ADMINISTRATIVE APPEAL DECISION

HARBOUR POINTE AT SOUTH SEAS RESORT

FILE NO. SAJ-2003-12117 (IP-MJD)

JACKSONVILLE DISTRICT

3 APRIL 2012

Review Officer: Jason Steele, U.S. Army Corps of Engineers, South Atlantic Division (SAD)

Appellant: Plantation Development, Ltd.

Date of Receipt of Request for Appeal: 7 July 2011

Acceptance of Request for Appeal: 15 July 2011

Appeal Conference: 18 October 2011

Authority: Section 404 of the Clean Water Act (CWA) (33 U.S.C. § 1344)

BACKGROUND

By letter dated 5 July 2011, Plantation Development, Ltd. (Appellant) submitted a request for appeal (RFA) of the Jacksonville District's (District) decision to deny their permit application. Plantation Development, Ltd. requested authorization to fill approximately 2.5 acres of mangrove wetlands (waters of the United States (US)), shade approximately 0.11 acres of seagrass via construction of a bridge, and trim in perpetuity 1.39 acres of mangroves for the construction of a residential development. The property is approximately 78 acres in size, of which 1.46 acres are uplands and 76.54 are wetlands. The property is located on Captiva Island, approximately 0.15 miles to the east of South Seas Plantation Road, in Section 22, Township 45 South, Range 21 East, Lee County, Florida.

On 9 May 2011, the District denied the permit. The denial was based on two grounds: noncompliance with the 404(b)(1) Guidelines (40 CFR Part 230); specifically the lack of avoidance (based on there being less environmentally damaging practicable alternatives to the applicants overall project purpose), minimization, and insufficient mitigation. The District also denied the permit based on the project being contrary to the public interest; specifically conservation, economics, general environmental concerns, wetlands, historic properties, fish & wildlife values, floodplain values, navigation, recreation, water supply and conservation, and water quality.

The Appellant contends the four fundamental components of their application – avoidance, minimization, mitigation, and public interest – were presented in compliance with the

404(b)(1) Guidelines.

SUMMARY OF DECISION

Appellant's request for appeal (RFA) has merit. The administrative record does not contain adequate evidence to support the District's decision to deny the permit based on failure to comply with the 404(b)(1) Guidelines or the project being contrary to the public interest.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

1. The District provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.

2. The Appellant's agent supplied supporting documentation at the time of submittal of the RFA.

3. The District and Appellant's agent supplied information, prior to the appeal conference, in the form of answered questions asked at the conference.

APPELLANT'S STATED REASONS FOR APPEAL

Appeal Reason 1: "The Applicant has clearly rebutted the presumption for a non water dependent use that there is a practicable alternative site(s) on Captiva Island which is available and which would result in less wetland impacts than the Harbour Pointe project as proposed. There is no such site available on Captiva Island."

Appeal Reason 2: "The Applicant has clearly documented a number of appropriate and practicable actions taken to reduce wetland impacts associated with the Harbour Pointe project as proposed to minimize adverse impacts."

Appeal Reason 3: "The Applicant has demonstrated, based on a UMAM Functional Assessment previously accepted by the Corps project manager in early 2009 that our proposed compensatory mitigation plan results in a positive score that fully offsets the proposed wetland impacts."

Appeal Reason 4: "The matter of whether or not this project is contrary to the public interest has not been fairly evaluated or presented in the EA."

EVALUATION OF THE REASONS FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE JACKSONVILLE DISTRICT COMMANDER

Appeal Reason 1: The Applicant has clearly rebutted the presumption for a non water dependent use that there is a practicable alternative site(s) on Captiva Island which is available and which would result in less wetland impacts than the Harbour Pointe project as proposed.

There is no such site available on Captiva Island.

Finding: This reason for appeal has merit.

Discussion: As it relates to the offsite alternatives analysis, the overall project purpose defines the geographic location in which the Corps wants the applicant to perform a geographic alternatives analysis. This definition is critical in setting the parameters for the Guidelines alternatives analysis required at 40 CFR 230.10(a)(2), which states, "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered."

The District defined the overall project purpose as, "Construct a residential development on Captiva Island." (pages 3 & 34, EA/SOF). The District goes on to state, "The Corps understands that the overall purpose dictates the geographic area for the alternatives analysis. However, the applicant's Environmental Resources Permit application dated 8 April 2005 contained an alternatives analysis that included areas other than Captiva so the Corps provided an analysis of the other areas considered by the applicant. The applicant submitted several versions of the alternatives analysis that both the Corps and EPA found to be incomplete and failed to rebut the presumption that the project site is the least damaging practicable alternative." (page 35, EA/SOF).

Although the District defined the overall project purpose to be on Captiva Island, they repeatedly asked the appellant to provide site specific analysis for properties on other similarly situated land (i.e. barrier islands). The appellant failed to provide this information (pages 38-41, EA/SOF). The appellant acknowledges this in their RFA (Appendix 3, page 4, Avoidance/ Alternative Sites Analysis, dated 7/5/11); "Why should the Applicant (PDL) provide information about any other barrier island if Captiva Island, by definition and as stated clearly in the Public Notice, the EA and in the C.F.R., is the only relevant geographic area for this analysis of available sites? The answer is clear: PDL's search for other alternative sites needed only to address Captiva Island."

The District framed the 404(b)(1) alternatives analysis by limiting the geographic scope of the overall project purpose to "on Captiva Island." Having done so, the District cannot then proceed to ask the appellant to conduct an alternatives analysis for other "similar" properties located on barrier islands other than Captiva Island within Lee County, Florida. If the District intends for the alternatives analysis to include barrier islands in addition to Captiva, it must redefine the overall project purpose to reflect this requirement and modify the EA/SOF accordingly.

As it relates to the onsite alternatives analysis (on Captiva Island), no permit may be issued under Section 404 of the Clean Water Act unless it is in compliance with guidelines

developed by the Administrator of EPA in conjunction with the Secretary of the Army pursuant to Section 404(b)(1) of the Clean Water Act, with a potential exception only for situations where navigation and anchorage may be affected. 33 U.S.C. § 1344; 33 C.F.R. § 320.2(f); 40 C.F.R. §§ 230.2 and 230.12. The focus of these "404(b)(1) Guidelines" is on the protection of the aquatic ecosystem. 40 C.F.R. §§ 230.1 and 230.10. The level of effort, procedures, and documentation required to meet the 404(b)(1) Guidelines is to be commensurate with the significance and complexity of the discharge activity, and the seriousness of the potential for adverse impacts. 40 C.F.R. §§ 230.6(b) and 230.10.

The primary restrictions on discharges of dredged and fill material in the 404(b)(1) Guidelines are set forth in 40 C.F.R. § 230.10(a) through (d). See 40 C.F.R. § 230.5(a). These restrictions are: no discharge where there is a practicable alternative with less adverse impact on the aquatic ecosystem and no other significant adverse environmental consequences (230.10(a)); no discharge where it would result in a violation of State water quality standards, toxic effluent standards, or compromise the protection of endangered or threatened species or marine sanctuaries (230.10(b)); no discharge where it will cause or contribute to significant degradation of waters of the United States (230.10(c)); and, no discharge unless appropriate and practicable steps have been taken to minimize potential adverse impacts on the aquatic ecosystem (230.10(d)). In determining whether any one of these restrictions would preclude the issuance of a permit, the Corps of Engineers may rely in part on information provided by the permit applicant and other government agencies, but in all cases must independently evaluate and verify information in the record without undue deference to other entities to reach its determination.

The practicable alternatives analysis of 40 C.F.R. § 230.10(a) requires the Corps to determine whether "there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences." Practicable alternatives include those "which do not involve a discharge ... into waters of the United States," as well as "[d]ischarges ... at other locations in waters of the United States." 40 C.F.R. § 230.10(a)(1). A "practicable" alternative is one that "is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. § 230.10(a)(2). An otherwise practicable alternative is "available" even if it is "an area not presently owned by the applicant, [if it] could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity." 40 C.F.R. § 230.10(a)(2). If an alternative is unreasonably expensive to an applicant, 45 Fed. Reg. 85343 (Dec. 24, 1980), or does not "provide similar logistical opportunities," Old Cutler Bay Permit 404(q) Elevation (13 Sept. 1990), it is not a practicable alternative. There is a presumption that practicable alternatives exist if a proposed project is not water-dependent. 40 C.F.R. § 230.10(a)(3).

> Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) 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.

There is an additional presumption that "all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site ... have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." 40 C.F.R. § 230.10(a)(3). "Special aquatic sites" include wetlands. 40 C.F.R. § 230.41 (subpart E).

The basic principle of the practicable alternatives analysis is one of avoidance: "if destruction of an area of waters of the United States may reasonably be avoided, it should be avoided." 45 Fed. Reg. 85340 (Dec. 24, 1980). The project purpose and practicable alternatives should be viewed from the perspective of a person or entity in the applicant's position. The practicable alternatives analysis is not susceptible to numerical precision, but requires a balancing of the applicant's needs with environmental concerns.

The burden to clearly demonstrate a lack of practicable alternatives and rebut the 404(b)(1) presumptions lies with the permit applicant. With guidance from the Corps, the applicant must conduct an assessment of practicable alternatives. The practicable alternatives analysis must be supported by appropriate documentation. See 40 C.F.R. § 230.6(b). The ultimate determination of whether the presumption(s) of the 404(b)(1) Guidelines has/have been rebutted is the sole responsibility of the Corps.

Where the 404(b)(1) Guidelines' practicability analysis presumption(s) is/are rebutted, an applicant must still demonstrate that "appropriate and practicable steps have been taken to minimize potential adverse impacts on the aquatic ecosystem" in accord with 40 C.F.R. § 230.10(d). This means that once the least damaging practicable alternative has been identified, steps must be proposed or agreed-to by the applicant to minimize project impacts through project modifications and permit conditions. Corps/EPA Mitigation MOA (1990).

In its 09 May 2011 EA/SOF (pages 41-47), the District addressed onsite alternatives (South Seas Resort, Alternative Site Adjacent to South Seas Resort, and the Do Nothing Alternative).

Within South Seas Resort, the Corps states (page 42, EA/SOF): "The Corps considers some of the sites listed by EPA within SSRMDP as reasonable alternatives. These sites are 3, 4, 7, 8, & 11 as described by EPA plus additional two vacant lots south of site #6. The applicant failed to show why they could not acquire one or more of these lots and split the development …." "The Corps concurs with EPA that the applicant failed to provide the additional information requested to complete the alternatives analysis for alternative sites on South Seas Resort."

The Appellant provided an alternative site analysis for sites number 3, 4, 8 and 11, primarily based on the Blackstone Group letter dated 17 June 2009 (RFA, Appendix #10) which stated that none of these sites are available to PDL, and is further documented by the Morris Depew report of 20 July 2009 (RFA, Appendix #11) and a matrix as prepared by the Applicant (RFA, Appendix #9). Sites #3 and #4 are reserved for development of additional units South Seas Resort plans to build as per their 2009 approved zoning modification, the details of which

were provided in the Morris-Depew Report. Site #8 is the existing six tennis court complex which the South Seas Resort owners have indicated they would not be willing to make available to PDL or allow other development on since that site is adjacent to existing condominium units and provides an open space/open view for those condominiums. Site #11 is currently used for boat storage, is outside of the South Seas Resort Master Development Plan and has a limited density based on existing Lee County zoning which would allow only 2 or 3 residential units.

The Appellant also provided an alternative sites analysis for sites #6, #7, and the vacant lot south of site #6, primarily based on the MRM Group letter dated 7 July 2009 (RFA, Appendix #13), and as further documented by the matrix provided by the Applicant as RFA, Appendix #9.

On Captiva Island (Alternative Site Adjacent to South Seas Resort), the District states (page 43, EA/SOF): "The Corps did identify two upland properties that are part of a recently settled trust…It is unknown if these parcels could be obtained for the proposed project but the Lee County property appraiser lists the combined appraised value of the parcels is $6,034,818."

The appellant provided a rebuttal to this alternatives analysis via letter dated 22 July 2009 (Appendix 13), which concludes that these parcels are controlled by a trust and not available for sale.

The District states, under "The Do Nothing Alternative", (pages 43-44, EA/SOF), "…If the applicant used only the uplands several single family lots would fit on the uplands…The applicant did not discuss whether a different type of water quality permit could be obtained to develop just the uplands and install very limited road improvements to restore the flushing under the shell road under a "net improvement" permit from FDEP." The District goes on to state, "The applicant stated that improving the existing shell road by paving to current Lee County standards would require 3.2 acres of mangrove impacts, stating this alternative would require more impacts than currently proposed."

The appellant provided a rebuttal to this alternatives analysis via e-mails dated 26 January 2009 and 7 December 2009 (Appendix 17 & 18), which concludes that improvements to the existing shell road would require more impacts than currently proposed (3.2-3.4 acres versus 2.5 acres).

The District goes on to state, under "The Do Nothing Alternative", (page 45, EA/SOF), "The Corps would require written documentation from Lee County Code Review, or the appropriate level of permit authorization, confirming the applicant's statements concerning non-availability of variance for height restrictions and road improvements for the existing roadway pertaining to the single-family development limited to uplands in order to consider this alternative not practicable."

The appellant stated, via RFA (Appendix 3, page 7, Avoidance/ Alternative Sites Analysis, dated 7/5/11), "It is outside the 404 Guidelines to require an Applicant to submit

alternative applications to a local government just to test the waters on the availability of a hypothetical variance."

The requirement of the applicant to provide written documentation from the County concerning variances of height restrictions and road improvements is not an unreasonable request. 33 CFR, 320.4 (j)(2) states, "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."

By letter dated 26 January 2006, the EPA classified the proposed impacted wetlands as an "aquatic resource of national importance" (ARNI). In addition, the proposed site is adjacent to an Outstanding Florida Water, Aquatic Preserve, and a National Estuary (i.e. special aquatic areas, including wetlands, with significant interstate importance). Therefore, the District was justified in requesting additional information pertaining to variances.

The District also suggested a split-plan, under "The Do Nothing Alternative", (pages 45-46, EA/SOF), "The Corps determined that at least one onsite alternative might be available to the applicant by utilizing Parcels D & E owned by the applicant as these parcels are of sufficient size to accommodate reasonable development."

The Appellant provided a rebuttal to this alternative analysis via site plan #8 and two Tables (AR01401, AR01402 & AR01402), which concludes this alternative would result in more wetland impacts.

There is no indication in the 9 May 2011 EA/SOF where the District analyzed the rebuttal information provided by the appellant (letters provided to the District and dated 22 July 2009 and 3 November 2009 (Matrix) and e-mails dated 26 January 2009 and 7 December 2009 (Appendix 17 & 18, RFA) and Site Plan #8 and two tables (AR01401, AR01402 & AR01402).

Actions: 1) If it is the District's intention, redefine the overall project purpose to accurately reflect a requirement to search for alternative sites on similar properties (i.e., other barrier islands) within Lee County, Florida, and modify the EA/SOF, accordingly.

2) Provide a detailed analysis/rebuttal to the analysis provided by the appellant (letters dated: 22 July 2009 and 3 November 2009 (Matrix), e-mails dated 26 January 2009 and 7 December 2009 (Appendix 17 & 18, RFA), and Site Plan #8 and two tables (AR01401, AR01402 & AR01402)).

Appeal Reason 2: The Applicant has clearly documented a number of appropriate and practicable actions taken to reduce wetland impacts associated with the Harbour Pointe project as

proposed to minimize adverse impacts.

Finding: This reason for appeal has merit.

Discussion: The appellant states in the RFA, "Harbour Pointe project proposes to cluster the project to one location to minimize direct and secondary impacts, and to access the project via a draw bridge in order to allow for the removal of an existing road which significantly impacts the adjacent mangrove wetlands, the total proposed project impacts with the bridge access is less than the wetland impacts which would be required just to improve the existing road to regulatory standards. The Harbour Pointe project design was specifically developed to meet the intention of Section 230.75(d). The Applicant's project, will, in addition to filling 2.5 acres of wetlands, also remove a 2,250 foot perimeter road on the eastern project border. This road, which has been in place since the 1960's, impounds the interior mangrove forest as it blocks tidal exchange to wetlands on the project's impact site and the to be preserved 36 acre mangrove forest to the south. The removal of this road will directly create 0.72 acres of tidal mangroves, hydrologically restore over 13.6 acres of mangroves to again become a functioning part of Pine Island Sound, and enhance tidal hydrological exchange to the remaining 22+ acres of mangroves in Preserve Area A. While the project will impact 2.5 acres of mangroves, it will directly restore over 14 acres (13.6 + 0.72) of tidally inundated mangroves by reconnecting them to Pine Island Sound, an Aquatic Preserve. Thus, under subpart H, the project achieves wetland restoration of an area over five times the size of the impact site. Under 404 guidelines, this qualifies as minimization and should have been credited to PDL in the EA."

The District stated in the 9 May 2011 EA/SOF (pages 53-54), "The applicant's minimization of wetland impacts from time of application was 4.79 to 2.5 acres of fill and a reduction from the impacts advertized in the public notice of 2.98 to 2.5 acres of fill impacts." The Corps lists various methods of minimization by the applicant, such as: "designing the buildings to place living units over parking areas to minimize the footprint of fill in mangrove wetlands and also minimize the area required for the surface water management system.", "revising the bridge plan to elevate the entire portion of the bridge over the mangrove wetlands approaching the project site…thus minimizing direct impacts.", "minimizing impacts by revising the site plan from six (6) 4-plex units to four (4) 6-plex units (reducing area for surface water management system also).", "limited the on-site recreation facilities to a single, community pool.", "The applicant also noted that by proposing to construct a retaining wall rather than the usual slope between development and preserve the applicant further minimized wetland impacts by 0.25 acres."

The District's 9 May 2011 EA/SOF is inconclusive in regards to whether or not the appellant's minimization efforts were inadequate.

The District requested (page 54, EA/SOF) "…the applicant consider removing another building to minimize wetland impacts and avoid the shell scatter sites. The Corps suggested that the applicant construct three buildings with 8 units each if they still

needed 24 units."

The District also stated, (page 76, EA/SOF), "....the Corps reviewed the applicant's minimization discussion and requested that the applicant consider further project redesign in order to minimize impacts to both mangrove wetlands and the shell scatter sites. The Corps and EPA believed that the applicant could minimize project impacts by constructing 24 smaller units in three buildings, or fewer large units in three buildings to minimize impacts."

The District further stated, (page 77, EA/SOF), "The applicant has declined to minimize impact further by changing the site plan to three buildings and either constructing smaller or less units."

It is not clear if the District is suggesting that the above minimization effort (project redesign and reduction) would result in a permittable project.

The District stated (page 54, EA/SOF), "The applicant had previously submitted a cost study of unit size/number needed to support the cost of the bridge," and that, "The applicant informed the Corps that no further minimization was possible, stating that smaller units were not economically feasible."

There is no indication in the District's 9 May 2011 EA/SOF that the District analyzed the applicant's cost feasibility study and concluded that it was inadequate.

Actions: 1) Reevaluate the various minimization efforts by the applicant (listed at pages 53-54 of the EA/SOF) and make a conclusion as to whether or not they are adequate.

2) Reevaluate the recommendation for the applicant to consider removing another building to minimize wetland impacts and avoid the shell scatter sites. Also, reevaluate the suggestion that the applicant construct three buildings with 8 units each if they still needed 24 units and make a conclusion as to whether or not these minimization efforts would result in a permittable project.

3) Analyze the applicant's cost feasibility study and make a conclusion as to whether or not it is adequate.

Appeal Reason 3: The Applicant has demonstrated, based on a UMAM Functional Assessment previously accepted by the Corps project manager in early 2009 that our proposed compensatory mitigation plan results in a positive score that fully offsets the proposed wetland impacts.

Finding: This reason for appeal has merit.

Discussion: The District stated (page 56, EA/SOF), "The Corps asked the applicant to make

adjustments to the wetland functional assessment and the final assessment accepted by the Corps showed that the functions and values that would be lost by the proposed project would be replaced by the applicant's proposed mitigation but did not make the requested corrections to the enhanced area of Parcel A."

It appears the District based its determination that the mitigation was insufficient on the applicant submitted proposal of 25 February 2009. Page 57 of the EA/SOF states, "Additional review of the initial and revised UMAM documents indicated that the calculation revision requested by telephone conversation on 26 February 2009 was not included."

However, page 25 of the EA/SOF, states, "The Corps met with the applicants on 28 October 2010…The applicant again offered an additional 33 acres of mangroves as mitigation to make the project "in the public interest". The Corps explained that accepting additional mitigation, beyond what was required to replace the functions and values was not appropriate therefore additional mitigation would not be accepted or considered."

Also, in two separate letters dated 4 March 2009 (Appendix 24 & 25, RFA), to the NMFS and EPA, the District states, "Additionally, the functional assessment provided to support the compensatory mitigation indicates that the onsite restoration and enhancement of forested mangrove wetlands will provide for an offset or slight increase in functional value which is specifically related to increased mangrove-bay tidal connection improving and restoring essential fishery habitat."

And finally, in an e-mail dated 31 August 2009 (Appendix 33, RFA) from the District to the EPA, the District stated, "I have reviewed their submittal and satisfied that the project complies with the 404(b)(1) Guidelines. I am going to work on the EA and draft permit while waiting for your final comments. I am hoping that you will remove your objections and issue a 3(d) letter. If you don't, and if there is no new information to consider, I will finalize our EA and then forward our 3(c) letter up to management for coordination…"

In summary, there appears to be conflicting information within the administrative record concerning mitigation.

Action: 1) Correct the conflicting statements in the EA/SOF, and explain the discrepancies between the referenced communications and the EA/SOF, concerning whether or not the appellant submitted an adequate mitigation proposal.

Appeal Reason 4: The matter of whether or not this project is contrary to the public interest has not been fairly evaluated or presented in the EA.

Finding: This reason for appeal has merit.

Discussion: 33 CFR, 320.4(a)(1), states, "The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity

and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people. For activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria (see §§320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest."

33 CFR, 320.4 (a)(2)(iii) states, "The following general criteria will be considered in the evaluation of every application:

> The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited."

33 CFR, 320.4 (3), states, "The specific weight of each factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal. A specific factor may be given great weight on one proposal, while it may not be present or as important on another. However, full consideration and appropriate weight will be given to all comments, including those of federal, state, and local agencies, and other experts on matters within their expertise."

33 CFR, 320.4 (p), states, "Some activities that require Department of the Army permits result in beneficial effects to the quality of the environment. The district engineer will weigh these benefits as well as environmental detriments along with other factors of the public interest."

The appellant made the following statement, in the RFA, related to the public interest: "The removal of the 2,250 feet bay front road will unquestionably restore a large area of mangroves to become hydrologically part of the adjacent estuary and associated sea grass beds. Presently, the road impounds and isolates the interior mangroves from these tidal waters. Its removal will generate a significant ecological benefit by adding those mangrove wetlands to be a functioning part of the Aquatic Preserve. In addition to providing direct compensatory

mitigation to offset lost wetland function values, the Applicant provided several additional coastal resource protection measures, including: a net increase in wetland functional values; a net increase of wetland acreage directly available for use by federally managed fish species, thus increases essential fish habitat values; the preservation of an additional 35.4 acres of onsite coastal wetlands; the purchase of an additional mangrove mitigation credit at Little Pine Island Mitigation Bank; the preservation of a significant archaeological site, and 1.3 acres of associated, and regionally rare, coastal hammock forest; and, the offer to purchase and protect an additional 32.8 acres of adjacent mangrove wetland forest. These project benefits were not acknowledged in the public interest analysis in the EA/SOF."

The District's evaluation of the Public Interest Factors can be summed up by the following statement, (page 90, EA/SOF), "The only permanent benefits that would accrue as a result of the proposed project would be to the applicant." There is no indication in the EA/SOF where the District described what these benefits were to the applicant. In addition, there is no indication in the EA that the District balanced the benefits which reasonably may be expected to accrue from the proposal against its reasonably foreseeable detriments.

Actions: 1) Evaluate the appellant's information pertaining to each of the Public Interest Factors, and carefully balance the benefits which reasonably may be expected to accrue from the proposal against its reasonably foreseeable detriments.

CONCLUSION

For the reasons stated above, I find that the appeal has merit. The District's administrative record does not contain adequate evidence to support its permit denial as outlined above. The District's determination was not otherwise arbitrary, capricious or an abuse of discretion, and was not plainly contrary to applicable law, regulation, Executive Order, or policy. The administrative appeals process for this action is hereby concluded.

TODD T. SEMONITE
Major General, USA
Commanding