ADMINISTRATIVE APPEAL DECISION

PASCO COUNTY BOARD OF COUNTY COMMISSIONERS

PASCO COUNTY SUNWEST PARK

FILE NO. SAJ-2007-5788

JACKSONVILLE DISTRICT

8 May 2014

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

Receipt of Request for Appeal: 9 July 2013

Acceptance of Request for Appeal: 23 July 2013

Appeal Conference/Site Visit: 9 September 2013

Authority: Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) and Section 404 of the Clean Water Act (CWA) (33 U.S.C. § 1344)

SUMMARY OF DECISION

The request for appeal (RFA) submitted by Pasco County Board of County Commissioners (Appellant) has merit. For the reasons set forth below, the administrative record (AR) does not sufficiently support the permit denial made by the U.S. Army Corps of Engineers, Jacksonville District (hereinafter the "District"). The matter is remanded to the District for action consistent with this decision.

In reaching this decision, I find that:

1) the District's decision-making process was not arbitrary and capricious, and the District Commander's decision not to refer the application to the Division Commander for resolution was consistent with the regulations at 33 C.F.R. § 325.8(b)(2) [Appeal Reason 1: Procedural error];

2) the AR does not support the assertion that the District erred in applying the Habitat Equivalency Assessment model or that the District reached its conclusion about mitigation as a means to avoid addressing any errors. The District's conclusion that the mitigation step of the sequencing process was not reached relies in part, however, on the District's 404(b)(1) Guidelines alternative analysis. The District must reevaluate and sufficiently document portions of its alternative analysis. Accordingly, the District must

also revisit and sufficiently document its determination regarding the mitigation sequence in light of its reconsideration of the 404(b)(1) Guidelines alternative analysis. [Appeal Reason 2: Omission of material fact];

3) the District did not sufficiently document its determination that the proposed project is not water dependent, nor did it sufficiently document its 404(b)(1) Guidelines alternatives analysis. [Appeal Reason 3: Incorrect application of Section 404(b)(1) Guidelines]; and

4) the District did not sufficiently document its evaluation of the benefits and detrimental impacts of several factors, and it did not sufficiently document the weight given to each factor nor its weighing of all relevant factors, to include an overall balancing of the benefits against the reasonably foreseeable detriments. [Appeal Reason 4: Use of incorrect data].

BACKGROUND

On 28 March 2007, the District received a jointly-filed application for an Environmental Resource Permit (ERP) from the Florida Department of Environmental Protection (FDEP), authorization to use sovereign submerged lands, and a Department of the Army permit to dredge an access channel and place fill into jurisdictional wetlands. In the application, the project was described to be "a joint public/private sector venture with portions of the permitting shared between Pasco County, [Southwest Florida Water Management District] SWFWMD, and SunWest Acquisitions [Corporation]."[1]

The initially proposed joint project included features for a public park and features that were associated with a private residential area being developed by SunWest Acquisitions Corporation and known as the SunWest Harbourtowne development. The location of the proposed County park is in Fillman Bayou in the Gulf of Mexico, west of the intersection of Old Dixie Highway and Racetrack Road, near Hudson in Pasco County, Florida. The proposed joint project initially included boat launch facilities, parking areas, temporary docking, recreational trails, re-alignment of an existing deepwater channel, an upland cut boat basin (also referred to as a "new boat basin" in the AR),[2] dredging of an access channel, and construction of a travel lift.[3]

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[1] Bate stamp AR002453 (Joint Application in District Administrative Record).
[2] For example, see Bate stamp AR033626 (page 6 of the Environmental Assessment and Statement of Findings (EA/SOF), stating "construction of an upland cut boat basin with travel lift access point (for the proposed SunWest Harbourtowne development)" and Bate stamp AR033631 (page 11 of the EA/SOF, stating "dredge a new boat basin associated with the SunWest Harbourtowne travel lift").
[3] The travel lift would be located in uplands between the waterbody (mining pit) at the center of the SunWest Harbourtowne development and the channel that Pasco County proposes to improve for its County Park. The travel lift would be designed to move vessels between the SunWest Harbourtowne development and the improved channel.

The District subsequently separated the Pasco County park portions of the project from the SunWest Acquisitions portions.[4] On 17 January 2008, the District issued a public notice (PN) describing the Pasco County park project under permit application number SAJ-2007-5788 and soliciting public comments.[5]

The AR documents that numerous meetings took place with, and communications were exchanged between, representatives of the District and Appellant. Appellant submitted several mitigation plans after the first PN was issued, which triggered the District to issue a subsequent PN on 12 April 2011. The 12 April 2011 PN provided information about two mitigation components requiring Section 10 and Section 404 authorization and solicited public comments. The second PN included a statement to inform the public that the Appellant had provided the acreage of proposed impacts; the PN noted that the District had not independently verified those impacts.

Subsequently, the District independently assessed the impacts and determined Appellant's assessment to be inaccurate. Also, after the second PN was issued, the travel lift was removed as a feature of the County park project. Then, on 4 September 2012, the District issued a third and final PN specifying a revised estimated acreage of proposed impacts. Included as part of the final PN were drawings that described the changes subsequent to the previous two PNs. Regarding elements of the project, the PN noted that the proposed travel lift – which was included in the previous PNs and drawings – would be incorporated into the SunWest Harbourtowne project review. However, the District stated that the travel lift would be addressed in the environmental cumulative effect analysis for the County park.

The third PN describes the final project elements, stating that the permit applicant proposed "to impact approximately 3.85 acres of jurisdictional wetlands to construct a County park that involves new dredging, maintenance dredging, the construction of an upland cut boat basin associated with the proposed SunWest Harbourtowne travel lift, [and] wetland fill for certain park components including mitigation." The PN also provided the following list of proposed work:

- Public boat ramp;
- Seven-lane concrete boat ramp with three 408 square foot accessory docks;[6]
- Replacement of two existing culverts underneath a berm on the north side of the boat ramp;

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[4] A handwritten annotation on the cover sheet for the Pasco County application (Bate stamp AR002454) notes there was a "split from SunWest Harbour Towne [sic] on 10/17/07."

[5] On 17 January 2008, the District also issued a separate PN describing the proposed construction of the commercial and residential development, to be known as SunWest Harbourtowne, under permit application number SAJ-2006-5871.

[6] The PN seems to identify two separate boat ramps as being in the County park project, but all other documents in the AR containing information about the project elements establish that the project includes a single public boat ramp with seven lanes and three accessory docks.

- 2,700 square foot marginal dock that will provide approximately ten (10) temporary mooring slips for the boat ramp;
- Three stairways to provide access from uplands to the marginal dock;
- Floating kayak/canoe dock;
- Two pedestrian bridges and an observation pier within an existing mine pit;
- Manatee observation tower;
- Public swimming beach along the shoreline of an existing mine pit;
- Approximately 8,000 linear feet of crushed shell hiking trails;
- Restrooms and picnic tables;
- Parking lot that will provide 219 parking spaces for vehicles and 250 parking spaces for vehicles with trailers; and
- Surface water management system comprised of a wet detention pond system to treat storm water runoff from 13.32 acres of impervious surfaces within the park.

Following the list of proposed work, the PN stated that the applicant would conduct maintenance dredging in the existing canal (removing approximately 30,236 cubic yards of material from the existing canal); dredge to construct a new boat basin in a channel area (6,700 feet long by not more than 80 feet wide by -5.15 feet NGVD with a 60 foot bottom channel width); and conduct new dredging (totaling 100,044 cubic yards in an area 15,850 feet long by no more than 80 feet wide by -5.15 feet NGVD with a 60 foot bottom channel width). The PN stated that this dredging would impact 26.80 acres of submerged aquatic vegetation (SAV), with an additional 2 acres of SAV impacts anticipated due to unavoidable over-dredging activities.

On 10 May 2013, the District completed its Environmental Assessment (EA), 404(b)(1) Guidelines Evaluation, Public Interest Review, and Statement of Findings (EA/SOF). The District's EA/SOF described the following project impacts: the discharge of fill materials into approximately 3.85 acres of jurisdictional wetlands to construct certain park components (e.g., parking, roadway and beach improvements; boat ramp; and storm water infrastructure) and mitigation areas; approximately 26.8 acres of SAV to construct a new navigation channel; and approximately two acres of SAV due to over-dredging activities.

Although the permit application for the Pasco County park was processed separately from the permit application for the SunWest Harbourtowne project, the District considered the connectivity between the two projects in its evaluation of the Pasco County park application – which the District had stated in the third PN would be done.

In parallel with the District's processing of Appellant's application, the State processed Appellant's request for authorization to use sovereign submerged lands. The State's process included the appearance of a representative of the Board of Trustees of the Internal Improvement Trust Fund before the Florida Cabinet, which occurred on 17

May 2011; Secretary Herschel Vinyard[7] represented the Board of Trustees. According to the verbatim transcript of the hearing, the Florida Cabinet consisted of four representatives -- the Honorable Governor Rick Scott (presiding); Pat Bondi, Attorney General; Jeff Atwater, Chief Financial Officer; and Adam Putnam (Commissioner of Agriculture).

The first agenda item for the Board of Trustees was the Pasco County/SunWest joint project, though the agenda item was not approval of the project but, instead, was approval to grant a 50-year sovereignty submerged land easement. Specifically, the Florida Cabinet was asked to consider the joint application between Pasco County and SunWest Corporation for a 50-year sovereignty submerged land easement, with the proposed project for which the easement was sought being described as the construction of a public navigation channel to use in conjunction with a new County park and a future residential subdivision. By voice vote, the panel approved the issuance of a 50-year easement to the joint applicants.

Several of the communications in the AR from the District to Appellant indicated that the District would be issuing a favorable permit decision. In particular, in an email dated 15 June 2012, a member of the District's Regulatory Division stated, "Based on the information we have reviewed since our last meeting, the Corps will issue the permit." In late August and early September 2012, the District sent Appellant draft special conditions for review and an opportunity for Appellant to submit in writing any concerns.[8]

However, other communications that were in parallel with, or subsequent to, such indications identified new or open issues that needed to be resolved before a permit decision could be made. For example, on 26 July 2012, District representatives and the Appellant's agent met and discussed unresolved mitigation issues.[9] At this meeting, the District informed Appellant's agent that another public notice would be issued, which was done on 4 September 2012 with a fifteen-day comment period. Numerous public comments were received in response to this third PN.[10]

Another meeting took place on 13 December 2012 to discuss open issues.[11] During the 13 December 2012 meeting, Appellant requested that the District address Appellant's concerns in writing and send a comprehensive request for any outstanding information needed for the District to make a permit decision. Accordingly, on 31 January 2013, the District sent a letter addressing the Appellant's concerns in Part I and providing a comprehensive request for additional information in Part II.[12] The District

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[7] Herschel Vinyard is Secretary of the Florida Department of Environmental Protection.
[8] See email messages at Bate stamps AR023375, AR023379, AR023383, AR023385, AR023475, AR023479, AR023501, AR031129, and AR031134.
[9] Bate stamp AR0033659 (EA/SOF, page 39).
[10] See Bate stamps AR033644-AR033651 (summary of PN comments in EA/SOF, Table 4).
[11] Bate stamp AR033659 (EA/SOF p. 39).
[12] See document starting at Bate stamp AR032205.

responded to Appellant's concern about correspondence having indicated that issuance was forthcoming and reference to the 15 June 20012 email stating, "Regrettably this correspondence was sent prematurely prior to the Corps completing a comprehensive review of our administrative record as discussed below."[13] The 31 January 2013 letter also advised that Part II represented a request for additional information that was determined to be necessary to make a permit decision, with a deadline of 18 March 2013 set for the District's receipt of the information.

In its 10 May 2013 EA/SOF, the District concluded that Appellant's proposed project would result in a mitigation deficit. However, the District concluded Appellant had not clearly demonstrated that there are no practicable alternatives with less impact on special aquatic sites. Furthermore, the District determined that practicable alternatives exist which would eliminate and/or minimize the proposed discharge of fill material into waters of the United States. Therefore, the District did not reach the mitigation step of the sequencing process (i.e., avoid, minimize, mitigate), and the proposed compensatory mitigation proposal was not fully evaluated.

The District concluded that the proposed discharge does not comply with the 404(b)(1) Guidelines. Based on its public interest review, the District also concluded that the project is contrary to the public interest based on the following factors: Conservation, Economics, Aesthetics, General Environmental Concerns, Wetlands, Fish & Wildlife Values, Flood Hazards, Navigation, Recreation, Water Quality, and Safety.

By letter dated 5 July 2013, Appellant submitted an RFA of the District's decision to deny its permit application. On 7 July 2013, Appellant advised the Division Commander via email of the substantive bases for appeal.

INFORMATION RECEIVED AND CONSIDERED IN DECIDING THE APPEAL

1. The supporting/clarifying documentation submitted with the 5 July 2013 RFA.

2. The District AR, which was provided to the Appellant and RO.

3. Additional clarifying information supplied by the District and Appellant, such as a PowerPoint presentation and an AR reference document, among other correspondence.

APPELLANT'S STATED REASONS FOR APPEAL

Appellant asserts the following four reasons for appeal: (1) the District made procedural errors; (2) the District omitted material facts; (3) the District incorrectly applied the 404(b)(1) Guidelines; and (4) the District used incorrect data concerning the public

[13] Bate stamp AR032208.

interest factors in rendering its decision. The following is a summary of Appellant's reasons for appeal.

Appeal Reason 1: Procedural error

a. Arbitrary Changes in Corps Positions and Decisions

i. Change in Corps' Decision to Issue a Permit

ii. Change in Corps' Acceptance of Design Channel Width

iii. Change in Corps' Impact and Mitigation Calculation Methodology

iv. Corps' Change in Policy of Seagrass Protection Zone (SPZ) Suitability for Mitigation

v. Pasco County SunWest Park was Improperly Linked to SunWest Harbourtowne Development

b. In accordance with 33 C.F.R. § 325.8(b)(2), the final permit decision should have been referred to the Division Commander because the District was aware that the Governor provided written support for the project, as documented by the unanimous Cabinet vote.

Appeal Reason 2: The AR does not support the District's conclusion that the proposed project had not reached the mitigation step of the permit application evaluation process. The District reached this conclusion as a means to avoid addressing the multiple errors the District committed by applying the Habitat Equivalency Assessment (HEA) model to its mitigation assessment. The objections raised by Appellant to the application of HEA, and the manner in which the District applied HEA, to its proposed project were well documented in the AR but were omitted from the District's EA/SOF.

Appeal Reason 3: The District incorrectly applied the 404(b)(1) Guidelines. More specifically, Appellant asserts water dependency was incorrectly determined; the alternatives analysis was extremely excessive for the proposed wetland impacts; and the alternatives analysis focused on activities within the Corps' jurisdiction under Section 10 of the Rivers and Harbor Act rather than activities within the Corps' jurisdiction under Section 404 of the CWA.

Appeal Reason 4: The District's evaluation of the following Public Interest Factors was flawed: Conservation, Economics, Aesthetics, General Environmental Concerns, Wetlands, Fish and Wildlife Values, Flood Hazards, Navigation, Recreation, Water Quality, and Safety.

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

Appeal Reason 1: Procedural error

a. Arbitrary Changes in Corps' Positions and Decisions

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iii. Change in Corps' Impact and Mitigation Calculation Methodology

iv. Corps' Change in Policy of SPZ Suitability for Mitigation

v. Pasco County SunWest Park was Improperly Linked to SunWest Harbourtowne

b. In accordance with 33 CFR 325.8(b)(2), the final permit decision should have been referred to the Division Commander because the District was aware that the Governor provided written support for the project, as documented by the unanimous Cabinet vote.

Finding: For the reasons set forth below, this reason for appeal does not have merit. I find that the District's decision-making process was not arbitrary and capricious, and the District Commander's decision not to refer the application to the Division Commander for resolution was consistent with the regulations at 33 C.F.R. § 325.8(b)(2).

Appeal Reason 1.a: Arbitrary Changes in Corps' Positions and Decisions

Arbitrary and Capricious Standard: Appellant's argument that the District arbitrarily changed its positions and decisions equates to a challenge that the District acted in an "arbitrary and capricious" manner. An "arbitrary and capricious" action or decision is a willful and unreasonable action or decision that is made without consideration of or in disregard of facts or law or without a determining principle; it is doing something according to one's will or caprice.

The focus of this standard is on the agency's process of reasoning. Where there is a rational connection between the relevant facts and the decision or action, and the agency relied on appropriate factors in analyzing those facts, the agency decision should be upheld. As explained below, the AR contains sufficient documents that show a rational connection between the relevant facts and the final decision to deny the permit.

Appeal Reason 1.a.i: Arbitrary Change in Corps' Decision to Issue a Permit

Discussion:

The District's final decision on 10 May 2013 denying the permit was not a reversal because a final decision to issue or deny the permit had not been made prior to that date. As explained below, it is not a good practice for District personnel to prematurely state what a final decision is expected to be because such communications could result in an expectation. A final decision could result in disappointment when expectations based on premature statements are not fulfilled. However, the District's premature communication was not a permit decision. The AR substantiates that the permit denial was not arbitrary and had a rational basis.

Appellant stated in its RFA that the District gave indications at various times that the permit issuance was forthcoming and then, for no apparent reason or because "new" District personnel became involved in the process, the District decided to deny the permit. Appellant states that the project did not change after June 2012 and asserts that previously resolved issues were revisited by District staff at a time when no changes were being proposed to the project. Appellant argues that this "vacillation" meets the definition of arbitrary and capricious.

In support for this sub-reason for appeal, Appellant references two meetings[14] with the District Commander and an apparent conversation[15] in the Fall of 2012. Appellant also references a 15 June 2012 email[16] in which the Regulatory South Branch Chief informed Appellant's agents that the District would issue a permit.

The AR supports Appellant's assertion that the District communicated its expectation that it would issue the permit. However, Appellant incorrectly characterizes the District's final decision not to issue the permit as an arbitrary change.

While Appellant references meetings that occurred in January and June 2012, there were also meetings between those dates in addition to meetings on 26 July 2012 and 13 December 2012.[17] During the 26 July 2012 meeting, the District informed Appellant's agent that a third PN would be issued for clarification because the two prior PNs contained errors. In response to the third PN, which was issued on 4 September 2012, the District received numerous comments.

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[14] In its RFA, Appellant states the District Commander met with Appellant in January and June 2012. There are some email messages indicating that the District Commander was present at a meeting on 6 June 2012 (Bate stamps AR031372-AR031375).

[15] In its RFA, Appellant states the District advised Appellant's agent that it was working on its decision document and provided Appellant with proposed permit conditions for review. The AR contains email messages on 27 August 2012 and 31 August 2012 from the District to Appellant providing draft permit special conditions for Appellant's review. Bate stamps AR0023379 and AR023383.

[16] Bate stamp AR023042.

[17] Bate stamps AR033658-AR033659 (EA/SOF pp. 38-39).

Furthermore, the AR also includes a 31 January 2013 letter[18] from the District to Appellant in which the District explained there were outstanding issues that had to be resolved. This correspondence also included the District's explanation of the 15 June 2012 email having been sent prematurely and prior to the District completing a comprehensive review of its administrative record.[19]

In addition, the 31 January 2013 letter from the District to Appellant clearly demonstrates the District was raising outstanding issues that needed to be addressed by Appellant. Specifically, the District explained that project impacts to seagrass, alternatives analysis, mitigation, public interest review, public comments, and the linkage of the County park to SunWest Harbourtowne were still outstanding issues and requested specific information from Appellant in order to facilitate the District's evaluation. Appellant responded to the District's 31 January 2013 request for additional information (RAI) by letter dated 18 March 2013. Therefore, approximately eight months prior to a decision on the permit, Appellant was on notice that numerous comments were received in response to the third PN,[20] and for at least three and a half months prior to the permit denial, Appellant was on notice there were outstanding issues that needed to be satisfactorily addressed. Consequently, Appellant was made aware of the District's concerns and could no longer have presumed that a permit authorizing the project was forthcoming.

As a Department of Army permit application is processed and evaluated, it is subjected to review and comment by District personnel as well as Federal and state resource agencies and the public at large. This review frequently results in new or different information being considered at different points in time, which may trigger additional questions or requests for additional information in order to facilitate the District's thorough review of any newly identified issues. This identification of new issues or requests for additional information may appear to be "vacillation" by District staff. However, District staff and senior leaders (i.e., the decision makers) may disagree in the course of rendering a final permit decision, and the District Engineer (or his delegee) is not bound to follow the inclinations or recommendations of staff members.

The authority to issue or deny permits pursuant to Sections 9 and 10 of the Rivers and Harbors Act of 1899; Section 404 of the Clean Water Act; and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, rests with the District Engineer (33 C.F.R. § 325.8(b)). The processing of a permit application includes review and comment by resource agencies and members of the public in addition to Corps personnel. Such comments must be considered in the Corps' evaluation of the permit application and frequently provide new or different information. Once all information has been evaluated, Corps personnel make a recommendation to

[18] Bate stamps AR032205-AR032240.
[19] Bate stamp AR032208.
[20] The District shared public comments with Appellant throughout the process. See Table 7 in the EA/SOF summarizing issues and comments that were forwarded to the applicant (Bate stamps AR033653-AR033656) and the 31 January 2013 letter (starting at Bate stamp AR032209).

the District Engineer, but the District Engineer may disagree and issue or deny the permit contrary to the recommendation.[21]

As acknowledged by the District and evident in the AR, there is sufficient documentation establishing that there was a change in direction by the District over the course of its permit evaluation. However, I find no evidence of bias or arbitrary and capricious behavior by District staff in reaching its permit decision. Accordingly, the District's decision was not arbitrary and capricious and this reason for appeal does not have merit.

Appeal Reason 1.a.ii: Arbitrary Change in Corps' Acceptance of Design Channel Width

Discussion:

Appellant asserts the District stated in writing that it "fully accepts 60 feet in regard to channel width." In support of its assertion, Appellant refers to discussions it claims took place between Appellant and District staff (to include the District Commander) and the District's "channel design memo by Jacksonville's Engineering Division."[22] Appellant further points out that this written acceptance of 60 feet is contrary to the District's current position or decision that Appellant has not justified the channel dimensions. In addition, Appellant asserts that the District's change in position is not supported by any change in the project or a result of any new information, nor is the change explained in the District's EA/SOF. As explained below, the AR does not support Appellant's assertion and, instead, supports the conclusion that the District never accepted 60 feet as the final channel width. Furthermore, the District conveyed its concerns about the channel width to Appellant and, having never made a final decision to accept 60 feet, did not change its decision regarding channel width.

The AR supports that the District transmitted the findings from an independent technical review of Appellant's channel design criteria and the recommended Corps navigation designs[23] for channel bottom width and depth to Appellant in May 2012. The independent review was conducted by the District Engineering Division and documented in a memorandum that was transmitted to Appellant as an enclosure to a Regulatory Division cover letter dated 8 May 2012.[24]

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[21] The issuance of a permit may be signed for and on behalf of the District Engineer by his designee. 33 C.F.R. § 325.8(b). However, the District Engineer may not delegate his signature authority to deny a permit with prejudice or to return an individual permit to an applicant with unresolved objections. 33 C.F.R. § 331.6(d).

[22] Appellant is referring to CESAJ-EN Memorandum for CESAJ-RD, subject: Sun West Pasco County Park Channel Design (1 May 2012), Bate stamps AR022615-AR022617 (also AR022264-AR022266). This memorandum set forth the District Engineering Division's independent review of the ability to minimize the channel bottom width given Appellant's design criteria.

[23] Channel designs were based on design vessels with lengths of 36 feet and 25.25 feet. Bate stamp AR022266.

[24] Bate stamps AR022613-AR022617.

In the cover letter, the District stated that based on Appellant's design vessel[25], a 60-foot channel bottom width is the maximum channel width and directed Appellant to the attached Engineering Division memorandum for information regarding the ability to minimize the channel bottom width. The Engineering Division memorandum cited the Corps of Engineers Engineering Manual for Hydraulic Design of Small Boat Harbors as the basis for its calculations and findings. This memorandum stated that the design presented is *preliminary* until additional information can be gathered during a site visit to assess "...the most appropriate consideration to be given to environmental conditions at the site, which directly affect design results."[26] The Engineering Division calculated a range of values (i.e., 60 feet, 56 feet, and 52 feet) for the maximum design channel width under a continuum of site conditions (i.e., poor, good and very good, respectively), thereby demonstrating that the selected design vessel and channel conditions can substantially affect the determination of appropriate navigation channel designs.[27]

The Engineering Division also documented its finding that Appellant assumed poor conditions to produce a design channel width of 62 feet and then rounded this value to 65 feet.[28] According to the District's memorandum, Appellant did not provide design channel width for good or very good conditions or other channel design features such as design channel depth. Consequently, nothing in the District Engineering Division's May 2012 memorandum nor in the AR was found supporting Appellant's assertion that the District, in written correspondence, " 'fully accepts 60 feet' in regard to channel width."

Consistent with the District's 8 May 2012 correspondence and Engineering Division memorandum, the District again identified its concerns regarding channel width and vessel design size in its 31 January 2013 correspondence to Appellant.[29] The District stated its position that several features of the proposed project could be minimized, including vessel design size, in order to reduce impacts to aquatic resources. The District requested Appellant to demonstrate why such minimization is not practicable. Therefore, the AR sufficiently documents that the District did not accept a 60-foot bottom channel width.

By letter dated 18 March 2013, Appellant responded to the District's 31 January 2013 request for information about minimization, stating that minimizing the design vessel does not meet the project purpose for providing deep water access for large vessels to the Gulf of Mexico, as required by the County's Parks and Recreation Master

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[25] Appellant design vessel was 36 feet in length.
[26] Bate stamp AR022615.
[27] Bate stamp AR022617.
[28] Bate stamp AR022617.
[29] Bate stamps AR032218-AR032220 (Enclosure 1, Request for Additional Information, pp. 7-9). According to the District's 31 January 2013 correspondence, data from a survey conducted within the County does not demonstrate the usage of vessels greater than 35 feet in length nor support Appellant's statements that large boats are brought to Pasco County via trailer and launched and/or retrieved at County public boat ramps.

Plan that was updated in 2006. Appellant explains what it describes as an apparent misunderstanding by the District Regulatory Division over which vessel feature[30] most influences channel design. Appellant states that vessel beam, not length, is the key component of vessel design that influences channel design.

The AR sufficiently documents that the District and Appellant had not reached a mutually acceptable position regarding the bottom channel width and that the District had not accepted a 60 foot bottom channel width. Accordingly, I find that the AR does not support Appellant's assertions, and I find no evidence of bias or arbitrary and capricious behavior by District staff in reaching its conclusions. This reason for appeal does not have merit.

Appeal Reason 1.a.iii: Arbitrary Change in Corps' Impact and Mitigation Calculation Methodology

Discussion:

Appellant states in its RFA that the District changed its methodology for calculating proposed project impacts to SAV and the associated mitigation requirements several times during the course of the project review. Appellant also asserts that, in changing its methodology, the District is now questioning the validity of seagrass surveys it had previously accepted. Lastly, Appellant argues that when the District stated that the seagrass impacts enumerated in the first two PNs were incorrect, it misrepresented the facts. Appellant states that the above actions, taken by the District, are arbitrary, capricious, misrepresent the facts, and are not supported by the AR.

Among other facts included in the RFA, Appellant asserts that in January 2011, the District was prompted by the National Oceanic and Atmospheric Administration National Marine Fisheries Service (NMFS) to change its position regarding an acceptable mitigation ratio. Appellant states that the District, after initially stating it could not justify nor require a ratio greater than 1:1 for this project, changed its position and stated that a ratio of 2:1 would be required. Appellant asserts that the District "negotiated" this ratio with NMFS based on NMFS's desire for a 3:1 ratio. Appellant also states that it participated in a 20 January 2012 meeting with the District Commander, representatives of NFMS and District staff, and the outcome of the meeting was a common understanding regarding the status of the proposed mitigation plan (i.e., the 2:1 mitigation ratio) based on the use of FDEP's methodology to calculate proposed impacts to seagrass.

[30] Vessel features discussed include vessel length, beam (width), and draft.

Appellant asserts that within two months of this meeting, the District changed course again when it adopted HEA[31] to calculate the proposed impacts to seagrass and the associated mitigation requirements.[32]

Although the AR supports Appellant's assertions that there were changes in the District's position regarding mitigation methodology and the required mitigation, the changes were not arbitrary and capricious. As explained below, the AR sufficiently documents the bases for the District's changes and that the District communicated the changes and accompanying reasons to Appellant.

The District's EA/SOF (pp. 134-137) addresses compensatory mitigation. The AR also contains sufficient documentation showing that the District repeatedly raised issues regarding the completeness of the mitigation plan and project impacts.[33] Initially, NMFS requested a 3:1 ratio to offset the SAV impacts, which was later reduced to a 2:1 ratio; however, the Appellant was unable to provide SAV mitigation to achieve a 2:1 ratio. The District explained NMFS recommended that the Appellant utilize an assessment tool and suggested HEA.[34] Because the Appellant was unwilling to utilize the HEA, the District and NMFS independently utilized the HEA in evaluating the proposed mitigation plan. To address the out-of-kind mitigation in the HEA, the State of Florida's Uniform Mitigation Assessment Method (UMAM) was used to determine the service lift. The District explained that the District's and NMFS's evaluation of the out of-kind areas differed from FDEP because some of the components accepted by FDEP are not appropriate as Federal mitigation (e.g., exotic removal on uplands and completed work). The Appellant disagreed with the HEA analysis results that the proposed mitigation was insufficient to offset the SAV losses.

The District sufficiently documented its rationale as to how it used HEA and UMAM and the resulting changes in mitigation calculations. The District also documented a chronology of project changes,[35] which in turn changed foreseeable impacts and the mitigation analysis. The AR documents that project and methodology changes and the supporting reasons were communicated to Appellant before the final

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[31] The National Oceanic and Atmospheric Administration developed HEA, which is a method for quantifying natural resource service losses in a natural resource damage assessment and calculating the scale of compensatory restoration required to offset those service losses (See http://www.csc.noaa.gov/archived/coastal/economics/habitatequ.htm). HEA has been used in other contexts, such as determining compensatory mitigation under Section 404 of the CWA (See Bate stamps AR032231-AR032240.)

[32] In this portion of its RFA, Appellant also raises issues with the District's determination in the EA/SOF that the mitigation step of the sequencing process was not reached. This issue is addressed in the discussion for Appeal Reason 2.

[33] E.g., see Bate stamps AR033653–AR033656 (EA/SOF Table 7) and the District's 31 January 2013 letter, Bate stamps AR032205-AR032230.

[34] The District's 16 May 2012 correspondence informed Appellant of the District's decision to use HEA.

[35] Bate stamps AR033627-AR033630 (EA/SOF pp. 7–10).

permit decision, to include the District addressing this information in its 31 January 2013 request for additional information.[36]

In its 31 January 2013 correspondence, the District stated that proposed impacts to seagrass were still unclear and requested that Appellant clarify impacts and associated HEA reports utilized for the proposed project. The District provided a history of project impacts[37] that documented the various changes addressed in the three PNs, detailed the current methodology (i.e., HEA) to calculate compensatory mitigation, and stated that HEA was applied to the estimate of seagrass impacts (area in acres of a channel with a bottom width of 60 feet) it received from Appellant.[38]

In its 18 March 2013 response, Appellant agreed that the proposed dredging will impact approximately 29 acres of channel bottom. However, Appellant maintained that SAV habitat varies across the area proposed to be dredged and argued for impacts to be calculated using density estimates versus counting every acre within the footprint of dredging as an acre of impact to SAV. The District addressed Appellant's concern on page nine of its EA/SOF, stating that the change in how the District estimated seagrass impacts within the footprint of the proposed dredging was a result of negotiations between Appellant and FDEP[39] that concluded all seagrass zones, regardless of density, would constitute impacts to seagrass habitat. In addition, the District refers to scientific literature and the professional opinion of Dr. Mark Fonseca,[40] which conclude that leaf density is only one of many factors used to determine the ecological value and services of seagrass beds. The District acknowledged Appellant's position regarding the variance in density of seagrass beds throughout the proposed dredge footprint, but ultimately concluded that "the coverage of SAV is consistently uniform within each zone."

In its EA/SOF, the District also documented the use of mitigation ratios to calculate mitigation requirements.[41] The District documented NMFS's initial request for a 3:1 mitigation to impact ratio which was later reduced to a 2:1 ratio. The District also documented its conclusion that Appellant was unable to provide enough mitigation to achieve the 2:1 ratio and that, according to NMFS, 50% is the national failure rate for SAV mitigation. The District further documented its reasons for using HEA to conduct its independent evaluation of Appellant's mitigation proposal.

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[36] Bate stamps AR032205 - AR032230.
[37] Bate stamps AR032227-AR032230 (Enclosure 2, Administrative Record of the History of Project Impacts SunWest Park).
[38] The District refers to a 10 August 2012 email from Appellant in which Appellant states dredging the channel will impact 26.8 acres, plus two acres for over dredging.
[39] Bate stamp AR004358.
[40] Dr. Mark Fonseca is the Science Director at CSA Oceans Science, Inc. and previously was a research ecologist for NOAA. Appellant also has cited to scientific work completed by Dr. Fonseca (e.g., see Bate stamp AR023332).
[41] Bate stamp AR033654.

Corps regulations at 33 C.F.R. § 332.3(f)(2) require a mitigation ratio greater than one-to-one where necessary to account for the likelihood of success and the difficulty of restoring or establishing the desired aquatic resource type or function.[42] In light of the national failure rate for SAV mitigation projects, the District documented a reasonable basis for requiring a ratio of 2:1 or greater. In consideration of Appellant's inability to achieve a mitigation ratio of 2:1, the District reevaluated the SAV mitigation plan using a functional assessment to ensure it was appropriately designed to replace the lost ecological value and to explore the potential for achieving appropriate mitigation in a way that might not otherwise be captured solely based on a simple ratio.

As discussed in Appeal Reason 1.a.i, a district's review of a Department of Army permit application may result in new or different information being considered at different points in time. This, in turn, may trigger additional questions or requests for additional information in order to facilitate the District's thorough review of any newly identified issues or project changes. As discussed above, there is sufficient documentation in the AR establishing there were a number of project description changes in addition to different positions regarding mitigation methodology (e.g., the positions articulated by FDEP and NMFS). For all such changes and differences, the AR contains documentation showing the District's communications of this information to the Appellant, for which Appellant was given an opportunity to respond. I find no evidence of bias or arbitrary behavior by District staff regarding the manner in which it selected a method to calculate proposed impacts to seagrass and the associated mitigation requirements. Therefore, this reason for appeal does not have merit.

Appeal Reason 1.a.iv: Arbitrary Corps Change in Policy of Seagrass Protection Zone (SPZ) Suitability for Mitigation

Discussion:

Appellant asserts in its RFA that the District reversed its position multiple times regarding SPZs being acceptable mitigation. Appellant references an unspecified correspondence[43] from the District in which it says the District stated it would not accept SPZs as mitigation. Appellant states this correspondence was sent after the 20 January 2011[44] meeting, and after Appellant submitted three iterations of

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[42] The full text states, "The district engineer must require a mitigation ratio greater than one-to-one where necessary to account for the method of compensatory mitigation (e.g., preservation), the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site. The rationale for the required replacement ratio must be documented in the administrative record for the permit action."

[43] Appellant seems to be referring to a 16 May 2012 correspondence from the District (see document at Bate stamp AR022788).

[44] Appellant again refers to a 20 January 2011 meeting. However, documentation in the AR was not found for a meeting having occurred on that date. A meeting took place on 20 January 2012 (see Bate stamps AR014014-AR014015).

SPZ mitigation proposals to the District. Appellant states that, following a meeting with the District Commander and based on his direction, the District changed its position, concluding again that SPZs were acceptable. Appellant also states the District contacted Appellant's agent and jointly developed a final SPZ mitigation proposal,[45] which was submitted on 9 August 2012.

According to Appellant, the District responded on 10 August 2012 that it had reviewed the proposal and found it acceptable but then reversed its position again when it ultimately determined SPZs were unacceptable mitigation for this project. Appellant concludes the District's determination is contrary to a 1995 Florida Marine Research Institute (FMRI) independent study; Appellant's 2008 propeller scar survey; and the District's previous acceptance of SPZs as mitigation. Appellant asserts that the District's change regarding acceptance of SPZ as suitable mitigation is arbitrary.

Documentation shows that the District initially agreed to consider SPZs as suitable mitigation during a 20 January 2012 meeting with Appellant.[46] The AR also contains documentation regarding the District's subsequent concerns and its conveyance of those concerns to the Appellant. The District documented six meetings that took place with Appellant[47] between 2 March 2012 and 26 April 2012. Mitigation was discussed at all of these meetings, and the suitability of SPZs was discussed in at least two of these meetings.

The District documented in its EA/SOF that it informed Appellant during a 4 April 2012 meeting that SPZs needed to provide restoration lift and not just preservation in order to be suitable mitigation.[48] In its 16 May 2012 correspondence to Appellant, the District acknowledged that it previously agreed to consider the concept of SPZ as partial mitigation for dredging impacts. However, the District further explained in its letter that, based on a subsequent conversation with Florida state officials, it determined that SPZs would not be enforceable. Therefore, at that time, the District concluded it could not accept SPZs as a form of mitigation.

The AR documents that Appellant requested the District to reconsider its position on SPZs during a 6 June 2012 meeting. The AR indicates that the District agreed to Appellant's request because on 9 August 2012, Appellant submitted its final SPZ mitigation proposal to the District with a note stating, "This is as good as it's going to get." On 10 August 2012, the District responded that "[the SPZ proposal] looks acceptable to us." In its SPZ proposal, Appellant acknowledged the following:

> The HEA model requires that a calculated "service lift" be identified for a proposed mitigation component in order to determine the value for that particular component.... Any service lift assigned would by the very nature of an

[45] Bate stamp AR023331 ("Narrative for SunWest Park Seagrass Protection Zone Selection").
[46] Bate stamp AR033658 (EA/SOF, p. 38).
[47] During three of these meetings, Congressional staff members were present.
[48] Bate stamp AR033658 (EA/SOF, p. 38).

SPZ be in terms of the prevention of future scarring while allowing the recovery of current scarring.

In its 31 October 2012 correspondence to Appellant, the District Commander notified Appellant that it appeared there would be little to no ecological lift provided by the proposed SPZ mitigation. To support his comments, the District Commander referred to a recent site visit[49] during which District staff observed very minimal propeller scarring. Appellant referred to a 1995 study and a 2008 propeller scar survey to argue against the District's findings.

On 13 December 2012, a meeting was held with Appellant and Congressional staff members. The District documented in its EA/SOF (page 39) that the issue regarding acceptance of SPZs as a component of a mitigation plan was "raised and resolved and re-opened."

In its 31 January 2013 request for information, the District explained NMFS's position that establishing SPZs to protect existing high quality SAV habitat from secondary impacts induced by the proposed project (i.e., increased vessels traffic) is not an acceptable mitigation strategy to compensate for the direct loss of SAV habitat and its associated ecosystem services from the proposed project. In addition, the District cited Corps regulations at 33 C.F.R. § 320.4(r)(2) requiring that all mitigation be reasonably enforceable, and the District reiterated its concerns regarding the difficult nature of enforcing and protecting SAV in perpetuity.

In addition, the District informed Appellant that it sought information from across the Corps regarding the use of SPZs as compensatory mitigation to offset direct impacts to SAV habitat and discovered this was not a practice accepted elsewhere. In summarizing its concerns, the District stated it could not accept the proposed SPZ as compensatory mitigation for direct seagrass impacts associated with the proposed project and advised Appellant that SPZs should be viewed as a management measure to minimize and avoid secondary impacts caused by increased vessel traffic in areas of SAV.

Finally, on page 10 of the EA/SOF, the District again addressed this issue by describing the changes to the project that occurred after the issuance of the third PN and discussing the reasons the use of SPZs as acceptable mitigation was eliminated from the proposed project. On pages 126-128 of the EA/SOF, the District documented its coordination with NMFS.

As discussed in Appeal Reason 1.a.i., a district's review of a Department of Army permit application may result in new or different information being considered at different points in time which, in turn, may trigger additional questions and receipt of new information. As the District forms a more complete understanding of the case

[49] Bate stamps AR031253-AR031279.

specific facts and issues or as facts and issues change, it is reasonable for the District to reach a different conclusion on a matter. There is sufficient documentation in the AR explaining the District's change in position during the permit application process. In addition, Appellant was given an opportunity to respond to this change and requested the District to reconsider its position. The District adequately documented that it considered and addressed Appellant's concerns, and it provided a sufficient rationale as to why SPZs would not be acceptable mitigation for this proposed project.

I find no evidence of bias or that District staff acted arbitrarily and capriciously in changing direction concerning the use of SPZs as mitigation to compensate for the direct loss of SAV habitat for Appellant's proposed project. Accordingly, this reason for appeal does not have merit.

Appeal Reason 1.a.v: Pasco County SunWest Park was Improperly Linked to SunWest Harbourtowne Development

Discussion:

Appellant asserts that the County park project and SunWest Harbourtowne project "are, and always have been two distinct independent projects." Appellant further asserts that, although the District agreed that the two projects are separate, the District's analysis in the EA/SOF improperly links the two projects via the District's characterization of the upland cut boat basin. Appellant describes the boat basin to be a "required aspect" of the county park project because it will provide a "loitering" area for vessels waiting to use the boat ramp, which Appellant characterizes as a "major safety feature of the design."

It is reasonable to conclude that some users of the public park would travel into the boat basin to wait for use of the boat ramp or otherwise loiter within the boat basin, given that the AR does not indicate such use will be prohibited or prevented. However, the AR does not support Appellant's assertions that the boat basin is being constructed as a "required aspect" of the county park and a "major safety feature of the design."

Even if the boat basin may contribute to the safe use of the channel, the primary purpose of the boat basin was set forth by Appellant as a feature linked to the SunWest Harbourtowne project. In fact, there is clear and unequivocal support in the AR for the conclusion that the boat basin was planned from the outset to be a feature constructed for the benefit of the residents of the SunWest Harbourtowne development and is directly connected to the planned construction of a travel lift to enable residents to move their boats over land and into the boat basin to then access the Gulf of Mexico. In fact, documents in the AR directly tie the location of the boat basin to the proposed location of the travel lift for the SunWest Harbourtown project. Furthermore, there is sufficient information in the AR to support the conclusion that the overall plan for the SunWest Harbourtowne project (and most specifically, the

plan for residents of SunWest Harbourtowne to be able to access the Gulf of Mexico) is dependent upon completion of the County park project.

In summary, the AR contains sufficient support for the District's conclusion that the two projects are related; that the boat basin was linked to the SunWest Harbourtown project; and that the SunWest Harbourtowne project is a reasonably foreseeable action of the County park project. Consequently, as explained below, the District supported its conclusion that the effects of the SunWest Harbourtowne project should be included in its cumulative impacts analysis for the County park project.

Contrary to Appellant's assertion that the two projects "are, and always have been two distinct independent projects," the AR supports the conclusion that a main feature to benefit residents of the planned SunWest Harbourtowne development – that is, access for boats to travel to the Gulf of Mexico – is dependent upon completion of the County park project. At the onset, there was a close, direct connection between the two projects, as described in Appellant's initial application of 28 March 2007 that it jointly filed with SunWest Acquisitions Corporation.

In this initial application, the County park project was described to be "a joint public/private sector venture with portions of the permitting shared between Pasco County, [Southwest Florida Water Management District] SWFWMD, and SunWest Acquisition [Corporation]."[50]. The application explains that the " [County park] project along with the adjacent SunWest Harbourtowne project have been carefully planned in accordance with Pasco County Land Development Code ...."[51]. The application also highlights that the joint planning of the two projects included having the access channel "service the County Park and the SunWest Harbourtowne development,"[52] and the plan anticipates that "[v]essel traffic will originate from the launch ramp facility proposed at the county park and/or from a boat lift at the SunWest site (north side of channel)."[53]

The initial application does not list the boat basin as a feature of the County park project nor as a "major safety feature of the design." Instead, the section regarding the proposed channel alignment and dredging links the boat basin to the SunWest Harbourtowne development with the following description:

> The future SunWest Harbourtowne channel access basin will be entirely excavated out of the adjoining uplands on the north side of the channel. The small cut ... will be excavated ... shallower than the adjoining channel to ensure that this area meets or exceeds existing water quality standards .... A travel lift will be utilized to move vessels from one water body to the adjacent water body.[54]

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[50] Bate stamp AR002453.
[51] Bate stamp AR002454.
[52] Bate stamp AR002455.
[53] Bate stamp AR002455.
[54] Bate stamp AR002461.

Furthermore, the application made clear that vessel traffic for the access channel to the Gulf of Mexico would originate from the County park and/or from the private development via the travel lift, which would move approximately 45 boats per day over land from the lake in the SunWest Harbourtowne residential development into the boat basin so that the boats could then traverse the newly constructed channel and access the Gulf of Mexico. A statement that the sole or primary purpose of the boat basin is one of safety for the County park users was not found in the initial application nor in any other document in the AR. To the contrary, documents show the direct relationship of the use and location of the boat basin as a staging area for the travel lift.

While the boat basin may provide a loitering area for users of the boat ramp, it is clear from documents in the AR that the location of the boat basin was and still is linked to the planned construction of a travel lift that will be used exclusively by residents of the SunWest residential development. For example, drawings prepared for Pasco County and provided to FDEP on 15 March 2011 show the boat basin area with a corresponding note that it is to be "EXCAVATED TO -7' MLW FOR BOAT STAGING FOR FUTURE TRAVEL LIFT,"[55] with the same drawing showing the adjacent future travel lift area.

Further information linking the SunWest Harbourtowne development to the County park are in the transcript of the 17 May 2011 Florida Cabinet hearing ,[56] which includes statements regarding the dependency of the SunWest Harbourtowne development on the County park project. The presenter for the Board of Trustees, Secretary Herschel Vinyard, described the first agenda item as "the Pasco County/SunWest project" and the joint application "to construct a public navigation channel to use in conjunction with a new County park and a future residential subdivision."[57] Also, Secretary Vinyard described the public-private partnership between SunWest Acquisitions Corporation and Pasco County, with SunWest Acquisitions being identified as the entity paying for all permitting costs as well as being ultimately responsible for the cost of the dredging and mitigation.[58]

In response to questions from Cabinet representatives, Secretary Vinyard explained that the project has four phases, with the park being constructed in Phase I.[59] Secretary Vinyard also confirmed that SunWest Acquisitions Corporation is "putting up all of the money" and, therefore, will not get any benefit until all four phases are complete.[60] Mr. Vinyard also acknowledged that it is a "key component" for the park to be completed and everything else to be done before the travel lift is put in.[61] In the final

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[55] Bate stamp AR009590 (with drawing stamped as approved by the State of Florida on 28 July 2011).
[56] The hearing took place after the 12 April 2011 issuance of the second PN, which gives further weight to the description of the project(s) within the hearing as being accurate and reflective of the joint planning.
[57] Bate stamps AR008909-AR008910 (Florida Cabinet Hearing Transcript).
[58] Bate stamps AR008923-AR008924 (Florida Cabinet Hearing Transcript, pp. 44-45).
[59] Bate stamp AR008959 (Florida Cabinet Hearing Transcript).
[60] Bate stamp AR008959 (Florida Cabinet Hearing Transcript).
[61] Bate stamp AR008960 (Florida Cabinet Hearing Transcript).

exchange, Governor Scott stated, "And if we approve this, there's no benefit to SunWest to put up the money unless they know they're going to get the benefit of the ramp, or the boat lift."[62] Mr. Vinyard's response was "That's correct. For them, this only works if they get through Phase IV."[63]

In contrast to the District splitting the County park project from the SunWest Harbourtowne development project for purposes of permit processing, FDEP issued a single permit for both projects as one. In the 28 July 2011 Consolidated Individual Environmental Resource Permit (ERP) and Recommended Intent to Grant State-owned Submerged Lands Authorization, the permittee is listed as Pasco County and SunWest Acquisitions Corporation, and the authorization includes "creation of a boat basin and installation of a travel lift associated with a future private residential/commercial development."[64] Also, the project description provided by FDEP states the following:

> The facilities to be constructed for use by residents of the future subdivision include: (1) a 30,000-square-foot boat basin excavated to a depth of seven feet MLW with a seawall and riprap installed to stabilize the boat basin, (2) a private travel lift used to transfer boats to and from the channel to a private lake within the future residential development; and (3) an approximately 3000-square-foot marginal dock for the temporary mooring of up to ten vessels.[65]

Consistent with information provided during the Florida Cabinet hearing, the General Construction Conditions in the ERP set forth a construction sequence consisting of four phases. Phase III includes "[c]onstruction and completion of the channel, boat basin and associated seawalls at the SunWest acquisitions property...,"[66] and Phase IV includes "[t]he installation of the travel lift and docking structure and excavation of the lift basin at the SunWest Acquisitions property."[67]

Documents in the AR show that the District initially processed the permit application for the County park in accordance with the Appellant's assertion that the County park and SunWest Harbourtowne projects are independent. For example, the Appellant included both projects in the initial application, but the District subsequently separated the projects, assigned them separate permit application numbers, and published separate PNs. The District also informed the Appellant that the travel lift should not continue to be included as a feature of the County park project because it was going to be used solely by residents of the SunWest Harbourtowne development.

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[62] Bate stamp AR008960 (Florida Cabinet Hearing Transcript).
[63] Bate stamp AR008960 (Florida Cabinet Hearing Transcript).
[64] Bate stamp AR009418.
[65] Bate stamps AR009418-AR009419.
[66] Bate stamp AR009424.
[67] Bate stamp AR009424.

The District's attempt to conduct its evaluation consistent with Appellant's assertion is further evident in the District's 31 January 2013 letter to the Appellant. In this letter, the District acknowledged its understanding of Appellant's and SunWest Acquisitions Corporation's continued assertions that the projects have independent utility and are not connected actions.[68] Regarding the Appellant's responses to the District's requests for additional information, the District noted that it would not be able to consider any anticipated use or benefit from the proposed SunWest Harbourtowne project because the projects would then not be considered to have independent utility and the NEPA analysis would need to consider the projects to be connected actions.[69]

Even if the District initially concluded it would process separate applications for the two projects and could consider the projects to be independent, the District must comply with the National Environmental Policy Act (NEPA) and include all reasonably foreseeable future actions within the scope of its cumulative impacts analysis. In its EA/SOF, the District concluded it could not determine that the proposed County park and SunWest Harbourtowne projects have independent utility.[70] The District acknowledged the Appellant's assertion that the projects are independent and the residential development is not contingent on the channel or the County park. However, the District pointed to documentation in the record indicating that the proposed SunWest Harbourtowne development is advertised and planned on the basis of Gulf access being provided through the travel lift and upland cut boat basin. The District sufficiently documented the basis for its conclusion that the travel lift and SunWest Harbourtowne project are reasonably foreseeable actions, though the District ultimately decided to deny the application and, therefore, did not expand the NEPA scope of action to include SunWest Harbourtowne as a connected action.

Based on the documents in the AR, there is sufficient support for the District's conclusion that the travel lift and SunWest Harbourtowne project are reasonably foreseeable actions that should be considered in the cumulative impacts analysis. The District's conclusion that the two projects are linked was not arbitrary and capricious and, instead, was based on relevant information and has a rational basis. Accordingly, this reason for appeal does not have merit.

Appeal Reason 1.b: Decision not to Refer Permit Decision to Division Commander

The Appellant asserted in its RFA that the District erred in issuing a denial and not referring the decision to the Division Commander because Appellant concludes that such elevation of the permit decision was triggered when the Governor of the State of Florida supported the project via his oral vote on granting an easement, which was voted on during a 17 May 2011 hearing that was transcribed into a written document.[71]

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[68] Bate stamp AR032209 (31 January 2013 Letter, p. 5).
[69] Bate stamp AR032209 (31 January 2013 Letter, p. 5).
[70] Bate stamp AR033635 (EA/SOF, p. 15).
[71] Bate stamp AR008880 (Florida Cabinet transcript).

Appellant states that the project was "presented to the Governor and unanimously approved by the Cabinet," and Appellant identifies the documentation of the unanimous Cabinet vote as the written support for the project. Appellant also asserts that the Division Commander should not remand the application to the District but, instead, should render the final permit decision post-appeal. However, as explained below, referral to the Division Commander for this permit decision was not required because the written record of the Cabinet's oral vote regarding a submerged land easement does not constitute the Governor's written support of the permit application. Furthermore, the rules governing the administrative appeal process set forth the authority of the Division Commander in making a final appeal decision, which does not include retaining the permit issuance decision at his level as requested by Appellant.

The applicable provision regarding situations warranting elevation of a permit to the Division Commander is in the Corps regulations at 33 C.F.R. § 325.8(b)(2). This provision states, "District engineers will refer the following applications to the division engineer for resolution: ... (2) When the recommended decision is contrary to the written position of the Governor of the state in which the work would be performed...."

As explained in the Background section, the Governor was one of four individuals that made up the Florida Cabinet; he is listed as the "presiding" Cabinet member. During the hearing before the Florida Cabinet, a representative of the Board of Trustees asked the Cabinet to grant a 50-year sovereignty submerged land easement. The proposed project to which the easement is connected was described as the construction of a public navigation channel to use in conjunction with a new County park and a future residential subdivision. The park features and four phases of the joint project were generally described, including the plan to complete the park in Phase I with the boat ramp, dredging, and travel lift being done in Phase IV. Opponents and proponents of the joint project provided comments during the hearing.

The panel approved the issuance of the 50-year easement by voice vote. A professional stenographer (registered professional reporter) typed what was being said and generated a verbatim transcript. Nothing in the verbatim transcript of the hearing refers to the District's processing of Appellant's application for a permit from the Department of the Army.

The transcript of the hearing is the only basis for Appellant's argument that the application should have been and must now be referred to the Division Engineer. The AR does not contain a written position of the Governor regarding the permit application, nor does the AR contain a request from the Governor, Appellant, or anyone acting on behalf of the Governor and/or Appellant for the District Commander to refer the application to the Division Commander for resolution. Furthermore, the Governor's voice vote to approve the joint application for an easement does not constitute the Governor's written support for the project, and there is no correspondence in the AR from the Governor to the District providing support for the project and/or requesting the Army to issue a permit for the project.

I find that the District Commander was never requested to refer the final permit decision to the Division Commander. In addition, the Governor's voice vote in favor of the State granting a 50-year sovereignty submerged land easement, while implicitly in favor of the joint County and SunWest project moving forward, is insufficient to constitute a "written position of the Governor" on the permit application that is necessary to trigger the requirement for the District to refer the final decision. A transcript of an oral hearing granting an easement does not constitute a "written position of the Governor".

The regulations setting forth the administrative appeal process allow the Division Commander to do the following in making a decision on the merits of the appeal: (1) disapprove the entirety of or any part of the District Commander's decision if the Division Commander determines that the decision on a relevant matter was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the AR, or plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corps policy guidance; (2) instruct the District Commander on how to correct any procedural error that was prejudicial to the Appellant; or (3) reconsider the decision where any essential part of the decision was not supported by accurate or sufficient information, or analysis, in the AR.[72] Accordingly, regarding Appellant's request that the Division Commander now make the final permit decision, the actions available to the Division Commander for an appeal decision do not include rendering a decision on the permit application. This reason for appeal does not have merit.

Action: None required.

Appeal Reason 2: In its second reason for appeal, Appellant asserts that the AR does not support the District's conclusion that the proposed project had not reached the mitigation step of the permit application evaluation process. Appellant claims the District reached this conclusion as a means to avoid addressing the multiple errors the District committed by applying the HEA model to its mitigation assessment. Appellant argues that its objections to the application of HEA, and the manner in which the District applied HEA, to its proposed project were well documented in the AR but were omitted from the District's EA/SOF.

Finding: The AR does not support the assertion that the District erred in applying the HEA model or that it reached its conclusion about mitigation as a means to avoid addressing any errors. The District's conclusion that the mitigation step of the sequencing process was not reached relies in part, however, on the District's 404(b)(1) Guidelines alternative analysis. As discussed in appeal reason three, the District must reevaluate and sufficiently document portions of its alternative analysis. Accordingly, this reason for appeal has merit because the District must revisit and sufficiently document its determination regarding the mitigation sequence in light of its reconsideration of the 404(b)(1) Guidelines alternative analysis.

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[72] 33 C.F.R. § 331.9.

Discussion: Appellant asserts that its multiple objections to the District's analysis of seagrass impacts and mitigation are well documented in the AR and alleges the District omitted these critical discussions from its EA/SOF. Appellant disagrees with the District's HEA results and methodology and the District's conclusion that Appellant's proposed mitigation was insufficient to offset the proposed impacts to seagrass. Appellant asserts the District acted in an arbitrary manner in making multiple conclusions regarding the sufficiency of Appellant's proposed mitigation.

Evaluation of Appellant's Proposed Compensatory Mitigation. Appellant refers to its communications with the District which occurred prior to the District's 31 January 2013 letter (requesting additional information) as evidence that the District had reached the step of assessing Appellant's compensatory mitigation proposal. Appellant argues that the District's EA/SOF omitted these discussions from the EA/SOF and that the District claimed the mitigation step was not reached as a strategy to avoid addressing the methodology it chose to apply in evaluating the mitigation proposal.

Applicable to review of all permit applications, Corps regulations at 33 C.F.R. § 320.4(r) state, "Mitigation is an important aspect of the review and balancing process on many Department of the Army permit applications. Consideration of mitigation will occur throughout the permit application review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses." For activities subject to Section 404 of the Clean Water Act, the implementing regulations at 40 C.F.R. § 230.93 require the district engineer to "determine the compensatory mitigation to be required in a [Department of the Army] permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity."[73]

The 1990 Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency on the Determination of Mitigation Under the Clean Water Act Section 404 (b)(1) Guidelines (1990 Mitigation MOA)[74], Section II.C., states,

> In evaluating standard Section 404 permit applications, as a practical matter, information on all facets of a project, including potential mitigation, is typically gathered and reviewed at the same time. The Corps ... first makes a determination that potential impact [sic] have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts, and, finally, compensate for aquatic resource values. This sequence is considered

[73] Compensatory mitigation is defined to mean "the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved." 40 C.F.R. § 230.92.

[74] The 10 April 2008 Final Compensatory Mitigation Rule states that the 1990 Mitigation MOA remains in effect (See 33 C.F.R. § 332.1(f)(2)).

> satisfied where the proposed mitigation is in accordance with specific provisions of a Corps and EPA approved comprehensive plan that ensures compliance with the compensation requirements of the Section 404(b)(1) Guidelines.[75]

The District concluded its compensatory mitigation analysis on page 137 of its EA/SOF by stating,

> However, the Applicant has not clearly demonstrated that there are no practicable alternatives with less impact on special aquatic sites. Furthermore, the Corps has determined that practicable alternatives exist that would eliminate and/or minimize the proposed discharge of fill material into waters of the United States. Therefore, the mitigation step of the sequencing process was not reached and the proposed compensatory mitigation proposal was not fully reviewed.

As set forth in the 1990 Mitigation MOA, it is appropriate for the District to consider mitigation during the last step in the sequencing process of the 404(b)(1) Guidelines (i.e., avoidance, minimization, mitigation). However, following an appropriate mitigation sequence does not preclude the District from considering mitigation throughout the review process. As acknowledged by Appellant in its arguments, and as documented in the AR, the District considered Appellant's mitigation proposals throughout the review process. Based on Federal regulations, policy, and guidance, the District's evaluation of Appellant's proposed mitigation throughout the permit application process was appropriate.

Appellant also asserted that the District arbitrarily changed its position regarding the methodology it used to evaluate the sufficiency of the proposed mitigation. As previously discussed in appeal reason 1.a.i., a district may change its position during the course of evaluating a permit application. There is sufficient documentation establishing that there was a change in direction by the District over the course of its permit evaluation. I find no evidence of bias or arbitrary and capricious behavior by District staff regarding the District's changes in the methodology it determined to be appropriate in evaluating Appellant's proposed mitigation, and there is a rational basis for the District's change in position.

Lastly, Appellant disagrees with the District's conclusion that it had "never reached the mitigation step in the review process," arguing it is not supported by the AR. The District's determination that the mitigation step of the sequencing process was not reached is based on the District's determination that the Appellant did not demonstrate there are no practicable alternatives with less impact on special aquatic sites, and the District's conclusion that practicable alternatives exist that would eliminate and/or minimize the proposed discharge of fill material into waters of the United States.

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[75] Available at http://www.usace.army.mil/Portals/2/docs/civilworks/mous/migrate.pdf.

Thus, the District's conclusion regarding the mitigation sequence relies, in part, on the District's 404(b)(1) Guidelines alternative analysis. As discussed in appeal reason 3, the District must reevaluate and sufficiently document portions of its alternative analysis. Accordingly, this reason for appeal has merit and the District must revisit and sufficiently document its determination regarding the mitigation sequence in light of its reconsideration of the 404(b)(1) Guidelines alternative analysis.

Application of HEA. Appellant raises multiple concerns regarding the decision by the District to use HEA in its evaluation of Appellant's mitigation proposal and in the manner in which the District subsequently applied HEA. As previously stated, the District's determination that it had not reached the mitigation step of the mitigation sequence must be revisited in light of its reconsideration of its alternatives. Should this reconsideration compel the District to complete its evaluation of Appellant's proposed mitigation, it should document its rationale for the method(s) and data chosen and/or not chosen to evaluate the sufficiency of Appellant's proposed mitigation (e.g., application of HEA to Appellant's proposed project; Appellant's 2006/2007 seagrass surveys and 18 March 2013 HEA analysis; and the use of UMAM in conjunction with HEA).

Actions:

1. The District must revisit and sufficiently document its determination regarding the mitigation sequence in light of its reconsideration of the 404(b)(1) Guidelines alternative analysis.

2. Should this reconsideration compel the District to complete its evaluation of Appellant's proposed mitigation, it should document its rationale for the method(s) and data chosen and/or not chosen to evaluate the sufficiency of Appellant's proposed mitigation.

Appeal Reason 3: In its third reason for appeal, the Appellant asserts that the District incorrectly applied the 404(b)(1) Guidelines. More specifically, Appellant asserts water dependency was incorrectly determined; the alternatives analysis was extremely excessive for the proposed wetland impacts; and the alternatives analysis focused on activities within the Corps' jurisdiction under Section 10 of the Rivers and Harbor Act rather than activities within the Corps' jurisdiction under Section 404 of the Clean Water Act.

Finding: This reason for appeal has merit. The District did not sufficiently document its determination that the proposed project is not water dependent, nor did it sufficiently document its 404(b)(1) Guidelines alternatives analysis.

Discussion:

Statutory and Regulatory Background.

Two statutory authorities of the Department of the Army are relevant to the proposed project – Section 404 of the CWA (33 U.S.C. § 1344) (generally referred to as Section 404) and Section 10 of the Rivers and Harbors Act of 1899 (RHA) (33 U.S.C. 403) (generally referred to as Section 10). For review of all permit applications, the regulations at 33 C.F.R. § 320.4 apply.

Section 404 and Implementing Regulations.

Under Section 404, the Secretary of the Army, acting through the Corps, has authority to permit the discharge of dredged or fill material in waters of the United States. The term "waters of the United States" is defined at 33 C.F.R. § 328.3, as supplemented by policy and guidance issued by the Army and EPA. For the proposed project, the Corps determined there to be jurisdictional wetlands present within the project area, which are "waters of the United States." Specific to the proposed project, the discharge of fill material into a total of 3.85 acres of jurisdictional wetlands from construction of the boat ramp, surface water management system, and parking for the beach area[76] requires issuance of a Department of the Army permit.

When Section 404 applies to a proposed activity, regulations and Corps policy guide the District's determination of basic project purpose and overall project purpose, which then guide the evaluation of alternatives to the proposed project. Federal regulations at 40 C.F.R. Part 230 implement Section 404(b)(1) of the CWA and govern the process of evaluating alternatives. These regulations are commonly referred to as the 404(b)(1) Guidelines or "Guidelines."

The Guidelines generally prohibit the permitting of projects where 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."[77] To be "practicable," an alternative must be "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of *overall project purposes*."[78] For projects that are not water dependent, the Guidelines establish a presumption that there are practicable alternatives unless it is clearly demonstrated otherwise.[79] A water dependent project "requires access or proximity to or citing within the special aquatic site in question to fulfill its *basic purpose*."[80]

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[76] Bate stamps AR033676–AR033677 (Table 12 of the EA/SOF, which breaks out the wetland impacts).
[77] 40 C.F.R. § 230.10(a).
[78] 40 C.F.R. § 230.10(a)(2) (emphasis added).
[79] 40 C.F.R. § 230.10(a)(3).
[80] 40 C.F.R. § 230.10(a)(3) (emphasis added).

The 2009 Army Corps of Engineers Standard Operating Procedures for the Regulatory Program (2009 SOP) clarifies that, under the CWA, it is the District's responsibility to define both the basic and overall project purpose. The basic project purpose is used to determine if the proposed activity is water dependent and requires access or proximity to, or siting within, a special aquatic site in order to fulfill its basic purpose. The overall project purpose is used to evaluate alternatives and identify the least environmentally damaging practicable alternatives (LEDPA), if any exist. The overall project purpose should be specific enough to define the applicant's needs, but not be so restrictive as to constrain the range of alternatives that must be considered under the 404(b)(1) Guidelines.

Although defining the overall project purpose is the District's responsibility, the applicant's needs and the type of project being proposed should be considered. The Corps has to differentiate between components that are integral to the project's purpose and those that are merely incidental to the applicant's basic purpose.

Section 10 and Applicable Regulations

Under Section 10, the Corps has authority to permit construction of any structure in or over any navigable water of the United States; the excavating from or depositing of material in such waters; or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters. The term "navigable waters of the United States" is defined at 33 C.F.R. § 329.4 and includes those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. Specific to the proposed project, the dredging in the channel, which is a navigable water, requires issuance of a Department of the Army permit. Other Section 10 activities for the proposed project that are within the channel are the construction of the boat ramp, accessory docks, temporary mooring slips, and floating kayak/canoe dock.

When Section 10 applies to a proposed activity, a district determines the purpose and need of the project, which is different from the determination of a "basic project purpose" and "overall project purpose" that is applicable to Section 404 and the implementing Guidelines. The purpose and need of the project is relevant to a district's evaluation of the permit application and consideration of mitigation in accordance with the general mitigation policy set forth in 33 C.F.R. § 320.4(r).

The general mitigation policy requires resource losses to be avoided to the extent practicable.[81] A district may identify project modifications to minimize adverse project

[81] 33 C.F.R. § 320.4(r)(1). A footnote for this section explains that this general statement of mitigation policy applies to all Corps regulatory authorities covered by the regulations at 33 C.F.R. parts 320-330). However, the footnote further explains that the mitigation policy "is not a substitute for the mitigation requirements necessary to ensure that a permit action under section 404 of the Clean Water Act complies with the section 404(b)(1) Guidelines."

impacts, and these modifications should be discussed with the applicant.[82] As a result of these discussions and as the district's evaluation proceeds, the regulations allow the district engineer to require minor project modifications, which "are those that are considered feasible (cost, constructability, etc.) to the applicant and that, if adopted, will result in a project that generally meets the applicant's purpose and need."[83]

Water Dependency Determination for Section 404 Activities.

Appellant asserts in its RFA that, in the Fall of 2011, the District agreed the basic project purpose was a boat access park and the project was water dependent. Appellant states the District suddenly changed its position in January 2013 and "unilaterally declared the project was not water dependent." The Appellant's stated Basic Project Purpose, according to the 18 March 2013 Revised Alternatives Analysis, was a "County Boat Access Park." According to Appellant, the District incorrectly determined that the project is not water dependent. While the District may have correctly determined the project not to be water dependent, the District did not adequately document the supporting rationale for its determination.

On page 12 of its EA/SOF, the District defined the basic project purpose to be "to construct a boat access point and to construct a county park."[84] The District then states, "Because the county park element of the basic project purpose does not require siting within a water of the U.S., the proposed discharges associated with the county park are not water dependent." Also on page 12 of the EA/SOF, the District documented its determination that multiple activities (e.g., construction of a seven-lane boat ramp with three accessory docks, construction of a floating kayak/canoe dock, construction of a marginal dock with temporary mooring slips, and dredging) associated with the *overall project purpose* are water dependent. The District summarized in Table 12 of the EA/SOF[85] its water dependency determination for each relevant project activity, the associated discharge of any fill material, and the applicable Corps statutory authority (i.e., Section 10 and/or Section 404). There are some inconsistencies, however, between the water dependency determination discussion on page 12 and the information in Table 12 because page 12 specifies multiple activities that were determined to be water dependent, while only the seven-lane boat ramp is specified to be water dependent in Table 12.

While the District's water dependency determination for the County park element of the project is, overall, sufficiently documented to be for a "special aquatic site," the District defined basic project purpose in terms of siting within the broader term "a water

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[82] 33 C.F.R. § 320.4(r)(1)(i).
[83] 33 C.F.R. § 320.4(r)(1)(i). Section 320.4(r)(1)(i) explains that such modifications can include the following: "reductions in scope and size; changes in construction methods, materials or timing; and operation and maintenance practices or other similar modifications that reflect a sensitivity to environmental quality within the context of the work proposed."
[84] Bate stamp AR033632.
[85] Bate stamps AR033676 - AR033677 (EA/SOF, pp. 56-57).

of the U.S." rather than the term "special aquatic site," which is used in 40 C.F.R. § 230.10(a)(3) and is a more specific term. However, the District described the associated impacts of specific County park construction activities to be to jurisdictional wetlands – which is a specific category of "waters of the United States" and also a special aquatic site. Therefore, the District sufficiently documented its determination that the County park element is not water dependent, and it is reasonable given the regulatory requirements. However, the District should amend its documentation to more specifically reflect that its determination was based on the special aquatic site in question.

Although it is adequately documented overall that the District's water dependency determination for the County park element is based on impacts to jurisdictional wetlands, the documentation is not clear on page 12 of the EA/SOF regarding the District's water dependency determination for the boat access point element of the basic project purpose. Specifically, the District lists multiple activities of the proposed project (that is, the construction of the seven lane boat ramp, accessory docks, floating kayak/canoe dock, marginal dock with mooring slips, and dredging) and states, "The Corps has determined that *these activities* associated with the *overall project purpose* are water dependent."[86] As set forth in the regulations and explained above, the water dependency determination is based on the basic project purpose and not the overall project purpose. In addition, there is no explanation for the inconsistencies between the information documented in Table 12 of the EA/SOF and the District's water dependency determination for some of the same identified activities. Consequently, the District must reconsider and adequately document its water dependency determination for the boat ramp and other specified activities and ensure the documentation is consistent in its EA/SOF. In doing so, the District should more clearly connect its use of the term "boat access point" in its basic purpose with the multiple listed activities.

Regarding Appellant's statements that the District changed its stated basic project purpose, it is appropriate for the District to change its position during the course of evaluating a permit application. There is documentation in the AR that the District initially stated the basic project purpose to be "County park" and to "construct a Pasco County [p]ark" in the 17 January 2008 and 12 April 2011 PNs, respectively. The documentation in the AR also documents that there was a change in the description of the basic project purpose during the District's evaluation of the permit application. However, I find no evidence of bias or arbitrary and capricious behavior by District staff in reaching its determinations for the basic and overall project purposes.

Section 10 Activities.

Appellant argues that the District improperly applied the Guidelines to its alternative analysis for Section 10 activities. As explained below, the District did not

[86] Bate stamp AR033632 (EA/SOF, p. 12) (emphasis added).

consistently document how it applied or did not apply the Guidelines to its review of alternatives for Section 10 activities.

On page 12 of the EA/SOF, the District correctly documented that, based on its determination that the County park element of the basic project purpose is not water dependent, the presumptions in the 404(b)(1) Guidelines apply to the determination of a LEDPA.[87] However, the documentation is not clear regarding the project components for which the District evaluated a LEDPA (that is, discharges of fill material into jurisdictional wetlands versus work in navigable waters). The District also correctly stated in its EA/SOF that the water dependency presumptions associated with the Guidelines do not apply to Section 10 activities, such as the dredging component of the project.[88] In addition, the District correctly references Corps regulations at 33 C.F.R. § 320.4(r) and states that, for Section 10 activities, all resource losses must still be avoided to the extent practicable. However, the documentation is not clear regarding the project components for which the District evaluated a LEDPA (that is, discharges of fill material into jurisdictional wetlands versus work in navigable waters), and the District's documentation of its review of various alternatives is not clear regarding the applicability of 33 C.F.R. § 320.4(r) or whether the LEDPA is being applied to the channel design or dredging component of the project.[89]

Following its statement that compliance with the Guidelines is not applicable to the dredging component of the proposed project, the District references 33 C.F.R. § 320.4(r) as the source of the requirement for the Appellant to avoid resource losses due to the proposed dredging.[90]

The District sufficiently documented how minimization of the channel design would result in less resource losses (e.g., reduced adverse impacts to SAV). Documentation in the AR is less clear, however, regarding how the District determined that the minor modifications are feasible to the Appellant and, if adopted, will result in a project that generally meets Appellant's purpose and need. To the contrary, the District acknowledges that, according to Appellant's 18 March 2013 submittal, minimizing the design vessel does *not* meet the project purpose for providing deep water access for large vessels to the Gulf of Mexico as required by the 2006 Master Plan.[91] The District documented its disagreement with Appellant's conclusion that the 2006 Master Plan indicates there is a need to provide deep water access for large vessels.[92] This disagreement, however, does not address the requirement that minor modifications are to be feasible to the Appellant and, if adopted, will result in a project that generally meets the Appellant's purpose and need.

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[87] Bate stamp AR033632.
[88] Examples in the EA/SOF include pages 58-59, 81 and 89.
[89] Examples in the EA/SOF include Alternatives 1, 8, 8, 10, 12, 23 and 24 on pages 61, 69, 70, 70, 72, 76 and 77, respectively.
[90] Bate stamp AR033701 (EA/SOF, p. 81).
[91] Bate stamp AR033704 (EA/SOF, p. 84).
[92] Bate stamp AR033705 (EA/SOF, p. 85).

In addition, the District should clarify its rationale for concluding that 8.5 feet is the standard beam for a "minimized vessel" rather than 10 feet, which is relevant to the District's conclusion that the channel bottom width for a "minimized vessel" could be decreased from 60 feet to 45-50 feet. Although the District discusses the difference between vessel length and beam with regards to channel design and notes the multiple occasions when Appellant provided information regarding vessel design relative to vessel length, the District's rationale and analysis are not sufficiently clear in its EA/SOF.

Therefore, the District's alternative analysis pursuant to the Guidelines does not sufficiently document the components of the project for which the LEPDA is being evaluated. Accordingly, the District must clarify in its documentation how it applied the presumptions of the Guidelines and the tenets of Corps regulations at 33 C.F.R. § 320.4(r) in its alternative analysis to show that the District's final assessment is consistent with its defined basic and overall project purposes as well as the regulations applicable to the Section 10 components of the proposed project.

Guidelines Alternative Analysis. Appellant states in the RFA that the District improperly conducted its alternatives analysis. Appellant argues that the District's analysis is excessive in light of the relatively minor impacts to low quality wetlands; the District's determination of practicable is incorrect; and alternatives that limit the vessel type to be a kayak, canoe or other non-motorized vessel fail to meet the project purpose. As explained below, the District's identification of certain alternatives is not consistent with the District's determination of the overall project purpose.

In its 18 March 2013 response to the District's 31 January 2013 request for additional information, Appellant defined the overall project purpose as follows:

> To provide a Pasco County boater access park to allow for public use and enjoyment of Pasco County's coastal lands including recreational vessel access to the Gulf of Mexico, swimming, picnicking, environmental education opportunities, nature trails and other common park amenities.[93]

Thus, Appellant described a project that includes both a County park and access to the Gulf of Mexico for recreational vessels.

On page 12 of its EA/SOF, the District acknowledged the Appellant's statement of purpose and need and stated that the Applicant's "purpose and need unduly limited the range of alternatives that could potentially be evaluated."[94] Accordingly, the District restated the overall project purpose as follows:

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[93] Bate stamp AR032656 (Alternatives Analysis portion of the response, p. 1).
[94] Bate stamp AR033632.

> "to construct a county park within Pasco County, Florida in order to provide recreational opportunities including boat access to the Gulf of Mexico."[95]

As stated above regarding applicability of the Guidelines, the overall project purpose is used to evaluate the LEDPAs, and it should be sufficiently specific to define the applicant's needs, but not be so restrictive as to constrain the range of alternatives that must be considered under the 404(b)(1) Guidelines. The District exercised its independent judgment in defining a reasonable overall project purpose while considering Appellant's needs in the context of the desired geographic area (Pasco County) and the type of project being proposed (that is, a County park with boat access to the Gulf of Mexico).

The District further exercised its independent judgment and established the following criteria to evaluate the off-site alternatives and determine the LEDPA: parcel size, wetland impacts, accessibility to the Gulf, SAV impacts, and infrastructure.[96] The rationale for the inclusion of the "SAV impacts" criteria is "SAV are special aquatic sites."[97] The District should provide further rationale because direct impacts to SAV would appear to be from dredging, which is a Section 10 activity.

In addition, the District's evaluation of certain alternatives and conclusion regarding the LEDPA does not sufficiently document consideration of the District's stated overall project purpose or its criteria. For example, the District evaluation in alternatives 3, 5, 7, and 24 does not clarify its consideration of the parcel size criteria. The District generally acknowledges Appellant's concerns with developable space for these alternatives, but does not sufficiently explain how these alternatives meet the parcel size constraint of 10-25 acres. Two additional examples are alternatives 4 and 6, in which the District considers the potential to locate a boat ramp or a boat access park at a separate location from a County park, but the District determined the overall project purpose to be a County park which integrates boat access to the Gulf of Mexico with construction of a County park.

Actions:

1. Revise documentation regarding water dependency determination to ensure the water dependency determination is based on the basic project purpose.

2. Ensure the EA/SOF sufficiently documents the alternatives analysis under the Guidelines versus the analysis based on 33 CFR § 320.4(r).

3. Review determination of overall project purpose and review/revise alternatives analysis to ensure it is consistent with stated overall project purpose.

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[95] Bate stamp AR033632.
[96] Bate stamp AR033679 (EA/SOF, Table 14 on p. 59).
[97] Bate stamp AR033679 (EA/SOF, Table 14 on p. 59).

Appeal Reason 4: In its fourth reason for appeal, the Appellant asserts that the District's evaluation of the following Public Interest Factors was flawed: Conservation, Economics, Aesthetics, General Environmental Concerns, Wetlands, Fish and Wildlife Values, Flood Hazards, Navigation, Recreation, Water Quality, and Safety.

Finding: For the reasons set forth below, this reason for appeal has merit. While the record does not support Appellant's assertions that the District was biased in its review of certain factors, the District did not sufficiently document its evaluation of the benefits and detrimental impacts of several factors, and it did not sufficiently document the weight given to each factor nor its weighing of all relevant factors, to include an overall balancing of the benefits against the reasonably foreseeable detriments.

Discussion: Appellant describes in its RFA the errors it asserts the District made in its public interest review evaluation of eleven specific public interest factors. The Appellant alleges that the District did not apply certain factors impartially (e.g., Economics and Aesthetics factors) and did not consider all relevant facts or applied incorrect facts or data for certain factors (e.g., Economics and Flood Hazards). For other factors (e.g., Fish and Wildlife Values, Navigation, and Recreation), Appellant states that the District's assessment is not supported by the facts.

In deciding whether to issue any Department of the Army permit, 33 C.F.R. § 320.4(a)(1) requires a district's review to include an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. This public interest evaluation requires a district to weigh all factors that are relevant to each particular case by balancing the benefits which reasonably may be expected to accrue from the proposal against its reasonably foreseeable detriments. Section 320.4(a)(1) specifies twenty factors that, at a minimum, must be considered to the extent they are relevant, which are the following: 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, and Considerations of Property Ownership.

In addition to consideration of specific factors, Section 320.4(a)(2) sets forth the general criteria that must be considered in the evaluation of every application.[98] A district determines the specific weight of each factor based on its importance and relevance to the particular proposal.[99] A permit will be granted, subject to applicable

[98] The three general criteria are the following: (1) the relative extent of the public and private need for the proposed work; (2) the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed work when there are unresolved conflicts as to resource use; and (3) the extent and permanence of the beneficial and/or detrimental effects which the proposed work is likely to have on the public and private uses to which the area is suited.
[99] 33 C.F.R. § 320.4(a)(3).

guidelines and criteria, unless the district engineer determines that the proposed activity would be contrary to the public interest.[100]

In the EA/SOF, the District documented its evaluation of each factor and determined that the proposed project would adversely impact the following public interest factors: Conservation, Economics, Aesthetics, General Environmental Concerns, Wetlands, Fish and Wildlife Values, Flood Hazards, Navigation, Recreation, Water Quality, and Safety.[101] The benefits and detrimental impacts within some of the factors, however, are not sufficiently documented. For example, the Recreation factor discusses the impacts on fisheries production due to the loss of seagrass in the project area, but the recreational opportunities that will be available due to a new County park and new boat access to the Gulf of Mexico that will add boating and fishing opportunities are not discussed.[102] Another example is the Safety factor discussion, which identifies the risk of accidents due to the lack of speed zones, the design of the channel regarding a particular curve (bend), and hazardous substance exposure if the Appellant fails to properly cap the contaminated fill material.[103] However, the documentation does not make clear the basis for the District's presumption that the County will not comply with the permit or the likelihood of such a scenario occurring.

In addition to insufficient documentation of relevant benefits and detrimental impacts within some of the factors, the EA/SOF does not sufficiently document the District's overall balancing of the factors against each other based on the importance of each factor and how much weight it was given. There is some discussion in the EA/SOF regarding the benefits and detrimental impacts,[104] but this discussion does not adequately document the District's full consideration of all benefits and detrimental impacts of the specific factors. I find no evidence of bias or lack of impartiality in the District's public interest review. However, for the reasons explained above, I find that this reason for appeal has merit.

Actions:

1. For each relevant public interest factor, document all relevant benefits and reasonably foreseeable detriments that were identified.

2. Document the balancing of the benefits against the reasonably foreseeable detriments and, as appropriate, explain the specific weight of each factor.

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[100] 33 C.F.R. § 320.4(a)(1).
[101] Bate stamps AR033716–AR033736.
[102] See Bate stamp AR033733.
[103] See Bate stamp AR033735.
[104] For example, see Bate stamps AR033758-AR033759.

CONCLUSION

For the reasons stated above, I find that the appeal has merit. The District's AR does not contain sufficient documentation to support its permit denial. 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.

DONALD L. WALKER
Colonel, U. S. Army
Commanding