ADMINISTRATIVE APPEAL DECISION

FILE NO. 199502428 (LP-VA)

JACKSONVILLE DISTRICT

Review Officer: Arthur L. Middleton, U.S. Army Corps of Engineers (USACE), South Atlantic Division, Atlanta, Georgia.

Appellant Representative: Mr. Peter Apanovitch, Summerland Key, Monroe County, Florida.

Receipt of Request For Appeal (RFA): June 3, 2002

Appeal Conference Date: September 11, 2002. **Site Visit Date:** September 11, 2002.

Background Information: A permit application, submitted by Glen Boe & Associates on behalf of Mr. Daniel P. Stevens, was received by USACE Jacksonville District (District) on April 24 and considered complete of April 29, 1995, for the placement of approximately 133 cubic yards of clean fill material in 3, 588 square feet of wetlands for the purpose of constructing a single-family residence with and access drive and septic tank/drain field. On March 8, 1996 the Jacksonville District Engineer issued Department of the Army authorization (permit) number 199502428 to "[p]lace fill for a house pad, access drive, and a septic system. Approximately 107 cubic yards of clean fill material will be placed in 2, 879 square feet of wetlands." Emphasis added. General condition 5 of the permit states, "If a conditioned water quality certification has been issued for your project, *you must comply with the conditions specified in the certification as special conditions to this permit*. For your convenience, a copy of the certification is attached if it contains such conditions." Emphasis added. A conditioned water quality certification by the State of Florida, Department of Environmental Protection (DEP), dated November 14, 1995, was attached to the permit. Specific Condition 12 stated, "To place this project clearly in the public interest, the applicant shall place all remaining wetlands into a Conservation Easement. This easement shall allow the trimming of the mangrove fringe...In addition, this Conservation Easement shall not prevent the applicant from applying for a boardwalk and pier through the wetlands." A site plan (sheet 2 of 4) submitted by Glen Boe & Associates with the application dated April 29, 1995 (with 2 revisions) depicted the jurisdictional line located just north of the proposed residence. This same site plan depicting the jurisdictional line was attached to the water quality certification. In the July 18, 1995 Memorandum For Record; Department of the Army Environmental Assessment and Statement of Findings for application number 199502428, under Alternatives, compensatory mitigation was discussed as "Project completion will impact 3,588 square feet of scarified wetland...Unavoidable project impacts can be compensated by precluding further development of the lots." The Conservation Easement was executed on March 5, 1996, and depicted the limits of the Conservation Easement. Included was a copy of the mortgage deed and the site plan, noted above, depicting the jurisdictional line. The Conservation Easement stated, "It is the purpose and intent of this Conservation Easement to

assure that the subject lands (with the exception of included wetlands which are to be enhanced or created as specified...) will be retained and maintained, forever predominantly in the natural vegetative and hydrologic condition existing at the time of execution on this Conservation Easement."

On April 6, 2001 the District received an application from Mr. Glen Boe (Glen Boe & Associates, Inc.) on behalf of Mr. Peter Apanovitch for a Department of the Army permit to place fill material in wetlands for the construction of a swimming pool within the, aforementioned, Conservation Easement. Additional information was required before the application was considered complete on August 2, 2001. Mr. Apanovitch requested of the State of Florida, Department of Environmental Protection to relinquish 2000 sq. ft. from the previously executed Conservation Easement to allow for the construction of a swimming pool. The DEP issued a Submerged lands and Environmental Resource Program Environmental Resource Permit to Mr. Apanovitch on February 19, 2002 with several "Specific Conditions". Specific Condition 8 stated, "As mitigation the permittee shall make a monetary contribution of $2, 963.00 for modification of the conservation easement, and $1,728.00 for installation of a swimming pool within wetlands, for a total of $4, 691.00, prior to start of construction authorized in this permit to the Florida Keys Environmental Trust Fund, for the purpose of restoring approximately 5,430-square feet (0.125 acres) of wetlands within the Carysfort Wetland Restoration and Enhancement Project in North Key Largo." By letter of April 10, 2002, the DEP provided Mr. Apanovitch the "executed release of Conservation Easement for your Summerland Key property. The Department has relinquished this easement in exchange for the new Conservation Easement granted to the Department and recorded on February 27, 2002 in Official Record book...of the Public Records of Monroe County, Florida." The District issued a conditioned permit to Mr. Apanovitch on May 30, 2002. It is two of those conditions that Mr. Apanovitch has identified as his Reasons for Appeal.

Summary of Decision: I find that the appeal does not have merit. I find that the District evaluated and documented their proffered permit dated May 30, 2002 according to applicable laws, regulations and policy guidance. The special conditions placed on the permit are reasonable given the specific circumstances of the permit request.

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

Reasons for the appeal as presented by the appellant:

Reason 1: "Special condition [number] 2 overstates the required mitigation by $9,539.96. The Corps never responded to my mitigation proposals as required by Regulatory Guidance. I have repeatedly appealed to [the Jacksonville District Engineer] for responses, he has ignored me. See attached exhibits [1] thr[ough] [15]."

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: Special condition number 2 in the District's proffered permit states, "The permittee agrees to compensate for 1500 square feet of button wood mangrove/saltmarsh impacts by sponsoring mitigation. Within 90 days from the permit authorization date, the permittee will submit $9,539.96 to the Florida Keys Environmental Restoration Trust Fund [(FKERTF)].... for the acquisition, enhancement, preservation and management of wetland resources within Monroe County...."

The application stated, "The applicant owns a residence on Summerland Key on which the installation of a swimming pool and landscaping is proposed. He seeks authorization to place fill..." The application allowed the applicant to identify the type of permit sought. It specifically stated "For activities in, on, or over wetlands or other surface waters check the type of federal dredge and fill permit requested:" "Nationwide" permit was identified by the applicant. Emphasis added.

By letter of July 25, 2001 the District informed the applicant that the information in the application were not sufficient to fully evaluate the permit request. In general, the District wanted to know why the proposed fill needed to be located in a wetland and stated, "The 404 (b)(1) guidelines make the presumption that an alternative upland site exists unless demonstrated otherwise." Emphasis added. The District asked the applicant to address "alternative sites and site plans that have been considered and why alternatives are not considered practicable. (e.g. uplands at the northwest corner of the lot)." They pointed out "this upland alternative will not require Department of the Army permit."

By letter of July 26, 2001, the applicant responded that the "septic tank is located northeast of the house", the "northwest area contains a utility pole and supports electric and cable services", "the area north of the house is heavily wooded and would be environmentally unsound to remove the vegetation for pool construction. Wildlife would lose habitation. The vegetation prevents run-off from the highway from eroding the soil." He also stated that if the pool were constructed near the highway it "would present a continuous danger to both children and adults in the pool area from vehicles that may lose control."

Mr. Apanovitch followed this with and undated letter (with a facsimile date of July 30, 2001) providing additional information regarding the purpose and need for his proposal. He stated that his "intent is to construct a swimming pool next to my primary residence to be used as part of my family's everyday activities...there is no standing water on the proposed pool location and the location is a good distance from the canal. The pool area was chosen to minimize environmental impact since house construction activity disturbed the area." He also stated, "I shall replace the wetland area that is used by the pool with other wetlands that I shall restore through mitigation payments. The dedication of restored wetlands to the preservation of the environment is a major benefit to wildlife since a natural setting promotes habitat conditions. The area next to a residence is much less desirable for habitat." This was the applicant's first mention of a mitigation proposal. Mr. Apanovitch made no other mitigation proposals other than variations dollar amounts of those noted above in the Submerged lands and Environmental Resource Program Environmental Resource Permit issued by DEP in Specific Condition 8.

Other than the applicant's opinion, noted above, about why the upland portions of his property did not represent a practicable alternative to building the pool in wetlands, this debate continued until April 3, 2001 when Monroe County stated their position regarding constructing the pool in uplands made that alternative "not practicable". Monroe specifically stated, "this area [pool site east of the house] is a mosaic of upland and disturbed (low quality) wetland habitats. The habitat to the west and south of the house is hammock. Although small, this hammock portion of the property contains listed species (Thrinax spp. and Coccothrinax argentata) of palms in large numbers. Per Section 9.5-345(a), [regulation applied by Monroe County] Clustering, [the applicant] must use the least valuable habitat on his parcel before intruding into more valuable habitats. Undisturbed wetlands may not be developed for any reason, and hammock habitat is considered more valuable than any type of disturbed habitat; therefore, the ONLY site available for a pool at this residence is the site chosen to the east of the house." Eliminating the alternative site issue allowed the District to consider issuing a permit with appropriate mitigation.

The District provided a letter to the applicant on April 22, 2002, informing him that a functional assessment for resource impacts utilizing the mitigation index guidelines established for the Florida Keys had been performed. (Only a draft of the letter was found in the administrative record. However, an April 25, 2002 from the applicant verified the District's letter). It was determined that a monetary donation to the FKERTF in the amount of $11, 267.96 would be required. In the April 25, 2002 letter, the applicant stated his intent to donate $11, 267.96 as compensatory mitigation in return for the permit. He also stated, "My intent to complete the remainder of the donation is dependent on the [A]rmy having accurately followed all federal laws, regulations, rules, policies, and precedents in its formulation of the mitigation compensation...It is also my understanding that alternative compensation may be substituted if both parties subsequently agree."

In an e-mail message on April 26, 2002 the applicant requested of the District "Could you please provide me with the written policy or regulation for crediting Florida DEP mitigation payments against the [A]rmy's mitigation requirements." In an e-mail message on April 29, 2002 the District responded. "The Corps is requiring mitigation for projects in the Florida Keys based on and evaluation procedure known as the KEYMIG [Florida Keys Mitigation Guidelines]. This evaluation procedure evaluates the ecological functions and values of the aquatic areas (including wetlands) impacted by the permitted activity and assesses mitigation consistently for all permittees. The State of Florida uses different approaches to mitigation, therefore often the mitigation requirements will vary. In some cases the Corps mitigation is higher and in others the State mitigation is higher. You are not required to do mitigation of the Corps plus the mitigation of the State, but you are required to do the larger of the two. In other words, you are "credited", in this case in the Corps requirement for what you were to do for the State. Your permit situation is further complicated by the fact that the State has required an assessment for release of its conservation easement on the site of your proposed pool. The conservation easement was established as mitigation for construction of the home you purchased. The Corps will not reduce our requirement for mitigation based on the States release of conservation easement assessment. Our mitigation is intended to offset the impacts to the aquatic environment of constructing your pool in the upper saltmarsh wetlands adjacent to your home and is consistent with mitigation we are requiring of all applicants."

By letter of April 29, 2002 the District acknowledged the applicant's April 25, 2002 letter and explained to the applicant "that $1728 is devoted to ...DEP...actual restoration requirement and will therefore be subtracted from the $11,267.96 total for a balance of $9539.96. The remainder of the FKERTF contribution of $2,963 was for the DEP to release the perpetual conservation easement and therefore will not be subtracted.

In an e-mail on February 26, 2002 a representative of DEP informed the District, "The $2,963.00 is a requirement of DEP permit (44-0181348-001). The payment is mitigation for release of a portion of a conservation easement. The permit also requires an additional payment of $1, 728.00, which is mitigation for filling of approx[imately] 2000sq.ft.of wetlands."

By letter of May 24, 2002 the applicant enclosed a check for $9,539.96 to the FKERTF as specified in the District's April 29 2002 letter. However, the applicant made it clear that he intended to "argue...over the mitigation for as long [as] it takes for a fair result." The applicant issued a 60 notice to the District to develop a mutually acceptable mitigation fee based on "statutes, regulations, and fairness." He included the following claims in his notice: 1. "The [USACE] refuses to accept [his] Florida DEP mitigation payments as credits"; 2. "the [USACE] refuses to accept the 5,430 square feet of restoration that [he] completed as credits"; 3. "the [USACE] refuses to establish jurisdictional authority over the project site"; 4. "the [USACE] refuses to accept an 80 foot vegetated buffer as mitigation"; 5. "the [USACE] violated its own policies and caused [the] project to be delayed...caus[ing] the mitigation calculation to be increased from $2, 010 to $11, 267.96"; 6. "the [USACE] refuses to use the mitigation formula in effect when [his] Florida DEP payment was made"; 7. "the [USACE] refuses to use its mitigation precedent established for the Boy Scout project in [his] neighborhood..." These claims are discussed in **Other Issues** below.

Reason 2: Special condition [number] 4 adds new mitigation requirements that renege the Corps previous commitment. The Corps previous commitment describes the FKERTF [Florida Keys Environmental Restoration Trust Fund] payment as full. [The Jacksonville District Engineer] inserted this condition without any justification. Item [number] 4 should be deleted in its entirety. See attached exhibits [16] thr[ough] [20]."

FINDING: This reason for appeal does not have merit.

ACTION: No action required.

DISCUSSION: Special condition number 4 in the District's proffered permit states, " The permittee acknowledges that; the hammock buffer on both sides of the driveway leading from the Overseas Highway, in the 1400 square feet of transitional salt wetlands north of the swimming pool (which were removed form the original proposal as minimization) and, the wetlands contained in the revised Florida [DEP] conservation easement will be preserved in perpetuity through a deed restriction. The permittee will prepare a draft of the deed restriction, complete with legal description, and scale drawings, and furnish the same within 120 days of permit issuance to the Regulatory Division...The Corps will, thereafter, review and approve the deed as to form. The deed restriction shall be recorded in the public records of Monroe County...The permittee will ensure that the wetland preservation area will not be disturbed by any dredging,

filling, land clearing, or any other construction work whatsoever. The permittee agrees that, otherwise, the only future utilization of the preservation area will be as a purely natural hammock buffer and wetland."

The applicant believes that this condition causes the USACE to renege on its previous mitigation commitment stating that the previous commitment describes the FKERTF payment as full. However, as discussed above, the applicant does not agree with the mitigation prescribed in the previous commitment. Also, the applicant built a case that the upland hammock represented important habitat and was, therefore, not a practicable alternative to constructing his pool in disturbed wetlands. Monroe County validated the importance of the upland hammock by stating, "hammock habitat is considered more valuable than any type of disturbed habitat." It has been documented that the conservation easement, which was put in place to protect the area in which the propose pool site is located, proved to be little protection in reality. Since the applicant and Monroe County agree that the upland hammock is valuable habitat, enough to eliminate the hammock as an alternative site for the pool location, the District determined that the upland hammock should be preserved in its natural state. Otherwise, once the pool is constructed in the disturbed wetland, determined to be the most practicable site based primarily on the value of the upland hammock, there would be nothing in place to prevent the upland hammock from being altered from its natural state. This was a reasonable consideration by the District.

U.S. Army Corps of Engineers regulations at 33 CFR Part 325.8(b) state, "District engineers are authorized to issue or deny permits in accordance with these regulations pursuant to...section 404 of the Clean Water Act of 1972...District engineers are also authorized to add, modify, or delete conditions in permits in accordance with [Section] 325.4 of this Part..." 33 CFR Part 325.4(a) states, "District engineers will add special conditions to Department of the Army permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the pubic interest requirement. Permit conditions will be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable." Emphasis added.

The placement of deed restrictions is a common practice and is used throughout the USACE Regulatory Program to facilitate sufficient mitigation to offset impacts to waters of the United States including wetlands. Regulatory Guidance Letter (RGL) 01-1 reiterates the importance of this practice. The RGL at section 4.a.1. states, "The wetlands,...and/or other aquatic resources in a mitigation project should be permanently protected with appropriate real estate instruments (e.g., conservation easements, deed restrictions, transfer of title to Federal or state resource agencies or non-profit conservation organizations." (Note: Unless superseded by specific provisions of subsequently issued regulations or RGLs, the guidance provided in RGLs generally remains valid after the expiration date as discussed in the Federal Register notice on RGLs of March 22, 1999, FR Vol. 64, No. 54, Page 13783.)

Other Issues: While not specifically identified in the Request for Appeal as Reasons for Appeal, the following issues were identified in the applicant's complaint:

1. "The [USACE] refuses to accept [his] Florida DEP mitigation payments as credits..." This issue was discussed in Reason 1 above.

2. "[T]he [USACE] refuses to accept the 5,430 square feet of restoration that [he] completed as credits..." As noted above, Specific Condition 8 of the DEP permit stated, "As mitigation the permittee shall make a monetary contribution of $2, 963.00 for modification of the conservation easement, and $1,728.00 for installation of a swimming pool within wetlands, for a total of $4, 691.00, prior to start of construction authorized in this permit to the [FKERTF], for the purpose of restoring approximately 5,430-square feet (0.125 acres) of wetlands within the Carysfort Wetland Restoration and Enhancement Project in North Key Largo." The Carysfort Wetland Restoration and Enhancement Project is a State initiative. In an e-mail on May31, 2002 the District communicated to [Fund Manager, FKERTF], "please apply the $2,963 assessed by DEP to any project. This is the amount for former impacts of the applicant's house pad and fill [and] removal of a DEP conservation easement. We provided you with a K[EY]MIG break down for $11,267.96. Please use this breakdown to credit both the $1,728,00 and $9,539.96 amounts. These amounts cannot be credited against the Carysfort project as recommended by the DEP. Carysfort has not been approved to receive Corps mitigation assessments...This amount is to compensate for impacts associated with the swimming pool the applicant wishes to construct in the future." Emphasis added.

3. "[T]he [USACE] refuses to establish jurisdictional authority over the project site..." By e-mail message on June 14, 2001, the District requested that the applicant's agent provide "[USACE] [19]87 wetland delineation manual data sheet(s) for this project which would support what areas are or are[] not wetlands." On June 15, 2001 the applicant's agent responded "Most of the areas in developed subdivisions that the [USACE] claims as jurisdictional do not exhibit hydric soils or wetland hydrology. Traditionally, wetland plants have been the sole determining factor...Subdivisions typically were created by placing crushed lime[]rock fill on cap[]rock...If the elevation is more than 2.5 ft above NGVD, the water table is more than 12 inches below grade...This being the case, is the [USACE] going to abandon jurisdiction if the sheet says the site does not meet all three criteria?...You need to consider this before demanding that applicants hire biologist to drill holes and prepare reports at significant expense...I will hold off on Apanovitch until I receive a response to these comments." By e-mail message on June 18, 2001 the District responded, "Please get in contact with [District Regulatory Team Leader]...regarding your concerns with the [d]elineations...I did forward the concern to [District Regulatory Team Leader], but unless I hear otherwise...consider the delineation request pending." There is no additional information in the administrative record regarding the request for wetland delineation manual data sheets. There are no data sheets in the administrative record. The applicant continued to raise the issue of USACE jurisdiction over the proposed pool site. There is an implied acceptance of jurisdiction in the applicant's submittal of the application for a Department of the Army permit (see discussion in Reason 1 above). By e-mail message on May 28, 2002 the applicant informed the District "For the first time at 10:42 this morning, I observed tidal water at the edge of the pool site. Jurisdiction is no longer an issue, I accept the site as wetlands as defined by the [USACE]." Emphasis added.

4. "[T]he [USACE] refuses to accept an 80 foot vegetated buffer as mitigation..." The applicant derives this issue from his reading of RGL 01-1, specifically section 2.d. that deals with Vegetated Buffers. That section states, "Compensatory mitigation plans for projects in or near streams or other open waters should normally include a requirement for the establishment

and maintenance of vegetated buffers next to open waters on the project site. In many cases, vegetated buffers will be the only compensatory mitigation required and may be a wetland, upland or composite mix of the two. Vegetated buffers should normally consist of native species. The width of the vegetated buffers should be determined based on documented water quality or aquatic habit loss concerns. Vegetated buffers need not be required to be as wide as some technical literature would suggest since the literature addresses the pre-human colonization of North America. Normally, vegetated buffers will be 50 feet wide or less on each side of a stream or other open water areas..." Emphasis added. The applicant points out that the proposed swimming pool site is situated 80 feet from a canal. The applicant fails to realize that the area he calls a vegetated buffer is part of the conservation easement that is mitigation for the construction of his house in wetlands. The existing mitigation cannot be mitigation for a new wetland impact. At the appeal conference, District representatives pointed out that the guidance in RGL 01-1 simply makes mitigation more flexible. The District is not required to include a vegetated buffer in a mitigation plan.

5. "[T]he [USACE] violated its own policies and caused [the] project to be delayed...caus[ing] the mitigation calculation to be increased from $2, 010 to $11, 267.96..." There were delays in the evaluation of the permit request. The initial delays were due to lack of manpower and change in personnel involved in the permit evaluation. This fact is documented in the administrative record. There was no deliberate attempt to delay the permit evaluation. Another delay in the permit evaluation was in resolving the issue of whether or not there was a practicable alternative to constructing the pool in wetlands. As noted above, this issue was resolved on April 3, 2001 when Monroe County stated their position regarding constructing the pool in uplands made that alternative "not practicable". Following that decision, the District immediately moved toward a permit decision that also involved notifying both the EPA and National Marine Fisheries Service that the District intended to issue the permit even though those agencies were opposed to the project. (Also, see 6. below).

6. "[T]he [USACE] refuses to use the mitigation formula in effect when [his] Florida DEP payment was made..." As noted above, the State of Florida uses different approaches to mitigation; therefore often the mitigation requirements will vary from those applied by the USACCE. At the appeal conference the District representative pointed out that the KEYMIG Public notice was issued in 1996. The notice indicated that the KEYMIG would be updated from time to time. The KEYMIG was updated on April 2, 2002. The District neither requested nor received comments regarding the update. At the appeal conference District representatives informed that mitigation data for the Florida Keys gathered in 1999, for the previous 10 years, concluded that mitigation has not been sufficient and, therefore, the KEYMIG had to be adjusted. By Memorandum For Record, April 2, 2002, Subject: Adjustment of Fees Assessed by the Florida Keys Mitigation Guidelines stated, "This ...is written to record procedural changes regarding fees for permitted activities with unavoidable impacts within Monroe County and the Florida Keys. All permits issued will include mitigation under this method, unless a specifically identified mitigation plan is approved ...KEYMIG Commitment letters should not be sent until after a project has been coordinated and any comments received considered by the [USACE]. The new costs listed below will be implemented immediately for any project where a KEYMIG Commitment letter has not been sent. In cases where a KEYMIG Commitment letter has been sent prior to April [2] 2002, the [USACE] will honor that former commitment, and the

former costs for mitigation." The normal process for permit review is that any permit decision that has not been made is open to any new policy.

7. "[T]he [USACE] refuses to use its mitigation precedent established for the Boy Scout project in [his] neighborhood..." The applicant believes the District is not in compliance with the Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning Federal Enforcement for the Section 404 Program of the Clean Water Act. This memorandum establishes a policy agreement between the two agencies for the "allocation of enforcement responsibilities between EPA and the [USACE]." In an e-mail message on March 11, 2002 the District explains, "The case was referred to [Environmental Protection Agency] EPA for lead agency determination...on April [13,] 2000. EPA accepted the case and became the enforcement lead agency...EPA resolved the case by issuing consent agreement [number] CWA 04-00-1032 (c). The consent agreement was signed on June [9,] 2000 and stipulated that Boy Scouts of America would restore 1.37 acres, preserve 0.92 acres [sic] of undisturbed wetland buffer, create 0.51 acres [sic] of wetlands and donate $15, 617.00 to the FKERTF. All in exchange of a NW 32 verification for placement of fill into 0.99 acres [sic] of wetla[]nds. We issued NW 32 on June [21] 2000." This enforcement resolution was an EPA action not a USACE action. As noted above, the District received an application on behalf of Mr. Peter Apanovitch on April 6, 2001.

8. The applicant points out that the District did not follow Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, Federal Register / Vol. 60, No. 228 / Tuesday, November 28, 1995 / Notices and identifies several specific issues in the Notice. As noted on page 58606 of the Notice, *Purpose and Scope of Guidance*, "This document provides policy guidance for the establishment, use and operation of mitigation banks for the purpose of providing compensatory mitigation for authorized adverse impacts to wetlands and other aquatic resources. This guidance is provided to expressly to assist Federal Personnel, bank sponsors, and others in meeting the requirements of Section 404 of the Clean Water Act..., Section 10 of the Rivers and Harbors Act,...and other applicable Federal Statutes and regulations. The policies and procedures discussed herein are consistent with current requirements... and ...provisions and are intended to clarify the applicability of existing requirements to mitigation banking." In addition, as stated on page 58607 of the Notice, *Authorities*, "The policies set forth in this document are not final agency action, nor can it be relied upon, to create any rights enforcement by any party in litigation with the United States. This guidance does not establish or affect legal rights or obligations, establish a binding norm on any party and is not finally determinative of the issues addressed."

9. The applicant points out that the District did not "object to DEP within 90 days" in accordance with the Clean Water Act, Section 404 (j)(2). This section deals with a State's assumption of the "404" program as established under 404 (g).

Information Received and its Disposition During the Appeal Review:

1) The Jacksonville District furnished a copy of the Administrative Record for the subject application.

2) Mr. Apanovitch furnished a copy of his outline of his discussion issues, used at the appeal conference, and a copy of RGL 01-1, cross-referenced to his discussion issues.

3) Mr. Apanovitch submitted a request, January 31, 2003, to the Division Engineer, South Atlantic Division, for him to agree to an interim agreement that would allow him to commence with the construction of his swimming pool. In the agreement he would adhere to special conditions numbers "2" and "4" until such time that the Division Engineer or the court orders modification of the special conditions. The regulations at 33 CFR 331, Administrative Appeals Process, do not allow for such an agreement. The final decision in this permit action rests with the District Engineer. 33 CFR 331.5(a) states, "An individual permit that has been signed [accepted] by the applicant, and subsequently unilaterally modified by the district engineer pursuant to 33 CFR 325.7, may be appealed under this process, provided the applicant has not started work in waters of the United States authorized by the permit." Emphasis added. This statement constitutes the response to the applicant's request for an interim agreement.

4) At the request of the Appeal Review Office, the District provided a copy of a Memorandum For Record, April 2, 2002, Subject: Adjustment of Fees Assessed by the Florida Keys Mitigation Guidelines. This document was referred to in the Administrative Record but a copy was not included. The document has been placed in the Administrative Record.

Conclusion: After reviewing and evaluating the administrative record provided by the Jacksonville District, I conclude that there is sufficient information in the administrative record to support the District's decision to issue a conditioned Department of the Army permit, pursuant to Section 404 of the Clean Water Act, for the placement of fill material for the construction of a swimming pool in wetlands. Accordingly, I conclude that this Request for Appeal does not have merit. This concludes the Administrative Appeal Process.

24 Feb 03

(Date)

Peter T. Madsen
Brigadier General, US Army
Commanding