# ADMINISTRATIVE APPEAL DECISION

## INTRACOASTAL ESTATES, LLC; FILE NO. SAD-2002-06953

## JACKSONVILLE DISTRICT

**16 April 2009**

**Review Officer:** Mike Vissichelli, U.S. Army Corps of Engineers, North Atlantic Division, acting by designation on behalf of the South Atlantic Division

**Appellant:** Intracoastal Estates, LLC

**Date of Receipt of Request for Appeal:** 23 May 2008

**Date of Request by Division for Specific Statement of Reasons for Appeal:** 3 July 2008

**Date of Receipt from Appellant of Specific Statement of Reasons for Appeal:** 1 August 2008

**Date of Acceptance by Division of Request for Appeal:** 5 September 2008

**Appeal Conference/Site Visit Date:** 7 November 2008

**SAD-ACCEPTED REASONS FOR APPEAL:**
SAD accepted the following reasons for appeal as detailed by the agent in the attachment to the Request for Appeal dated 1 August 2008:

1. The decision contains procedural errors;
2. The decision incorrectly applies laws, regulations and officially promulgated policy;
3. The decision was not in accordance with the law due to omissions of material fact; and,
4. The District incorrectly applied the 404(b)(1) guidelines.

**SUMMARY OF DECISION:**
The Appellant's request for appeal has merit. The administrative record should be revised to provide additional documentation to support the District's decision.

**BACKGROUND INFORMATION:**
Intracoastal Estates, LLC is appealing the Jacksonville District's (the District) decision to deny its permit request for placement of fill material into approximately 0.39 acres of federally regulated wetlands for a proposed multi-family housing complex consisting of four units, driveways, swimming pools and a community dock in Boynton Beach, Florida.

The original application was received by the Jacksonville District on 18 November 2003. A public notice was issued for the proposed project on 3 January 2006. A letter was sent to the Appellant on 10 January 2007 with comments received by the agencies in response to the public notice. The letter requested a response to the comments from the Appellant including an alternatives analysis with details

on measures taken to avoid and minimize impacts to onsite tidal wetlands. The letter said that in the event avoidance and minimization is demonstrated that a more detailed compensatory mitigation plan should be provided with a functional assessment that demonstrates that the proposed mitigation will offset the proposed impacts. The letter also stated that based on the conditions at the time of the letter that the District would recommend denial of the permit because it is contrary to the public interest due to impacts that would occur as a result of the proposal to wetlands and fish and wildlife values and because the project does not meet the Section 404(b)(1) guidelines. In a letter dated 12 June 2007 the Appellant provided a response to the comments with an alternatives analysis detailing what they believed was an acceptable plan that sufficiently avoided and minimized impacts to wetlands and waters. The alternatives analysis looked at five offsite alternatives that the Appellant said were not practicable because they were not zoned for multi-family housing, they were economically infeasible or they created similar impacts to the existing proposal. The alternatives analysis demonstrated that impacts on the site were reduced from 0.59 acres to 0.39 acres by minimizing the front yard set backs to provide an alternate site layout moving the houses closer to the street and away from the wetlands, moving the proposed pools closer to the proposed houses and moving the proposed seawall 40 feet further landward. The alternatives analysis also provided proposed mitigation that the Appellant felt would offset any impacts that would result to aquatic resources as a result of the proposal. On 30 January 2008, the District and the Appellant met to discuss the Appellant's proposal. In response to concerns raised at the 30 January 2008 meeting with the Jacksonville District, a submittal was made on behalf of the Appellant by M. J. Nichols and Associates, LLC on 20 February 2008. The submittal provided further analysis of the Appellant's 12 June 2007 submittal with some additional documentation. The 20 February 2008 submittal continued to support that the Appellant feels that the proposal is the least damaging practicable alternative, that the Appellant has addressed agency comments and that the proposed mitigation offsets the impacts of the proposed project. On 28 March 2008 the District denied Intracoastal Estates, LLC proposal stating that it was not in compliance with the Section 404(b)(1) guidelines and that the project is contrary to the public interest. The Appellant submitted its initial request for appeal on 20 May 2008. It was determined by the U.S. Army Corps of Engineers South Atlantic Division Office (USACE SAD) to be incomplete and the Appellant was notified of such in writing in a letter dated 3 July 2008. A subsequent submission was submitted by the Appellant dated 30 July 2008 which was accepted by USACE SAD on 5 September 2008.

**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) With the request for appeal, the Appellant provided documents containing its comments and analysis of the District's jurisdictional determination. The submittals were accepted as clarifying information in accordance with 33 CFR 331.7 (e).

**EVALUATION OF THE REASON FOR APPEAL/APPEAL DECISION FINDINGS:**

**Appeal Reason 1:** The decision contains procedural errors;

**Finding:** This reason for appeal does not have merit.

**Action:** In its review of the remand (see Appeal Reason 4), the District should clarify in the administrative record its reasons for processing delays and why a permit decision was not issued at an earlier date.

**Rationale:** The Appellant raised concerns that the District did not provide copies of the revised plans submitted by the Appellant in its 12 June 2007 submittal to the resource agencies who commented on the public notice. This submittal was a response to the comments raised by the District and the resource agencies in a letter dated 10 January 2007 following the public notice. The Appellant's allegations that the District did not properly follow procedures set out in the regulatory standard operating procedures are not supported by the record. In response to the comments sent by the District, the Appellant reduced the scope of work to minimize impacts to wetlands and waterways and offered compensatory mitigation. The District determined that although the Appellant had reduced the impacts, that the Appellant did not sufficiently avoid the impacts and they did not rebut the presumption that other less environmentally damaging alternatives existed. Based on this determination, the District concluded it was not necessary to obtain further input from the resource agencies.

The Corps is the final decision maker and recoordination with the resource agencies is at the discretion of the District should they feel they need further input. Based on 33 CFR 325.2(a)(3) it is clear that the District followed the proper procedure and that recoordination of the revised plans with the resource agencies was not necessary. In accordance with 33 CFR 325.2(a)(3):

> The district engineer will consider all comments received in response to the public notice in his/her subsequent actions on the permit application. Receipt of the comments will be acknowledged, if appropriate, and they will be made a part of the administrative record of the application. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition. If comments relate to matters within the special expertise of another federal agency, the district engineer may seek the advice of that agency. If the district engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant will be given the opportunity to furnish his/her views on such issue to the district engineer (see 33 CFR 325.2(d)(5)). At the earliest practicable time other substantive comments will be furnished to the applicant for his/her information and any views they may wish to offer. A summary of the comments, the actual letters or portions thereof, or representative comment letters may be furnished to the applicant. The applicant may voluntarily elect to contact objectors in an attempt to resolve objections but will not be required to do so. District engineers will ensure that all parties are informed that the Corps alone is responsible for reaching a decision on the merits of any application.

The District's decision not to circulate the Appellant's revised plans to the resource agencies because of its conclusion regarding the availability of practicable alternatives is within its discretion. Should the District reach a differing conclusion on remand with regard to the practicability analysis (see Appeal Reason 4), however, then the decision not to circulate the revised plans should also be revisited.

The Appellant also states in their request for appeal that they feel that in accordance with Regulatory Guidance Letter 93-2 (RGL 93-2) that the level of scrutiny for this application was to high. The District states throughout the administrative record that mangrove ecosystems in the area of the Lake Worth Lagoon are threatened and very sensitive. This is further supported in the record by letters from the National Marine Fisheries Service, the U.S. Environmental Protection Agency and the U.S. Fish and Wildlife Service. Furthermore, nationwide permits for minimal impact projects for development such as that proposed have been rescinded in the state of Florida and are not available for use. Based on the sensitive nature of the area and the fact that nationwide permits are not available, the District had no other options for the processing of the proposed application than through the standard individual permit process. The information provided by the Appellant in the administrative record does not clearly rebut the presumption that other alternatives exist and therefore the District's request for information does not appear to be excessive. Based on this, the District followed proper procedure with regard to the level of scrutiny that they used for this application.

The Appellant raised concerns that the process took longer than 3 years from start to finish. It states in the regulations that decisions for individual permits should be completed within specific time frames. In reviewing the administrative record and from information provided by the District at the appeal conference it appears as though workload and manpower were part of the reasoning for the District not making a decision in a more timely manner. There was some delay on the part of the Appellant in responding to requests for information as well which took up to 6 months. The following portion of the regulations serves only as a guide that decisions will be made in the time frames described and it often is not possible to achieve those goals due to various reasons beyond the control of the District. In accordance with 33 CFR 325.2:

> (d) *Timing of processing of applications.* The district engineer will be guided by the following time limits for the indicated steps in the evaluation process:
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> (3) District engineers will decide on all applications not later than 60 days after receipt of a complete application, unless
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> (i) precluded as a matter of law or procedures required by law (see below),
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> (ii) The case must be referred to higher authority (see §325.8 of this part),
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> (iii) The comment period is extended,
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> (iv) A timely submittal of information or comments is not received from the applicant,
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> (v) The processing is suspended at the request of the applicant, or
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> (vi) Information needed by the district engineer for a decision on the application cannot reasonably be obtained within the 60-day period. Once the cause for preventing the decision from being made within the normal 60-day period has been satisfied or eliminated, the 60-day clock will start running again from where it was suspended. For example, if the comment period is extended by 30 days, the district engineer will, absent other restraints, decide on the application within 90 days of receipt of a complete

> application. Certain laws (e.g., the Clean Water Act, the CZM Act, the National Environmental Policy Act, the National Historic Preservation Act, the Preservation of Historical and Archeological Data Act, the Endangered Species Act, the Wild and Scenic Rivers Act, and the Marine Protection, Research and Sanctuaries Act) require procedures such as state or other federal agency certifications, public hearings, environmental impact statements, consultation, special studies, and testing which may prevent district engineers from being able to decide certain applications within 60 days.

In the case of this application the State never issued their permits under Section 401 of the Clean Water Act or the Coastal Zone Management Act and they State only issued its Notice of Intent to issue a Water Quality Certification on 31 July 2007. Although these were not the specific reasons behind all of the delays, it did contribute to the District's delay in not making a final decision. In accordance with 33 CFR 325.2 (d)(4):

> Once the district engineer has sufficient information to make his public interest determination, he should decide the permit application even though other agencies which may have regulatory jurisdiction have not yet granted their authorizations, except where such authorizations are, by federal law, a prerequisite to making a decision on the DA permit application. Permits granted prior to other (non-prerequisite) authorizations by other agencies should, where appropriate, be conditioned in such manner as to give those other authorities an opportunity to undertake their review without the applicant biasing such review by making substantial resource commitments on the basis of the DA permit. In unusual cases the district engineer may decide that due to the nature or scope of a specific proposal, it would be prudent to defer taking final action until another agency has acted on its authorization. In such cases, he may advise the other agency of his position on the DA permit while deferring his final decision.

Although there were delays in the processing of the application, this reason for appeal does not have merit. Time frames provided in the regulations are only a guide and the District has discretion to not issue a final permit decision until State permit decisions are completed; final permits were never issued by the State for this project. In its review of the remand (see Appeal Reason 4), the District should clarify in the administrative record its reasons for processing delays and why a permit decision was not issued at an earlier date.

**Appeal Reason 2:** The decision incorrectly applies laws, regulations and officially promulgated policy.

**Finding:** This reason for appeal does not have merit.

**Action:** No action required.

**Rationale:** The Appellant alleges that the project as proposed will have minimal impacts on

environmental resources and that the level of scrutiny for this project was too high. The primary reason for denying the permit according to the administrative record is that the Appellant failed to rebut the presumption that a less environmentally damaging practicable alternative exists and that the project as proposed was contrary to the public interest due to environmental impacts.

The administrative record provides detailed documentation supporting that the impacts from the proposed project would be contrary to the public interest. In accordance with 33 CFR 320.4(a)(1):

> 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...

A detailed discussion in the Statement of Findings and Environmental Assessment provides numerous reasons why the project is not in the public interest. The overall reasons relate to the adverse impacts that would occur on conservation, wetlands, general environmental concerns, water quality, and fish and wildlife values. The administrative record reflects that the detrimental impacts associated with the loss of 0.39 acres of mangrove wetlands are substantial and permanent and allowing development as proposed would cause a loss of irreplaceable mangrove wetlands and would likely encourage application for similar projects which, if granted, would cause even greater cumulative impacts and therefore, the detriments of this proposal on conservation, wetlands, general environmental concerns, water quality, and fish and wildlife values do not outweigh the benefits this project would have on the public interest. The administrative record contains comments from federal resource agencies supporting denial of this permit because of the adverse environmental impacts that would result from issuance of a permit for the Appellant's proposal. The wetlands on the site are locally significant and threatened due to development in the area and have been identified by the EPA as an aquatic resource of national importance. The sites wetland ecosystem provides numerous environmental functions to the region such as habitat, flood storage, water quality and nutrient retention. These benefits are vital to the surrounding ecosystems associated with the Lake Worth Lagoon watershed and would be impacted if a permit were issued for the proposed development. As stated in 33 CFR 320.4(b)(2) the following wetlands perform functions that are important to the public interest:

> **(i)** Wetlands which serve significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species;

> **(iii)** Wetlands the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;
> **(v)** Wetlands which serve as valuable storage areas for storm and flood waters;
> **(vi)** Wetlands which are ground water discharge areas that maintain minimum base flows important to aquatic resources and those which are prime natural recharge areas;
> **(vii)** Wetlands which serve significant water purification functions; and
> **(viii)** Wetlands which are unique in nature or scarce in quantity to the region or local area.

In accordance with 33 CFR 320.4(b)(4):

> no permit will be granted which involves the alteration of wetlands identified as important by 33 CFR 320.4(b)(2)...unless the district engineer concludes, on the basis of the analysis required in paragraph (a) of this section, that the benefits of the proposed alteration outweigh the damage to the wetlands resource.

Consequently, I find that the administrative record includes substantial evidence to support the District's determination that this proposal is contrary to the public interest since the benefits of the proposed alteration of these wetlands and their functions do not outweigh the damage that would occur to the wetlands resource if a permit was issued for the Appellant's proposal.

The Appellant also raised concern that the District allowed impacts to the same mangrove system on the property that directly abuts the parcel of land where the Appellant proposed to construct their project. The Appellant felt this contradicted the District's standing that cumulative impacts would occur if they issued a permit for the Appellant's proposal because they would then have to allow other projects that are similar, resulting in further degradation of the sensitive mangrove ecosystem. The District clarified that the reason they allowed the impacts to the mangroves was to allow for a city sponsored project to construct a stormwater outfall which was designed to help the water quality in the Lake Worth Lagoon. The District further clarified that the impacts to the mangroves were temporary and that the area was planted and restored to preconstruction contours.

**Appeal Reason 3:** The decision was not in accordance with the law due to omissions of material fact.

**Finding:** This reason for appeal has no merit.

**Action:** No action required.

**Rationale:** The Appellant alleges that the Corps was incorrect in stating that a permit had not been issued by the State of Florida. The state issued a notice of intent to issue a permit on 31 July 2007, however, the final permit was never issued. This was clarified and supported by the Appellant at the appeal conference and it is clearly documented in the administrative record. See also Appeal Reason 4.

**Appeal Reason 4:** The District incorrectly applied the 404(b)(1) guidelines.

**Finding:** This reason for appeal has merit.

**Action:** The administrative record does not contain an economic analysis by the District that support its position that the less environmentally damaging offsite alternatives considered in its Decision Document (the 28 March 2008 Memorandum for Record) are practicable for the Appellant in terms of cost. If, upon remand, the District continues to deny the permit based upon noncompliance with the 404(b)(1) guidelines, the Decision Document should be revised to include a more detailed analysis on why the cost for offsite alternatives would not be prohibitive to the Appellant based on an assessment of whether the projected cost to procure other offsite alternatives is (or is not) substantially greater than the costs normally associated with this particular type of project. In addition, the District should ensure that the cost comparison is between like projects, rather than between multi-family and single-family housing (see Decision Document, p. 8).

The following language should be removed from the Decision Document: "As an alternative to housing, the applicant might investigate use of the site for vessel mooring and access. The applicant could pursue permitting to construct a docking facility accessed by an elevated boardwalk. Grated decking on the dock would minimize impacts to seagrass."

A meeting summary should be included in the record to reflect the purpose and intent of the 30 January 2008 meeting as well as a summary of its results

**Rationale:** The Appellant alleges that, while there are less environmentally damaging offsite alternatives, they are not available because of zoning restrictions and are not practicable due to their greater cost.

The issue is whether the administrative record provides sufficient documentation supporting the District's conclusion that the Appellant's proposal does not meet the 40 CFR Part 230 Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material ("the guidelines"). Part 230.10(a) states that:

> "except as provided under section 404(b)(2), 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, so long as the alternative does not have other significant adverse environmental consequences."

Part 230.10(a)(3) states:

> 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 sighting 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. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge, which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

As the proposed work does not require access or proximity to or sighting within a special aquatic site to fulfill its basic purpose,[1] it is not water dependent and the burden is on the Appellant to rebut the presumption that other alternatives with no impacts or impacts less than those proposed exist. Documentation in the administrative record provided by the Appellant fails to clearly provide justification and support that an alternative with less impact on the environment that would meet its project purpose, as well as being practicable and profitable, does not exist.
The record clearly shows that the District in its 10 January 2007 letter requested that the Appellant consider a project plan that would have less impact on the aquatic resource. The letter also stated that as proposed, the District would be recommending that the permit be denied. In the Appellant's 12 June 2007 response, they provided an alternatives analysis stating that there were no feasible offsite alternatives and a revised plan which provided a revised layout of the site. In addition the Appellant provided proposed mitigation which it felt would offset any proposed impacts. On 30 January 2008 a meeting was held between the Appellant, its representatives and the District. At the meeting, the District explained that it had concerns with the proposed project and that the alternatives analysis was not sufficient. The Appellant submitted revised information which came to the same conclusions as its original submittal. The revised information supporting the original alternatives analysis still did not clearly rebut the presumption that other less environmentally damaging alternatives were available to them. The administrative record does not include any information other than references to the 30 January 2008 meeting. A meeting summary should be included in the record to reflect the purpose and intent of the meeting as well as a summary of its results

The Appellant provided evidence that alternative sites in the vicinity identified by them and the District are not practicable because the costs to purchase the sites are prohibitive. The Appellant paid approximately $150,000 for the property and other available lots in the area that would satisfy its project purpose cost upwards of $600,000 or more. Based on this the Appellant did not feel that the alternative sites were practicable because the costs were not commensurate with what they paid for the property. The District stated at the appeal conference that the Appellant got the property so cheap because it was an undesirable property for constructing housing due to the wetlands and waters on the property. The District also stated at the appeal conference that cost comparisons for alternative sites were considered in accordance with what would be the typical cost to purchase property in the area and that just because the Appellant bought something that was undervalued that other alternatives should still be considered. However, while the District made this argument at the appeal conference, the administrative record does not include any appreciable economic analysis supporting the District's conclusion that the Appellant did not rebut the presumption of practicable offsite alternatives in terms of cost. The Decision Document should be revised to include a more detailed discussion on why the difference in the costs would not be prohibitive to the Appellant based on the fact that the projected cost to procure other offsite alternatives is not substantially greater than the costs normally associated with this particular type

[1] The basic project purpose as determined by the Corps on page 3 of the 28 March 2008 Memorandum for the Record states that the basic purpose of the project is to provide housing.

of project. The District should ensure in any such revision that the Decision Document does not inadvertently compare multi-family housing with single-family housing projects.

In accordance with the 15 October 1999 "Army Corps of Engineers Standard Operating Procedures for the Regulatory Program,"

> By initially focusing the alternatives analysis on the question of impacts on the aquatic ecosystem, it may be possible to limit (or in some instances eliminate altogether) the number of alternatives that have to be evaluated for practicability (an inquiry that is difficult, time consuming, and costly for applicants).
>
> The level of analysis required for determining which alternatives are practicable will vary depending on the type of project proposed. The determination of what constitutes an unreasonable expense should generally consider whether the projected cost is substantially greater than the costs normally associated with the particular type of project.
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> It is important to emphasize, however, that it is not a particular applicant's financial standing that is the primary consideration for determining practicability, but rather characteristics of the project and what constitutes a reasonable expense for these types of projects that are most relevant to practicability determinations.

At the appeals conference and in the administrative record the Appellant referred to potential zoning issues prohibiting the use of an alternative that may have less adverse impact on the aquatic ecosystem. Discussions between the district and the Appellant were based upon the potential or lack of potential for the Appellant to get the required zoning or zoning variance for potential offsite alternatives with less impact to wetlands. The Appellant's correspondence in this regard did not provide any documentation regarding zoning restrictions to support its arguments regarding the feasibility of either securing a zoning change or zoning variance from single family to multi-family zoning. The Appellant did not meet its burden of clearly demonstrating unavailability due to zoning or land use restrictions.

In reviewing the administrative record there is a portion of the letter to the Appellant denying the permit as well as Section 8(a) and 10(c) of the Memorandum for the Record which discusses other alternatives that may be permittable. In accordance with the 24 December 1980 preamble to the Section 404(b)(1) Guidelines, to be practicable, an alternative must be capable of achieving the basic purpose of the proposed project. As the alternative to construct a dock does not meet the basic purpose of the project which is to provide housing, this language should not be included in the final Decision Document and therefore should be removed.

The Appellant's arguments that the District failed to adequately consider its minimization of impacts and compensatory mitigation only come into play after compliance with the avoidance requirement of the 404(b)(1) Guidelines. Should the District conclude as a result of this remand that the Appellant has clearly demonstrated that practicable, less environmentally-damaging alternatives are not available, and

has therefore met their obligation to avoid impacts to waters of the United States, then it must proceed to address the adequacy of the Appellant's minimization under the 404(b)(1) guidelines. Otherwise, the District need not address these issues.

**OVERALL CONCLUSION:**

After a review of the administrative record, I find that portions of the District's decision to deny the permit based on the 404(b)(1) guidelines are not supported by substantial evidence, and additional documentation is necessary. In all other respects, there is substantial evidence in the administrative record to support the District's decision to deny the permit, and I find that the Division's determination was not arbitrary, capricious or an abuse of discretion and was not plainly contrary to applicable law or policy. With regard to the aspects of the appeal on which merit has been found, I am remanding the decision back to the District to provide additional documentation to further support its decision. The District shall complete these tasks within 45 days from the date of this decision and upon completion, provide the Division office and Appellant with its revised Decision Document.

Joseph Schroedel
Brigadier General, US Army
Commanding