries.

The District agrees that the impacted mangroves range from healthy to disturbed. However, the District's denial decision is based on the potential significant adverse direct, indirect, and cumulative impacts to mangrove wetlands of the Indian River Lagoon system [Record, OV000942]. The District supports their decision that a residential development not need to be constructed in tidally influenced mangrove wetlands, whether the mangrove wetlands are high or low quality. The District's decision to deny a permit to fill mangrove wetlands ranging from low to high in their quality is not arbitrary and capricious. The District's decision will also protect resources important to marine fisheries.

Appeal Reason III (A): Contaminants Resulting from Construction.

The RFA states that on page 10 of the EA-SOF, the District Engineer observes that, "The construction of the proposed project would result in anticipated contaminants to include oil and grease runoff from parking lots and herbicides from landscape maintenance." The SFWMD addresses this issue with its water quality permit.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: The issue of contaminants resulting from construction was addressed during the permit process that led to the issuance of the SFWMD permit. Therefore, the Appellant believes the District made an arbitrary and capricious decision concerning the projects impacts from contaminants.

Corps of Engineers Regulatory Guidance Letter 90-04, advises how the Corps Project Managers should consider water quality concerns.

Section 320.4(d) provides that a state's certification of compliance with applicable effluent limitations and water quality standards will be conclusive with respect to water quality considerations, unless the Environmental Protection Agency (EPA)

advises the district engineer (DE) of "other water quality aspects" that he should examine.

The District coordinated with the Environmental Protection Agency (EPA) throughout the permit process. By letter dated February 22, 2006, the EPA considered the mangrove wetlands and their associated tidal creeks at the project location to be aquatic resources of national importance. EPA indicated that the proposed project does not comply with the Section 404 (b)(1) Guidelines. They also state the proposed project will cause degradation of mangrove wetlands and tidal creeks classified as Outstanding Florida Waters. In accordance with the procedural requirements outlined in 1992 404(q) Memorandum For Agreement Part IV3(a), they advised the Corps that the proposed work would have adverse impacts on aquatic resources of national importance.

The Guidance Letter further states:

Although the state certification still satisfies the CWA Section 401 requirement in such cases, ***the DE must make his own independent judgments regarding compliance with 40 CFR 230.10(b)(1) and the consideration of water quality issues in the public interest review process.*** In exercising his judgment, the DE shall coordinate his actions with the state certifying agency and EPA. [emphasis added].

The District conducted a Section 404 (b)(1) analysis in the EA/SOF and addressed water quality considerations as part of the public interest review. Cumulative effects are properly part of a 404(b)(1) analysis regarding water quality. The 404(b)(1) Guidelines state that "[e]xcept as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause *or contribute to* significant degradation" 40 CFR 230.10(c) (emphasis added). The water quality section of the EA/SOF, states:

Issuance of the South Florida Water Management District permit ensures that the project would meet State water quality standards. However, the cumulative loss of this and similar mangrove wetlands on privately owned property would degrade the water quality of the Indian River Lagoon. *** Contaminant loading on the Indian River Lagoon from sources such as parking lot run-off, herbicides, and pesticides would increase over time and grow with the cumulative rate of development. [Record, OV001018].

The District's decision that a multi-family housing unit in a tidally influenced mangrove swamp will have significant indirect, and cumulative impacts on surrounding water quality is reasonable and not arbitrary and capricious, and was reached in coordination with the EPA.

Appeal Reason III (B): Availability of Alternate Sites.

The RFA states that over the multi-year course of the Districts' review of the alternative site analysis, the District never stated that this alternative analysis was inadequate.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: This issue is subsumed in appeal reasons I (A), I (C) and II (A). Appeal reasons I (A), I (C) and II (A) discuss how the District received and considered comments from the Appellant and review agencies, including information on project alternatives. According to regulations, the Corps is neither a proponent nor opponent of a project. The Corps can ask for information that is needed to make a permit decision. The Project Manager cannot preapprove a project or aspects of a project without the required public interest review. A permit decision should not be made until the PM receives enough information to make a permit decision.

After receiving the permit application, the District sent a letter to the Applicant dated September 18, 2002, stating that the proposed project is located in a special aquatic site and is not water dependent [Record, OV000051]. Therefore, alternatives that do not include filling in special aquatic sites were presumed to be available. The Appellant replied to the letter with a May 2002 404(b)(1) Compliance report that was included in the Administrative Record [Record, OV000224]. The District evaluated the material in the 404(b)(1) Compliance report and discussed the findings in the EA-SOF.

CONCLUSION: As my final decision on the merits of the appeal, I conclude there is substantial evidence in the administrative record to support the Jacksonville District's decision to deny the permit. The District's determination was not arbitrary, capricious or an abuse of discretion and was not plainly contrary to applicable law or policy. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.

Benjamin G. Buller COL
Joseph Schroedel
Brigadier General, US Army
Commanding