Permit Denial Decision
City of Lake Worth/TerraMark (Tyler's Island)
Lake Worth, Florida
Jacksonville District File Number SAJ-2003-11115 (IP-TKW)

Review Officer: Douglas R. Pomeroy, U.S. Army Corps of Engineers, for South Atlantic Division

Appellant Representative: Robert Diffenderfer (attorney)

Permit Authority: Section 404 of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act (33 U.S.C. 403).

Receipt of Request for Appeal: July 21, 2005

Appeal Conference and Site Visit: September 15, 2005

Summary of Decision: I found that portions of this administrative appeal had merit. The District must reconsider and document aspects of its Clean Water Act (CWA), Section 404(b)(1) Guidelines analysis as detailed below, with the burden remaining on the Appellant to clearly demonstrate the absence of a less environmentally-damaging practicable alternative. The District must also reconsider its cumulative environmental effects analysis and provide greater documentation of its conclusions regarding cumulative impact and precedent. As part of reconsideration of this decision, the District must reconsider whether it is undertaking an action that is contrary to a state or local land use decision, and if so, the District must document whether significant issues of overriding national importance have been identified, and explain why those issues are overriding in importance. Finally, I found several locations in the District's decision document where the document made reference to earlier versions of the Appellant's project proposal which had subsequently been modified. As part of the District's reconsideration of this action, the District must review its decision document and insure that all areas of the document evaluate the most current version of the Appellant's proposed project and mitigation measures, and the Appellant may be expected to notify the District of any changes in circumstances pertinent to the alternatives analysis. The District may communicate with the Appellant to further refine the Appellant's project alternatives and /or project mitigation measures.

Background Information: The proposed project site is located at the southwest corner of Lake Avenue (State Road (S.R.) 802) and S.R. A1A, in the City of Lake Worth, Palm Beach County, Florida. The landforms in the vicinity of proposed project site from east to west are as follows: (1) the Atlantic Ocean, (2) a barrier island with beaches and narrow upland areas that varies from approximately from one thousand to several thousand feet in width from east to west, (3) the east shoreline of Lake Worth Lagoon (LWL), (4) the LWL and the Intracoastal Waterway, and (5) the western shoreline of the LWL on the mainland of south Florida. Terramark Inc. and the City of Lake Worth (Appellants) are working together to develop on this site, which has been under

consideration for development since the 1950's. The City of Lake Worth and a private entity signed a 99 year lease to further development of the property in the 1967.

The "Tyler's Island" project site is approximately 11.44 acres in size and consists of approximately 1.02 acres above the mean high water elevation on the barrier island on east shoreline of the LWL, and an additional approximately 10.42 acres of submerged bottomland below the mean high water elevation, which extends westward into the LWL. The Appellant evaluated several alternative project locations for its proposed residential development project. The only individual parcels abutting the LWL that the Appellant considered large enough for the proposed project are owned by the City, but only the proposed project site is unencumbered by deed restrictions on its use. Remaining areas along the LWL are either smaller parcels with single-family residences, or are outside of the boundaries of the City of Lake Worth.

The Appellant considered several variations to the initial project permit request to construct a residential development as a result of interaction with the Army Corps of Engineers Jacksonville District (District), other regulatory and environmental agencies, and comments from agencies and the public. The Appellant ultimately proposed to install 0.0345 acres of pilings into the bottomland of the LWL and construct four, multi-story residential building towers on pilings over the open waters of the LWL. The proposed project also included boat slips and automobile parking underneath the buildings. The District concluded that the direct impacts as a result of the construction footprint included 2.65 acres of seagrass, 0.1 acre of hardbottom, 0.37 acre of tidal mudflats, 0.13 acre of oyster, and 0.01 acre of mangroves. The District also concluded that there would be shading impacts to an additional 1.36 acres of seagrass beds adjacent to the structures. The Appellant proposed various mitigation measures to address these environmental effects and to improve the water quality of the LWL.

The District denied the Appellant's permit request. In the District's permit denial letter of May 18, 2005, the District concluded that the proposed project should be denied because it did not comply with the CWA Section 404(b)(1) Guidelines (404(b)(1) Guidelines and was also contrary to the public interest. The District's permit denial letter and combined Environmental Assessment/Statement of Findings ("EA/SOF," also May 18, 2005) identified that the Appellant's proposed project did not comply with 404(b)(1) Guidelines requirements at 40 CFR 230.10(a) and 40 CFR 230.12(a)(3)(i) because it was not the least environmentally damaging practicable alternative; did not comply with 40 CFR 230.10(c) and 40 CFR 230.12(a)(3)(ii) because it would result in significant degradation of the aquatic ecosystem; and did not comply with 40 CFR 230.10 (d) and 40 CFR 230.12(a)(3)(iii) because it did not include all appropriate and practicable measures to minimize potential harm to the aquatic environment. The District identified that the proposed project would be precedent setting resulting in significant adverse cumulative impacts to the aquatic environment, potentially including several hundred acres of tidal waters of the LWL. The District also concluded that less damaging alternatives were available to the Appellant such as construction of the project on an alternative upland site and constructing recreational amenities, i.e., a public boardwalk and fishing pier at the

proposed project site, or simply leaving the site as is for public passive recreation and fishing. The Appellant disagreed and appealed.

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

Reason 1: The Corps failed to accept all the of the basic project purpose principles from the City in establishing the overall project purpose.

Finding: This reason for appeal did not have merit.

Action: None required.

Discussion: The Appellant's stated Reason for Appeal 1 was the District's failing to accept all the Appellant's "basic project [purpose] principles." However a review of the Appellant's arguments, objections, and conclusions in support of Appeal Reason 1 show that this reason for appeal is actually part of the Appellant's assertion (see Reason 2 for Appeal) that the District's evaluation of practicable alternatives in accordance with the 404(b)(1) Guidelines was also flawed. Nevertheless, the District's determination of basic project purpose and overall project purpose were both reviewed as part of this decision.

The Corps must evaluate the compliance of CWA individual permit applications in accordance with the 404(b)(1) Guidelines. The Corps Regulatory Program Standard Operating Procedures issued April 8, 1999 ("SOP") describes how the determination of basic project purpose and overall project purpose are used during the 404(b)(1) Guidelines analysis. The basic project purpose is identified to determine whether a project is "water dependent" and the overall project purpose is used to evaluate practicable alternatives under the 404(b)(1) Guidelines. The Department of the Army decisions in the Clean Water Act, Section 404(q), elevation cases for Plantation Landing Resort Inc., (April 21, 1989), Hartz Mountain (July 25, 1989), Old Cutler Bay Associates (September 13, 1990), and Twisted Oaks Joint Venture (March 15, 1991) also provide guidance on basic and overall project purposes which were used in consideration of this administrative appeal.

The District on page 3 of its Environmental Assessment and Statement of Findings ("EA/SOF") stated the basic project purpose of the proposed development as:

> "The basic project purpose of the proposed development is residential development."

It concluded on EA/SOF page 34 that:

> "The activity does not need to be located in a special aquatic site to fulfill its basic project purpose."

The administrative record and Corps policy guidance supports the District's conclusion that the proposed project is not water-dependent. 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, nor to preclude the existence of practicable alternatives."

The District's statement of basic project purpose was reasonable, as was the District's determination that the Appellant's proposed project was not a water-dependent activity.

The District on page 3 of its Environmental Assessment and Statement of Findings (EA/SOF) stated the overall project purpose of the proposed development as:

> "The overall purpose of the project is to revitalize the City of Lake Worth's blighted downtown areas by creating high value real estate through the creation of a residence community with access to the Intracoastal Waterway."

The Appellant cited the City of Lake Worth's letter of February 27, 2004, as evidence that the District did not correctly determine the overall project purpose for the proposed project. The February 27, 2004, letter from the Mayor of Lake Worth states the City's project purpose as follows:

> "the project purpose ... is to provide the City the means to accomplish redevelopment and combat blight. The specific instrument of that is configuration of buildings and uses. That project purpose is the same regardless of what use the City, or the City's tenant makes for that land. That site is our opportunity to stabilize our economy dramatically [sic] improve the quality of life for our citizens. So while it may be true to say, in a literal sense, that the project is to build these specific buildings, it is more accurate to say that the purpose of this project is to facilitate redevelopment in the City of Lake Worth....Please note that the proposal does not include a marina, which is an independent commercial operation; what are indicated are simply accessory boat docks."

The July 15, 2005, Request For Appeal ("RFA") further states that "the ultimate purpose of use of the site is economic revitalization for the city. The Corps has simply chosen to ignore this overall project purpose." The Appellant concluded that the District had ignored economic revitalization as an overall project purpose because by identifying a public boardwalk and fishing pier as an alternative use for the site, it "simply ignore[d]

the City's purpose and substitute[d] the Corps' judgment for that of the local government."

The Appellant's conclusion is inconsistent with the District's statement of overall project purpose. The District specifically identified the creation of high value real estate "to revitalize the City of Lake Worth's blighted downtown" as part of its overall project purpose. At the same time, the District's overall project purpose was sufficiently general so as to allow the consideration of alternative project locations other than the Tyler's Island property, which was the City's preferred project location. The District's determinations of basic and overall project purposes were reasonable and consistent with applicable law. However, the Appellant's assertion that the consideration of economic revitalization was effectively ignored under the 404(b)(1) alternatives analysis is discussed under Reason 2, below.

Reason 2: The Corps has ignored the evidence in the record and departed from relevant law, regulation and policy in its identification of alternative sites for the project.

Finding: Portions of this reason for appeal had merit - in certain respects the decision was not supported by sufficient information or analysis.

Action: The District must complete the items for reconsideration described in detail at the close of the discussion under this Reason 2, contingent upon the Appellant's cooperation, and provide the results of its reconsideration and any further information submitted by the Appellant, in a revised EA/SOF and permit decision transmittal letter.

Discussion: As discussed under Reason 1 above, the District reasonably concluded that the Appellant's proposed project was not water dependent. The 404(b)(1) Guidelines dictate that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem ...." 40 CFR 230.10(a). Further, where the proposed project would be sited in a special aquatic site and is not water dependent, the District must follow 40 CFR 230.10(a)(3), which states:

> "Where the activity associated with a discharge which is proposed for a special aquatic site ... does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise."

It is further presumed that practicable alternatives that "do not involve a discharge into a special aquatic site ... have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." 40 CFR 230.10(a)(3). Here, it is undisputed that the proposed project site contains seagrasses, a type of vegetated shallow that is considered a special aquatic site as defined by the 404(b)(1) Guidelines at 40 CFR 230.43. Therefore, in accordance with the 404(b)(1) Guidelines, it was the Appellant's burden to clearly rebut

the presumption that there were no other less damaging practicable alternatives to the Tyler's Island site available to it.

The Appellant evaluated 11 alternative project sites, including: the submerged lands of the "Tyler's Island" site – its preferred site on the east side of Lake Worth Lagoon; the City of Lake Worth Golf Course on the west site of the Lake Worth Lagoon; Bryant Park on the west side of Lake Worth Lagoon; Snook Islands - submerged land in Lake Worth Lagoon adjacent to the Lake Worth Golf Course; submerged land adjacent to Bryant Park; and 6 upland parcels within the city limits of the City of Lake Worth. Based on that analysis, the Appellant determined that there were no viable upland sites with associated water access available to meet the project purpose, so that the preferred Tyler's Island site is the only practicable alternative.

All of the alternatives considered by the Appellant are owned by the City of Lake Worth. The District requested that the Appellant pursue an alternative on upland sites with water access where waterfront amenities could be located, and also believed it is "reasonable to request the applicant to expand the alternatives analysis to consider alternative upland sites not owned by the City." [EA/SOF, pp. 22-23]. As stated in its RFA, Appellant takes the position that the project must be "located on City-owned land because the City is financially not in a position to purchase land." [RFA, p. 13].

The District disagreed with the Appellant's conclusion that there were no viable upland alternative sites. [discussed in EA/SOF at pp. 20–23, 33, 34, 36, and 40]. The District rejected the 2 alternative project locations involving the submerged lands of Lake Worth Lagoon (submerged lands off Bryant Park, and Snook Islands) as less damaging, practicable alternatives. There was little discussion in the EA/SOF regarding these alternatives, but it is apparent that the concerns expressed over the Tyler's Island site in the 404(b)(1) factual determinations also applied to these alternatives. [EA/SOF, pp. 27-33]. Further, the focus of the alternatives analysis where the proposed discharge would be located in a special aquatic site is to identify practicable alternatives that would not involve discharge in a special aquatic site. See 40 CFR 230.10 (a) (3), The District's elimination from further consideration of alternatives that relied solely on the use of submerged lands off Bryant Park or the Snook Islands was reasonable.

The District noted that the Appellant's alternatives analysis concluded that since some of the upland parcels were not zoned for residential use, they were not viable alternatives. In the District's view, it was "reasonable to assume that rezoning of these parcels to residential would be relatively easy since the applicant is the local government agency responsible for rezoning." [EA/SOF, p. 22]. In its description of the alternatives analyzed by the Appellant, the District stated that the 6 city-owned upland parcels within the city limits (Landfill, Park of Commerce, Utility Administration, Utility Facility, City Library, City Hall) did not have access to the water. It is not clear whether the "water access" statements represent the District's conclusion regarding whether these sites were practicable alternatives. The Appellant's overall project purpose includes "access to the Intracoastal Waterway." It is also unclear whether the District had in mind the rezoning of other, unidentified upland parcels.

The District identified the Bryant Park (upland) and the Lake Worth Golf Course sites to be less environmentally damaging practicable alternatives. [EA/SOF, p. 22]. However, the District also acknowledged that the Lake Worth Golf Course and Bryant Park might be limited by deed restrictions to recreational and/or public uses. The District stated that

> "[w]ithout more information, it is not known whether these restrictions can be removed from the deeds. The applicant could explore removal of the deed restriction to allow development." [EA/SOF, p. 22].

By letter of October 8, 2004, the Appellant's attorney provided copies of the deed restrictions for Bryant Park and the Lake Worth golf course. The cover letter stated that:

> "You will note that the deeds contain restrictions limiting the use of those lands to certain park and golf course purposes, restricting their sale or lease and reverting the property if it is not used in accordance with the restrictions. These lands are thus not available for consideration as alternatives inasmuch as they are not available within the meaning of the regulations".

The District's March 16, 2005, letter requested clarification of several pieces of information in order to complete evaluation of the proposed project, but did not request more information regarding the practicality of removing deed restrictions from the Lake Worth Golf Course, Bryant Park, or of rezoning other alternative project site locations.

As noted above, the District's EA/SOF determined that it was reasonable to request the applicant to expand the alternatives analysis to include alternative upland sites not owned by the City. Indeed, the 404(b)(1) Guidelines state that

> "[i]f it is otherwise a practicable alternative, an area not presently owned by the applicant which would reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered."

The Environmental Protection Agency's February 24, 2005, letter to the Corps stated that it considered the Appellant's alternatives analysis incomplete because it only considered properties owned by the City of Lake Worth. It is noted that the District's March 16, 2005, letter to the Appellant did not specifically request the Appellant provide more information on alternative project site locations. However, the Appellant's search characteristics for its alternatives analysis automatically excluded any parcel(s) not owned by the City, which is contrary to the 404(b)(1) Guidelines.

The District's identification of alternative sites was guided in part by the required presumption that less environmentally-damaging practicable alternatives to the Appellant's proposed project site were available. "Practicable" is defined in the CWA 404(b)(1) Guidelines at 40 CFR 230.3 as:

> The term *practicable* means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose.

A key question presented by this RFA is whether alternative sites that are either zoned or deed restricted to exclude the overall project purpose are "available" within the meaning of the 404(b)(1) Guidelines, including in terms of cost and logistics. The burden to "clearly demonstrate" that practicable alternatives are not available, including in terms of zoning or deed restrictions, is on the applicant.

Regarding rezoning, the Appellant essentially argues that the law provides that the Corps may not disregard the City's land use decision for this site which has been in place for several decades, and that even if rezoning was otherwise appropriate, it could not rezone a site to a use which was prohibited by deed restrictions. Appellant cites 33 CFR 320.4(j)(2), which contemplates that "[t]he District Engineer will normally accept decisions by [state, local and tribal] governments on [zoning and land use] matters unless there are significant issues of overriding national importance." Variances to zoning restrictions are not unusual, and a private applicant would be required to demonstrate that a variance could not be obtained or a parcel rezoned in order to clearly demonstrate that a particular alternative is unavailable, and therefore impracticable. For purposes of the alternatives analysis, it was appropriate to hold a municipality to the same requirement.

Regarding the deed restrictions on the Bryant Park (upland) and City of Lake Worth Golf Course, the administrative record contains only the copies of the deed restrictions, and the statement from the Appellant's attorney that "[t]hese lands are thus not available." The effect of deed restrictions must be determined on a case-by-case basis, since the difficulty of removing or modifying such restrictions varies. Options that should be addressed include the feasibility of judicial extinguishment, or of obtaining an agreement from the holders of the rights of reversion to eliminate the restrictions/reversions. The Appellant submitted new information during this appeal stating that the City of Lake Worth Charter now requires voter approval of a referendum prior to converting existing parkland to another use. In accordance with the Corps regulations at 33 CFR 331.7(e)(6), that information could not be considered during this administrative appeal. It is not clear that the deed restrictions in this case are "zoning and land use ... decisions by [state, local and tribal] governments" within the meaning of 33 CFR 320.4(j)(2) – that issue must be examined on reconsideration.

The burden to clearly demonstrate the unavailability of practicable alternatives to a proposed discharge into a special aquatic site is placed on the applicant. That burden must be sustained by more than conclusory statements regarding zoning or deed restrictions. That is not to minimize the potential impact of such land use restrictions, but only to recognize that the impact and permanence of such restrictions can greatly vary. The administrative record does not establish that the District Engineer was arbitrary or capricious in concluding that the Appellant failed to clearly demonstrate the unavailability of practicable upland alternatives.

However, there are elements of the EA/SOF that merit reconsideration because the District's conclusions regarding the alternatives analysis were unclear. **To begin with,** the District stated:

> An alternative for utilization of the Tyler's Islands site is to enhance tidal flow and the mangrove habitat at the small parcel of land at the project site and construct public recreational facilities such as a boardwalk and a fishing pier for the City. [EA/SOF, p. 23].
>
> The proposed site could provide a recreational resource for the residents of the City if it were to be used to build a public boardwalk and fishing pier or simply left as a public passive recreation and fishing area. [EA/SOF, p. 27].

While the District clarified at the appeal conference that it did not consider a public boardwalk and fishing pier in and of themselves to be a less environmentally damaging practicable alternative that met the Appellant's overall project purpose, the language of the EA/SOF suggests that the boardwalk and fishing pier were considered as a separate alternative under the 404(b)(1) Guidelines analysis. The District's clarification that the boardwalk/fishing pier was only considered to be an alternative in combination with an upland residential component at a separate location must be reflected if the District continues to consider the boardwalk/fishing pier a less environmentally-damaging practicable alternative.

This also highlights an issue relating to the District's definition of the overall project purpose for the Appellant's project - the District did not define what it meant by "access to the Intracoastal Waterway" in the EA/SOF. The Appellant evaluated 6 City-owned upland properties that were not contiguous with the Intracoastal Waterway, and concluded that none of the 6 project sites were practicable project alternatives. The District did not clearly identify in the EA/SOF whether or not it considered these 6 sites to be practicable alternatives, including for purposes of water access.

The District must establish a definition or parameters for the term "access to the Intracoastal Waterway" (or "access to water") for several purposes. This is necessary to determine whether there are practicable alternatives that combine access to the Intracoastal Waterway at one location with the proposed residential development at a separate, non-contiguous location. The District must use that definition to evaluate whether the 6 City-owned upland sites that were not contiguous with the Intracoastal Waterway are practicable alternative project sites to the Appellant's proposed project site. If the District concludes that combining water access at the Tyler's Island (or another) site with a residential project at a separate upland location could represent a less environmentally-damaging practicable alternative, then the District must also consider whether privately-owned properties that could be acquired, as well as publicly-owned properties within the City of Lake Worth, could be used to create such an alternative. Also along these lines, the District should consider whether access to Lake Worth Lagoon from the proposed project site could be combined with residential development at the

City of Lake Worth's beach park on the shoreline of the Atlantic Ocean, located less than 500 feet east of the Appellant's proposed project site.

The District should also consider whether practicable alternatives can include groups of properties that in aggregate would total approximately 6 acres. If the District concludes that assembling such a group of properties is practicable under the circumstances and consistent with the 404(b)(1) Guidelines, then it may require the Appellant to clearly demonstrate the unavailability of such alternatives.

Regarding the effect of cost on the availability of otherwise practicable alternatives, the District stated:

> "According to the applicant's 3 December 2004, letter, the co-applicant is purchasing sites to be used as mitigation. If the co-applicant can purchase other lands to be used as mitigation for the project, it is reasonable to request the applicant expand the alternatives analysis to consider alternative upland sites not owned by the City, which the co-applicant could purchase in lieu of having to purchase mitigation lands ... purchase of an alternative site which does not require mitigation may be more economically practicable than the Tyler's Islands site with compensatory mitigation. [EA/SOF, p. 23].

The Appellant clarified at the appeal conference that it considered it impracticable to purchase upland properties to meet the project purpose because they were too expensive, but that purchasing submerged lands as sites to develop compensatory mitigation areas, either inside or outside of the boundaries of the City of Lake Worth, appeared to be economically practicable. However, the administrative record does not evidence a clear showing by the Appellant that only parcels currently owned by the City could be used to help revitalize the downtown area.

The issue of the cost of practicable alternatives was addressed in the Army Corps of Engineers, CWA 404(q) Elevation Decision for *Plantation Landing Resort Inc.,* dated April 21, 1989, page 21 which states that:

> While the applicant's wish to minimize his costs is obviously a factor which the Corps can consider, that factor alone must not be allowed to control or unduly influence the Corps' definition of project purpose or practicable alternative", or any other part of the 404(b)(1) evaluation. ....often wetland property may be less expensive to a developer than comparably situated upland property. The (CWA) Guidelines obviously are not designed to facilitate a shift of development activities from uplands to wetlands, and so the fact that an applicant can sometimes reduce his costs by developing wetland property is not a factor which can be used to justify permit issuance under the Guidelines. On the other hand, the 404 (b) (1) Guidelines do address the factor of cost to an applicant in the concept of practicability .... "If an alternative is unreasonably expensive to the applicant, the alternative is not 'practicable.'"

A permit applicant cannot summarily eliminate all consideration of parcels not currently owned by a restrictive definition of overall project purpose, or by starting from the proposition that all non-owned parcels are too expensive.

In summary, the District must reconsider and document the following determinations in a revised EA/SOF:

(1) Develop parameters for the phrase "access to the Intracoastal Waterway" (or "water access") in the overall project purpose for this action, and evaluate proposed project alternatives accordingly.
(2) Determine and document whether an upland location within the City of Lake Worth that does not have a contiguous shoreline and access to Lake Worth Lagoon (with or without a separate project component that does have such access) may be considered as a less environmentally-damaging practicable alternative to the Appellant's proposed Tyler's Island project site.
(3) Consistent with nos. 1 and 2, document in greater detail whether any of the 6 City-owned upland alternatives that were not encumbered by deed restrictions represented a less environmentally-damaging practicable alternative to the Appellant's proposed Tyler's Island project site.
(4) Consistent with nos. 1 and 2, determine and document whether upland parcels within the City, either individually or in the aggregate, that are not currently owned by the City may be considered to be available within the meaning of the term, practicable.
(5) Allow the Appellant to provide additional documentation for the District to determine whether the Appellant can clearly demonstrate that the Bryant Park (upland) and City of Lake Worth Golf Course alternatives (or other deed restricted alternatives that may be identified) are not practicable for purposes of the 404(b)(1) Guidelines, as well as clearly demonstrate whether it is impractical to obtain zoning variances or changes, or gain approval of a voter referendum to approval a land use change for a possible alternative project site.
(6) Ensure that all sites or uses characterized as practicable alternatives meet the overall project purpose, consistent with no. 1, above.
(7) In all of these areas of reconsideration, the burden remains on the applicant to clearly demonstrate the lack of a less damaging practicable alternative that does not involve a discharge into a special aquatic site.

The Appellant also raised under Reason 2 the issue of whether the District complied with the Corps regulations at 33 CFR 320.4(j)(2) regarding the relationship of zoning and land use matters to the Corps regulatory decisions and whether significant issues of overriding national importance were present. That issue is addressed under Reason for Appeal 8.

Reason 3: Incorrect application of Section 404(b)(1) Guidelines

Finding: This reason for appeal does not have merit.

Action: None required. However, after undertaking the reconsideration described under Reason 2, the District may reconsider its factual determinations pursuant to 40 CFR 230.11.

Discussion: The Appellant states that "[t]he Corps has further misapplied the 404(b)(1) Guidelines in its handling of the factual determinations ...." Specifically, it contests only the determinations made in the EA/SOF under Section 9.a(2) *Water Circulation*; Section 9.a(3) *Suspended Particulates/Turbidity*; Section 9.a(4) *Contaminant Availability*; and, Section 9.a(5) *Aquatic Ecosystem Effects*. The District stated at the appeal conference that the factual determinations under 9.a(2), (3), and (4) were not part of its basis for denying this permit. However, during the appeal conference, the Appellant realized that the District had not received copies of the most current correspondence between the Appellant and the South Florida Water Management District ("SFWMD") regarding the Appellant' measures to control stormwater discharges which would be applicable to 9.a(2) and (3). In addition, regarding Section 9.a(4) *Contaminant Availability*, the District and the Appellant clarified at the appeal conference that the EA/SOF evaluation of contaminant availability was based on an earlier version of the proposed project that included extensive fill, and not on the project as currently proposed by the Appellant. While these factual determinations were not the basis for permit denial, given the fact that under Reason 2 the alternatives analysis must be revisited, and the fact that the documentation used for these factual determinations was not current in some instances, the District may reevaluate these factual determinations consistent with 40 CFR 230.11 to assess the individual and cumulative impacts based on current information (and if so, require the Appellant to submit the most current information regarding stormwater discharges and its communications with the SFWMD for the District to evaluate as part of this reconsideration).

In regard to Section 9.a(5) *Aquatic Ecosystem Effects*, the Appellant in its RFA contends that the EA/SOF "contains an incorrect statement of the projects [sic] effect on mangroves. The direct mangrove impact totals only $1/100^{th}$ of an acre." The EA/SOF "also recites that corals and sponges would be impacted as a result of the project. This statement is unsupported in the record."

The District's EA/SOF recognizes that the revised plan would impact "0.01 acre of mangroves." [EA/SOF, pp. 3, 19]. While elsewhere the discussion of mangrove impact and acreage figures is not entirely clear and appears to differ somewhat from the Appellant's figure (EA/SOF, p. 25], there is no indication that this was a material factor in the District's decision to deny the permit. Regarding corals and sponges, the EA/SOF does state that "benthic resources ... at the project site that would be impacted [include] corals and sponges ...." In contrast, the Lake Worth Lagoon Natural Resources Inventory and Resource Enhancement Study (NOAA, December 15, 1990) states that "[c]orals and sponges are limited in occurrence to areas within close proximity to the inlets." However, elsewhere in the EA/SOF the description of aquatic resource impacts

does not reference corals and sponges, and there is also no indication that this was a material factor in the District's decision to deny the permit.

After the District completes its reconsideration of the 404(b)(1) analysis, , the District may choose to reexamine and/or clarify these factual determinations consistent with 40 CFR 230.11 as part of its revised EA/SOF.

Reason 4: The record does not provide an adequate and reasonable basis to support the Corps' reasonably foreseeable cumulative or secondary environmental impacts analysis; the Corps has improperly defined the scope of analysis.

Finding: Portions of this reason for appeal have merit.

Action: The District must reconsider its cumulative environmental impact analysis as described in this reason for appeal. The District's scope of analysis and analysis of secondary environmental impacts were found to be reasonable.

Discussion: The District defined the scope of analysis as follows:

> The project site of 11.44 acres includes 10.42 acres of navigable waters of the United States and 0.36 acre of waters of the United States, i.e. jurisdictional adjacent wetlands [and 0.66 acres of uplands]. [EA/SOF, pp. 1, 4].

The District and the Appellant appear to agree the scope of analysis stated in the EA/SOF above is reasonable. However, the Appellant believes that the District did not actually use the scope of analysis stated in the EA/SOF, but instead used a much larger area for its scope of analysis, specifically "all submerged lands not owned by the state within the entirety of Lake Worth Lagoon." The Appellant based this conclusion on the District's statements in the EA/SOF regarding secondary and cumulative environmental effects of the proposed project.

The Regulatory SOP provides that "[s]cope of analysis has two distinct elements[:] [1] determining the Corps Federal action area and [2] how the Corps will evaluate direct, indirect, or secondary, adverse environmental effects." [SOP, p. 1]. It goes on to say that [b]oth direct and indirect impacts of the [activity to be permitted] ... must be evaluated within site-specific and cumulative impact contexts. [SOP, p. 1]. Appellant's complaint is that the administrative record does not support the Corps conclusions regarding secondary or cumulative effects, and that the Corps effectively merged the cumulative impact (including the direct and indirect impact of other sites) of the proposed project into the Federal action area for purposes of the scope of analysis.

Regarding secondary effects, the 404(b)(1) Guidelines provide the following definition:

> Secondary effects are effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill materials. 40 CFR 230.11 (h).

The secondary effects identified by the District are within the scope of analysis as defined by the District in the EA/SOF. The EA/SOF identifies the secondary environmental effects of the proposed project as increased turbidity and sedimentation from the placement of fill in aquatic environment and during construction, shading of adjacent resources in Lake Worth Lagoon north of the construction site as a result of construction of five nine-story buildings, damage to submerged resources due to the use of power vessels in areas of insufficient water depths, and losses of food production and contaminant removal functions performed by mangroves and seagrasses. [EA/SOF, pp. 33, 44]. The District concluded that these effects would occur within the District's identified scope of analysis. These environmental effects can reasonably be considered secondary effects of the proposed project, except increased turbidity from the placement of fill, which is more accurately characterized as a direct environmental effect of the proposed activity. Since the Appellant's project had changed from five, nine-story buildings on solid fill to four, nine-story buildings on pilings, the Review Officer confirmed with the District, that the District had actually evaluated the Appellant's revised proposal. The District confirmed that it had. The District's conclusions regarding secondary environmental effects of the Appellant's proposed project are reasonable and supported by the administrative record.

Regarding cumulative environmental effects, the District's discussion of cumulative environmental effects appears in the EA/SOF on pages 31 – 33 and 42 – 44. The following statements are included in its discussion of cumulative effects pursuant to 40 CFR 230.11 and 230.12:

> The project would set a precedent for future similar development if permitted. The applicant identified 468 acres of lots and parcels of submerged land and parcels in the LWL, which are not owned by the State of Florida including the proposed parcel ... Of the 468 acres, the applicant indicated that 237 acres are already in conservation or designated open space use. Of the remaining 231 acres, 66 acres comprised of 21 parcels have land use other than single-family. [EA/SOF, p. 31].
>
> [A]uthorization of the proposed project would not only set a precedent for development of a similar type and density but also for any type of residential development within the open waters of the LWL. The Corps is currently processing such an application ... which includes filling ... submerged lands ... for construction of 8 single-family homes... Areas located around the LWL are under intense development pressure, particularly sites along navigable waters. There is a lack of available waterfront property with navigable access within the limits of the City, along the LWL, and throughout Florida. [EA/SOF, p. 32].
>
> Further development and elimination of seagrass beds within partially-impaired aquatic systems would adversely affect water quality throughout the LWL. [EA/SOF, p. 33].

In its cumulative environmental effects analysis as part of the public interest review, the following statements are included:

> The Corps believes it is reasonable to conclude that if the project were permitted all 231 acres of submerged lands not designated as "conservation" may be affected by some type of development, not necessarily at the scale of the proposed development due to size constraints. [EA/SOF, p. 42].
>
> Should a permit for this project be issued as proposed, a precedent would be set for developing other open water areas. It is anticipated that other property owners would use the authorization of the project as justification for development in similar circumstances. Further development and elimination of seagrass beds within partially impaired aquatic systems would adversely affect water quality throughout the LWL. Therefore, it is reasonable to assume that the cumulative impact of the project would be a substantial loss of aquatic resources in the LWL, throughout Florida, and the nation. [EA/SOF, pp. 43-44].

The District also stated that:

> If rezoning of the land use occurred at this date [1991] it is reasonable to believe it could occur now for any non-State owned parcels currently designated as conservation or open space. At least 468 acres of tidal estuarine waters including various categories of EFH [Essential Fish Habitat] could be lost in the LWL. [EA/SOF, p. 43].

The Appellant asserts in its RFA that statements such as these demonstrate the District did not use the scope of analysis the District identified in its EA/SOF to consider cumulative environmental effects, but instead used a scope of analysis that included the "entirety of the State of Florida and the entire United States" (Appellant's words). The Appellant did not dispute the figures used in the EA/SOF regarding the amount of submerged land outside of conservation or designated open space uses, and that the areas around LWL are under intense development pressure.

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. 40 CFR 1508.7.

Cumulative effects are properly part of the 404(b)(1) analysis. 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. While the District EA/SOF states that the

cumulative impact of issuing a permit for the proposed project would be "a substantial loss of aquatic resources in the LWL, throughout Florida, and the nation", the District's actual analysis of cumulative environmental effects in the EA/SOF is focused on the cumulative environmental effect on the LWL.

The Appellant appears to misunderstand the District's cumulative effects analysis. While the scope of analysis should not itself include other projects, that scope must be assessed in the context of cumulative environmental effects. The CEQ's regulations expressly provide that the scope of cumulative environmental assessment must include "other past, present, and reasonably foreseeable future actions regardless of [who] ... undertakes such actions." The District's conclusion that it must look beyond the 11.44 acre project site scope of analysis area to sufficiently consider the incremental impacts of other past, present, and reasonably foreseeable future actions associated with approving the Appellant's proposed activity is reasonable. The District's approach is also consistent with CEQ's nonbinding January 1997 handbook on *Considering Cumulative Effects under the National Environmental Policy Act*, page 12, which states:

> For a project-specific analysis, it is often sufficient to analyze effects within the immediate area of the proposed action. When analyzing the contribution of this proposed action to cumulative effects, however, the geographic boundaries of the analysis almost always should be expanded.

The District's conclusion that a larger area than the project site scope of analysis area must be considered to evaluate cumulative environmental impacts the proposed activity is reasonable.

However, the District's conclusion that issuing a permit for this proposed project could result in cumulative environmental effects throughout Florida and the United States is not sufficiently documented in the EA/SOF. That is not to say that consideration of whether an action would be precedent-setting, and of the resulting cumulative impacts, should not be considered – it should. But certain of the factual conclusions involved in the cumulative effects assessment need greater analysis. The question of whether the Tyler's Island project is unique or should be distinguished from other properties or potential projects in the LWL or elsewhere is addressed under Reason for Appeal 6.

The District concluded that if this project was approved that a precedent would be set that would effectively require the District to approve numerous other projects for residential or other development within the open waters of the LWL or elsewhere in open waters in Florida. The District clarified at the appeal conference that permit requests for non-water dependent residential projects in open tidal water areas containing important and high value aquatic resources, such as seagrasses, had generally been denied because the District had concluded that they would result in significant degradation of the aquatic environment. The District stated that if it could not consider the effects of the Appellant's proposed project to represent a significant degradation of the aquatic environment, how could the District deny permit requests with similar environmental effects that were likely to follow the Appellant's request. Therefore, the District

concluded that given the intense development pressures, it was reasonably foreseeable that many similar permits would have to be approved if this permit request was approved.

Regarding cumulative effects on the LWL, specifically, the District concluded that:

> ... all 231 acres of submerged lands not designated as "conservation" may be affected by some type of development, not necessarily at the scale of the proposed development due to size constraints. [EA/SOF, p. 31].

And that

> ... it is reasonable to believe it [rezoning of land use] could occur now for any of the non-State owned parcels currently designated as conservation or open space. At least 468 acres of tidal estuarine waters including various categories of EFH could be lost in the LWL. [EA/SOF, p. 43].

Indeed, the Appellant's RFA reflects that a public purpose restriction on the Tyler's Island site, itself, was released by the State of Florida. The determination of what future actions are reasonably foreseeable for the purposes of a cumulative environmental effects analysis is an inherently imprecise activity, and typically involves some estimation of what cumulative environmental effects are reasonably foreseeable. In this instance the District has concluded, without sufficiently detailed explanation, that all owners of lands not designated conservation lands may seek permits to fill parts of their submerged lands, and potentially all private owners in LWL might seek permits to fill their submerged lands.

The District must either revise or further document its conclusion that it is reasonable to conclude that all 217 acres of submerged land in LWL not designated as conservation lands and all 468 acres of submerged land in LWL (including the 217 acres) not owned by the State could be filled as a reasonably foreseeable cumulative environmental effect of the Appellant's proposed project. As part of this reconsideration, the District must consider its past history of permit requests for similar activities in recent years (i.e. rate of permit applications for similar activities including rate of denials of such permits); restrictions of other federal, state, or local entities regarding fill activities in the LWL (e.g. restrictions to protect endangered species or water quality); the nature and extent of mitigation that would be typically be required for permits that are approved (i.e. if there is a 1:1 mitigation requirement for example, each acre of seagrass mitigation that was approved would reduce the remaining area available for fill activities by one acre); and, whether it is aware of any similar precedent-setting permitting actions.

Reason 5: This basis for appeal states that: "The Corps failed to discharge its consultation responsibilities."

Finding: This reason for appeal did not have merit.

Action: None. However, as part of its reconsideration of this administrative appeal for other reasons, the District may need to reconsider whether or not to conduct Endangered Species Act, Section 7 consultations with the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS").

Discussion: The Appellant claimed that the District preempted consideration of the views of the FWS and the NMFS, in violation of the Fish and Wildlife Coordination Act, and did not give "full consideration to the views of those agencies" pursuant to 33 CFR 320.4(c) because the District issued a permit denial decision before completing Endangered Species Act (ESA), Section 7, consultations with those agencies. The Section 7 consultation regulations at 50 CFR 402.14 require that federal agencies enter into consultations with the FWS and/or NMFS prior to undertaking actions that may affect federally listed threatened or endangered species, or affect federally designated critical habitat for such species. Federal agencies must complete formal ESA Section 7 consultations and receive a Biological Opinion (BO) from the FWS and/or NMFS before undertaking an action that would be likely to adversely affect a federally listed threatened or endangered species, or adversely modify federally designated critical habitat for such a species.

The District did not "preempt" the consideration of the views of the FWS or the NMFS regarding this permit request. The District received comments from these agencies in response to the public notice, and sought additional comments from these agencies when the Appellant modified his proposed project. Both agencies submitted CWA Section 404(q) letters objecting to the issuance of a permit for the proposed activity.

The District's conclusion not to conduct Section 7 consultations before concluding to deny the Appellant's permit request is consistent with the federal regulations regarding interagency consultation under the ESA because the District chose a course of action that would have no effect on listed species. Under such circumstances no Section 7 consultation is required, although consultations may be conducted by federal action agencies prior to reaching a decision. In addition, by letter dated April 14, 2005, the NMFS explained that they did not have "sufficient information" to determine impacts to protected species, and "requested the applicant provide a proper biological evaluation ...." This letter was forwarded to the applicant. [EA/SOF, p. 19]. The District clarified at the appeal conference that its denial of the Appellant's permit request was not based on adverse effects to federally-listed threatened or endangered species.

The District also states that:

> It has not been demonstrated that the proposed activity does not jeopardizes [sic] the continued existence of federally listed threatened or endangered species or affects their critical habitat. The Corps has not received a BO from the FWS determining the project's effect on the manatee and designated critical habitat. Likewise, the Corps has not received a BO from the NMFS determining the project's effects on Johnson's seagrass. [EA/SOF, p. 34].

While this language might have been clearer as to the fact that the District chose to issue a permit denial decision before it completed Section 7, interagency consultations or received BOs from the FWS or the NMFS, it does not state that the District concluded that Appellant's project had not met the requirements of the ESA. It was within the District's discretion to deny the Appellant's permit before it had completed Section 7 consultations.

As discussed in several other sections of this appeal decision, the District must reconsider several factors in its reevaluation of the Appellant's proposed project. As a result, it is expected that the District's discussion of ESA Section 7 consultation requirements in a revised EA/SOF for the permit decision for this proposed activity will include a determination along the lines of one of the following:

(1) that the District reevaluated the proposed permit and concluded that it was unnecessary to conduct ESA, Section 7, consultations because the District concluded that there was sufficient information to deny the permit request without completing ESA consultations, or the District identified a project alternative that did not result in any affect on listed species or designated critical habitat requiring consultation, or

(2) that the District concluded that it should complete ESA Section 7 consultations prior to reaching a permit decision on this action, and District subsequently reports the results of those consultations in a revised EA/SOF.

Reason 6: The record does not provide an adequate and reasonable basis to support the Corps' precedent analysis.

Finding: This reason for appeal has merit.

Action: The District did not adequately document its concern that this permit decision would represent a precedent that would be applicable to other permit decisions in the LWL, Florida, and elsewhere in the nation.

Discussion: The District states that:

> Not only would issuance of the permit establish a precedent for filling, or building on pile supported structures in submerged lands for residential development in the LWL but also throughout Florida and the nation. The Corps has not issued permits for residential development in open tidal waters for many years in Florida, and landowners do not expect to be able to receive permits for such development. [EA/SOF, p. 32].

And that:

> Should a permit for this project be issued as proposed, a precedent would be set for developing other open water areas. It is anticipated that other property owners

would use the authorization of the project as justification for development in similar circumstances. [EA/SOF, pp. 32-33].

The District did not adequately explain in the EA/SOF the basis for its conclusion that a project-specific decision to issue a permit for this project would establish a precedent that the Jacksonville District and other Corps Districts must follow in other permit decisions. While similar permit actions with similar environmental effects would typically receive similar permit decisions, each permit application has its unique features, and the Corps regulations require that each permit application be evaluated on its own merits. However, as discussed under Reason 4, the District must reconsider its conclusion that that all 217 acres of submerged land in LWL not designated as conservation lands and all 468 acres of submerged land in LWL (including the 217 acres) not owned by the State could be filled as a reasonably foreseeable cumulative environmental effect of the Appellant's proposed project.

The appellant has provided detailed information supporting its contention that the Tyler's Island project is unique, or at least sufficiently distinguishable from other sites in the LWL, so that it would not serve as the precedent about which the District is concerned. In part because of the lengthy history of the site, it asserts in its RFA (and in previous correspondence in the administrative record) that there are no comparable properties in the LWL. The EA/SOF does not address this contention in any great detail. The District must address and adequately document to what degree Appellant's project may be distinguishable from other LWL or open water sites, and the impact of this on cumulative effects precedent.

Reason 7: The Corps failed to rebut the presumption that the project's proposed discharge was acceptable and not contrary to the public interest.

Finding: This reason for appeal did not have independent merit.

Action: Because the District will be reconsidering aspects of its 404(b)(1) Guidelines analysis, and because there are some elements of this analysis in common with the public interest review, the District may also need to revisit its public interest review analysis.

Discussion: The District's Determinations under paragraph 12 in the EA/SOF include its conclusions that "the proposed discharge does not comply with the 404(b)(1) Guidelines" (12.b), and that "issuance of a Department of the Army permit is contrary to the public interest" (12.d). Either one of these bases is a sufficient ground on which to base denial of a permit. As stated in 33 CFR 320.4(a)(1):

> "[A] permit will be denied if the discharge ... would not comply with the [404(b)(1) Guidelines]. Subject to the preceding sentence ..., a permit will be granted unless the District Engineer determines that it would be contrary to the public interest."

The District's public interest review analysis is found on pages 36 – 46 of the EA/SOF. Among other things, the EA/SOF discusses the beneficial impacts of the proposal on economics in terms of economic stimulus and stabilization for the City of Lake Worth. It also discusses the detrimental impacts of the proposal on the factors of conservation, general environmental concerns, fish and wildlife values, floodplain values, land use, recreation, navigation, water quality, and property ownership. It also considered detrimental effects related to threatened and endangered species, Corps wetlands policy, and cumulative impacts.

At the administrative appeal conference, the District indicated that its finding that the proposal would be contrary to the public interest was based on the District's conclusion that the project would result in significant degradation to the aquatic environment, as was its determination that the discharge would not meet the 404(b)(1) Guidelines. Because the District will be reconsidering aspects of its 404(b)(1) Guidelines analysis, and because there are some elements of this analysis in common with the public interest review, the District may also need to revisit its public interest review analysis. It may also elect to clarify further the role of the individual public interest factors in arriving at its public interest conclusion.

Reason 8: The Corps has tailed to comply with 33 C.F.R. 325.2(a)(6).

Finding: This reason for appeal had merit.

Action: After the District has completed the other necessary reconsiderations identified in this administrative appeal decision (particularly those under Reason 2, above), the District must review whether its permit decision would be contrary to a state or local zoning or land use decisions as discussed in 33 CFR 230.4(j)(2) and 33 CFR 320.4(j)(4). If so, the District must comply with the requirements of 33 CFR 325.2(a)(6), and clearly document in the EA/SOF the significant national issues and explain how they are overriding in importance the state and/or local zoning or land use decisions.

Discussion: The Corps regulations at 33 CFR 320.4(j)(2) state 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.

And the Corps regulations at 33 CFR 320.4(j)(4) state that:

> In the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination provide the concerns, policies, goals and requirements as expressed in 33 CFR parts 320-324, and the applicable statues have been considered and followed: e.g., the National Environmental Policy Act; the Fish and Wildlife Coordination Act; the Historical and Archeological Preservation Act; the National Historic Preservation Act; the Endangered Species Act; the Coastal Zone Management Act; the Marine Protection, Research and Sanctuaries Act of 1972, as amended; the Clean Water Act, the Archeological Resources Act, and the American Indian Religious Freedom Act.

Finally, the Corps regulations at 33 CFR 325.2(a)(6) state that:

> "If a district engineer makes a decision on a permit application which is contrary to state or local decisions (33 CFR 320.4(j)(2) & (4)), the district engineer will include in the decision document the significant national issues and explain how they are overriding in importance."

The Appellant has asserted that the EA/SOF "does not contain any explicit discussion of what significant national issues exist and how they are overriding in importance," and that the EA/SOF "avoided a discussion of the critical state approval issue," (i.e., the 1978 state court judgment to the apparent effect that no further state procedures were necessary at that time to effect the filling of the Tyler's Island parcel). The District's EA/SOF (pp. 7-8) and March 16, 2005 letter to the Appellant do document that the EPA, FWS, and NMFS all advised that the Tyler's Island project "may result in substantial and unacceptable impacts to aquatic resources of national importance." The EA/SOF also mentions concern for Essential Fish Habitat (EFH), concern for seagrass habitat and endangered species, and national interest in the form of the Comprehensive Everglades Restoration Plan (CERP). It also concluded that the Appellant's proposed project would result in significant degradation of the aquatic environment. The District stated at the appeal conference that it considered significant degradation of the aquatic environment to be a significant issue of overriding national importance. However, the District did not identify that issue (or other issues) as being of overriding national importance in the EA/SOF.

The District's EA/SOF does not meet the requirements of 33 CFR 325.2(a)(6). The District must clearly document in a revised EA/SOF what, if any, issues it considers to be the significant national issues, and explain whether they, alone or in combination, override state and local land use decisions.

Reason 9: The Corps incorrectly applied law, regulation and policy by relying upon an unwritten policy to prohibit impacts in tidal waters for residential and commercial development.

Finding: This reason for appeal does not have merit.

Action: None.

Discussion: The Appellant asserted that the District relied on an unwritten policy to prohibit impacts to tidal waters for residential and commercial development. The Appellant based this conclusion on an e-mail between District's supervisor of the West Palm Beach field office and the District's Regulatory Branch Chief of August 26, 2003 that states that:

> "The proposal is for an either pile supported or fill supported condominium and commercial development in open tidal waters of Lake Worth Lagoon... [O]ur GIS system indicates a seagrass bed under the vast majority of the proposed 7 – 8 acre open water proposed fill... [S]eagrass is a very important resource in the Lagoon, and seagrass is limited in its distribution, so every area of seagrass, or depths that support seagrass is critical... Based on the above, Corps regulatory will have very serious concerns about any development on this site, other than boat dockage or potentially a marina, that would be built beyond the area of seagrass. This is one of many tidal areas that involve privately owned bay bottom, and permitting a project here would reverse a very important precedent, which over many years the Corps and the state have established, that open tidal waters, particularly those with seagrass or other resources, are not permitted for residential and commercial development. The Corps and state have denied other such projects, and we have a couple in the process now ...."

At the appeal conference the District stated that it did not have a specific written or unwritten policy of not issuing permits for residential development in tidal waters. The District stated that it did not have the statutory authority under the CWA to disallow filling of a general category of waters, and that such authority was reserved to the EPA under CWA Section 404(c). The District stated that it had a general pattern and practice of typically not permitting fills for residential developments in open tidal waters. The District stated its reason for this pattern and practice was not an unwritten policy, but rather that the District had generally concluded in the past that such projects in the open tidal waters of south Florida have usually been determined to result in significant degradation of the aquatic environment, or had less environmentally-damaging practicable alternative available to the applicant, or both, so typically those permit requests had been denied. The District stated that it had from time to time permitted small fills for single-family residential developments in open tidal waters that were associated with a project being developed on an upland area.

The Appellant considered the District's statement that "[t]he Corps has not issued permits for residential development in open tidal waters for many years in Florida, and landowners do not expect to be able to receive permits for such development" as further evidence that there was an unwritten policy to deny permits for residential development in open tidal waters. While the Appellant prefers to explain the District's statements and actions as an unwritten policy of not issuing permits for residential activities in the open tidal waters of LWL and south Florida, the District's clarification at the appeal

conference that these are a pattern and practice rather than a policy is reasonable. The District recognizes that it lacks the statutory authority to categorically prohibit the discharge of dredged or fill material into a particular category of waters, in this case the open tidal waters of the LWL and the Intracoastal Waterway, and the District continues to consider permit requests for actions in such areas. The Corps regulations preclude the District from denying such permit requests without evaluation, so the District must consider them on a case-by-case basis. Over time the District stated that its pattern and practice has been to deny most permits for such activities based upon individual evaluations that result in a denial under the 404(b)(1) Guidelines. In its permit-by-permit evaluation of such actions, the District stated it often identified that such requests were not the least environmentally damaging practicable alternative, and were anticipated to result in significant degradation of the aquatic environment.

The District's use of the word "precedent" in its August 26, 2003, e-mail appears to oversimplify the District's practices. Note that the email quoted above does not state that the Tyler's Island project will be denied outright because of the fact that it proposed a residential development in open tidal waters, but that "Corps regulatory will have very serious concerns" about such a development. The District does not contend that it has the authority to outright prohibit particular classes of discharges, nor is such a position reflected in the EA/SOF. The District's use of the word precedent appears to refer to the District's concern that a part of reasonable decision-making is that decisions on similar projects with similar circumstances will, in general, have similar outcomes. For the District to approve a permit in a situation where it has generally denied permits in the past, part of a reasonable decision-making process would be to explain the basis for that apparent difference. 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 are not in compliance with the 404(b)(1) Guidelines. Therefore, should the District determine upon reconsideration of this action that it is appropriate to issue this permit, when other similar actions have been denied, the District should provide some explanation as to its basis for that conclusion. It is expected that any other concerns that may remain related to this Reason for Appeal will be adequately addressed in the areas identified for reconsideration, or additional analysis and documentation, above.

Information Received and its Disposition during the Appeal Review: The Division evaluated this appeal based on the Appellant's Request for Appeal, the District's Administrative Record, clarification of the administrative record at the appeal conference including the Review Officer's Appeal Meeting Summary and Appellant's Addendum to the Appeal Meeting Summary and the following submittals:

1. By letter of September 12, 2005, the Appellant submitted copies of letters referenced in the Request for Appeal regarding certain State of Florida permits and authorizations pertaining to the project site. These were considered clarifying information and considered during the administrative appeal.

2. By letter of October 3, 2005, the Appellant submitted a copy of Charter of the City of Lake Worth in order to include Article II, Section 4, for consideration,

which the Appellant stated requires a vote of the citizens prior to conveying city park land from public ownership. This was determined to be new information that was not presented to the District during the permit evaluation, and so in accordance with 33 CFR 331.7(e)(6) this information could not be considered during the administrative appeal. Since this permit decision is being reconsidered by the District, this information may be considered during that reconsideration.

3. By letter of October 3, 2005, the Appellant submitted the Department of the Army's January 16, 2001, response to a CWA 404(q) elevation request for the Naples Reserve Golf Club, Collier County, Florida, and requested the guidance in that document be considered as it applied to this administrative appeal. That CWA 404(q) elevation response document was considered as a Corps guidance document as part of this administrative appeal.

4. By letter of October 3, 2005, the Appellant submitted updated information and correspondence from the SFWMD. The Appellant had assumed the District had received this information because correspondence from the SFWMD and the Appellant indicated the District had been sent copies of these materials, but the District has no record of receiving them. This was determined to be new information that was not presented to the District during the permit evaluation, and so in accordance with 33 CFR 331.7(e)(6) this information could not be considered during the administrative appeal. Since this permit decision is being reconsidered by the District, this information may be considered during that reconsideration.

5. By Facsimile submittal of October 7, 2005, the Appellants submitted a letter from the City of Lake Worth stating that the City of Lake Worth considered the Appellant TerraMark to be an agent for the City of Lake Worth, and that therefore both the City of Lake Worth and TerraMark should be considered as appealing the District's decision. I accept this administrative clarification from the City of Lake Worth.

Conclusion: Because some of the Reasons for Appeal had merit, in whole or in part, in that the District Engineer's decision in those respects was not supported by substantial evidence, the District must reconsider its prior permit denial decision as described in detail in this administrative appeal decision.

Michael J. Walsh
Brigadier General, US Army
Commander