ADMINISTRATIVE APPEAL DECISION

FRANK W. HULSE, FILE NO. 199101257 (IP-IS)

JACKSONVILLE DISTRICT

DATE: October 19, 2000

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

Appellant Representative: Mr. Irby Pugh (attorney), Orlando, Florida, Mr. Frank W. Hulse (appellant), Atlanta, Georgia.

Receipt of Request for Appeal (RFA): May 30, 2000.

Appeal Conference Date: July 13, 2000. **Site Visit Date:** July 12, 2000.

Background Information: Mr. Frank W. Hulse (appellant), by application received on December 28, 1998, requested a permit for the placement of fill material, in 2.51 acres of waters of the United States, including wetlands, on two, five-acre parcels of land for the construction of a single family residence and associated driveway and septic system on each parcel. In the late 1980's, Mr. Jimmy Paul (partner of Mr. Hulse) requested a site inspection of the property, at which time Ms. Irene Sadowski, indicated that, with the exception of the impoundment berms, the entire site was considered waters of the United States and under the USACE' jurisdiction. On October 3, 1990, Mr. Hulse jointly applied for permits from the USACE and the Florida Department of Environmental Policy (FDEP(formerly known as the Florida Department of Environmental Regulation)). The FDEP denied the permit request on November 14, 1991. On November 21, 1991, the USACE, in turn, denied the permit without prejudice. Subsequently, Mr. Hulse appealed the FDEP denial (a FDEP hearing process followed – see discussion in Reason 1 below) and on December 10, 1998, was issued conditioned FDEP permits for the placement of fill in wetlands for the construction of two houses and pads with separate driveways totaling 2.5 acres. Mr. Hulse then submitted an application to the Jacksonville District (District) on December1, 1998, to place fill on the two parcels. On March 3, 2000, the Jacksonville District Engineer denied the request for authorization. He determined that the proposed fill discharge would not be in compliance with the Section 404 (b) (1) Guidelines because less environmentally damaging alternatives were available to the applicant and that the project is contrary to the overall general public interest. The denial is being appealed.

Summary of Decision: I find the appeal has merit as follows: I find that (a) the District did not provide clear and convincing evidence that wetlands on the east side of the property are more valuable than wetlands on the west and that relocating the house pads to the west would be a less environmentally damaging alternative; (b) the District did not identify significant national issues and how they are overriding in importance in light of FDEP's decision; (c) the District was not clear in identifying the various ecosystems in which impacts are anticipated to occur; and (d) the

District did not document evidence upon which the reasonably foreseeable future cumulative environmental impacts analysis was based. This matter is remanded to the District Engineer for reconsideration of the permit decision consistent with the instructions in this administrative appeal decision.

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

Reasons for the appeal are as presented by the appellant:

Reason 1: "The review process does not meet the minimum requirements of substantial, competent review rising to a violation of the property owner's procedural and substantive due process."

FINDING: The appeal has merit.

ACTION: The decision is remanded to the DE to document by clear and convincing evidence the contrast in the value of wetlands on the site and to demonstrate that the alternative to locate the house pads near SR 3 is less environmentally damaging.

DISCUSSION: The appellant clarifies this issue by stating that requested information and data related to less environmentally damaging practicable alternatives for house pad placement, submitted in a July 16, 1999, package to the USACE was not thoroughly reviewed and considered prior to the decision to deny the permit.

The 404(b)(1) Guidelines, 40 CFR 230.10(a) state "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have a less adverse impact on the aquatic ecosystem, so long as the alternative does not have other adverse environmental consequences.... Where the activity associated with a discharge which is proposed for a special aquatic site...does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e. is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise."

The purpose of the proposed discharge of fill material, as defined in the December 10, 1998 public notice is for the development of two single family home sites with driveways. The MFR identified the basic purpose as the development of two single-family lots. The applicant desires that the houses be near the waterfront. Housing does not require access or proximity to or siting within a special aquatic site, wetlands, to fulfill its basic purpose and is therefore not water dependent. Regulatory Guidance Letter (RGL) No. 84-9 states "Both the Corps' regulations and the 404(b)(1) guidelines contain a water dependency "test." Corps regulations limit the application of this test to work, which would alter wetlands, while the guidelines set up a rebuttable presumption against discharges in all aquatic sites. In both situations, however, the water dependency test, standing alone, is not intended to be determinative of whether a permit is issued. Activities which are not water dependent may still receive permits, provided the overall public interest balancing process so warrants, and also provided the guidelines' presumption against such discharges is successfully rebutted and the other criteria of the guidelines are met."

In the past, the District has issued several permits for fill in wetlands for housing, in the vicinity, south of this proposed activity.

There is no dispute between the applicant and the District that step one of the sequence to avoid, minimize, and compensate has been met and that there are no other practicable alternative locations available to the applicant for the project. The point of contention is whether or not there is an alternative footprint available for the project that would have less environmentally damaging impacts and still be practicable.

The District, in its' decision document Memorandum For Record (MFR), page 5, stated with regard to the pre-application meeting, with the applicant's consultant, on November 20, 1998, "[i]n reviewing the plan, alternatives and minimization were discussed." A public notice for the proposed activity was issued on December 10,1998, stating "the applicant proposes to fill 2.51 acres of wetlands for the development of two (2) single family home sites". The MFR, page 5 and 6, lists dates of coordination letters related to resolving issues raised as a result of the public notice. A key meeting was held on April 22, 1999, attended by, among others, Ms. Vivian Garfein, FDEP, where six alternative plans reviewed during the FDEP hearing process were briefly discussed. The six alternatives are listed on page 6 of the MFR. On that same page is the statement "[i]n the [F]DEP settlement agreement, Vivian Garfein of the [F]DEP was instructed to explain the agreement to Mr. Bertil Heimer." There is no indication in the MFR or the Administrative Record that an explanation of the settlement agreement occurred. Interesting is the fact that FDEP provided a copy of a Draft Environmental Resource Permit to the District on November 6, 1998, for the same proposal advertised in the Districts' December 10, 1998, public notice. Then, the FDEP issued their final permit on December 10, 1998 which, also, included water quality certification and consistency with Florida's Coastal Zone Management Program for the same proposal advertised by the District. Typically, these state approvals and certifications would be provided in response to a USACE public notice. The DEP provided no written comments regarding the public notice.

By letter dated April 30, 1999, the District requested that the applicant provide information previously requested at the April 22, 1999, meeting. Specifically, to state a specific purpose for the parcels; why the house pads can't be relocated along State Road (SR) 3 and identify any variances requested in pursuing alternative locations that would allow the house pads to be located closer to SR 3. The District also requested that the applicant explore an alternative performance-based system (PBS) of sewage treatment in an effort to reduce the house pad footprint from the 200'x 200' required by the Brevard County Environmental Health Services for a septic drain field.

The Administrative Record provides no evidence of dialog of the disparity between the FDEP's permit for the proposal and the District's belief that there is less environmentally damaging practical alternative. FDEP issued its permit for the house pads to be constructed on the east side of the parcels, near the waterfront. In the MFR, pages 14 and 15, the District contends that the higher quality wetlands are located immediately adjacent to the Banana River and that the proposed work would result in the segmentation of the impoundment along with filling of the most valuable wetlands onsite. By letter dated July 16,1999, the applicant responded to the request by stating that "[t]hese parcels are expected to be developed as one executive home site

on each of the five (5) acre parcels either for the owners or for anyone else who desires a natural home site with a waterfront surrounded by natural areas..." In the July 16,1999, letter, the applicant stated, in reference to the April 22, 1999, meeting, "FDEP agreed that the final engineered sites that we are now applying to the ACOE, minimizes the impacts to the affected wetlands...This was not a casual review by the FDEP." The applicant continued "As discussed in our meeting the FDEP has evaluated the near road option and determined that such location does not minimize the potential impacts to affected wetland areas when compared to the final design." The applicant also responded to two suggested scenarios, submitted as hand drawn sketches, for relocation of the house pads along SR 3. The applicant demonstrated that the two scenarios would place the eastern edge of the house pads at 315' and 285', respectively, into the property from SR 3 right of way. Using a conventional septic system would require a minimum pad of 200' by 200' regardless of where it is located.

The District is correct in its position that the applicant did not provide documentation to substantiate his claim that local and state authorizations would not be received for the relocation of the house pads along SR 3 (MFR, p.10). The applicant did not furnish the Corps with a decision document from Brevard County concerning the piping or relocation of the west ditch. The applicant did not provide a serious response to the District regarding the request to consider a PBS sewage treatment system even though the Brevard County Environmental Health Services stated they would be happy to direct the applicant towards the assistance they would need. The rebuttable presumption at 40 CFR 230.10(a)(3) is intended to increase the burden on an applicant for a non-water dependent activity to clearly demonstrate that no less environmentally damaging practicable alternative is available.

The Army Corps of Engineers Standard Operating Procedures for the Regulatory Program, April 8, 1999, states "The Corps determines the project purpose, the extent of the alternatives analysis, determination of which alternatives are practicable, which are less environmentally damaging, the amount and type of mitigation and all other aspects of the decisionmaking process (RGL 92-1)." It further states "It always makes sense to examine first whether potential alternatives would result in no identifiable difference in impact on the aquatic ecosystem. Those alternatives that do not, may be eliminated from the analysis since Section 230.10(a) of the Guidelines only prohibits discharges when a practicable alternative exists which would have less adverse impact on the environment." Emphasis added.

Both, the U.S. Environmental Protection Agency, letter dated February 3, 1999, (after being given an additional 30 days to review the proposal), and the National Marine Fisheries Service, letter dated January 8, 1999, recommended that the activity as proposed be denied. The EPA suggested that the proposed house pads could be located adjacent to SR 3 and elevated walkways could provide access to the river. Neither agency took a strong position, with regard to Section 404 (q) of the Clean Water Act, for elevation of this proposal, as established under the Memorandum of Agreement between the USACE and their respective agencies. Both agencies spoke of the historical salt marshes that existed prior to the impoundment of this site in 1958, but neither spoke of the quality of the existing wetlands. The EPA stated that "limited wildlife and water storage are still present."

Following the appeal, a site visit was conducted on June 12, 2000. The appeal review officer observed that, with the exception of the road embankment at SR 3, spoil mounds adjacent to the ditches and the impoundment berms, the entire site is a wetland. No judgements were made regarding the value of the wetlands. However, an observation was made that some of the areas immediately west of the easternmost ditch were experiencing some level of stress. This observation is consistent with bare and defoliated areas depicted in aerial photographs submitted with the appeal.

I find that the District has not clearly documented its argument that the more valuable wetlands exist on the eastern portion of the site near the waterfront and therefore have not demonstrated that that the alternative to locate the house pads near SR 3 is a less environmentally damaging alternative. The decision is remanded to the DE to document by clear and convincing evidence the contrast in the value of the wetlands on the site and thereby document that the alternative to locate the house pads near SR 3 is less environmentally damaging. The applicant should submit the requested information regarding the PBS sewage treatment system in order for the District to factor the facts into their decision.

In addition, regulations at 33 CFR 325.2(a)(6) state "If a district engineer makes a decision which is contrary to state or local decisions, the district engineer will include in the decision document the significant national issues and explain how they are overriding in importance."

In addition to the above, the permit decision is remanded to the DE to document whether the project impacts national issues. The District has identified, although not singled out as a national issue, the importance of the site as wildlife habitat and the value of the mosquito impoundments remaining intact. The MFR, page 10, states "The subject site is within one of three remaining intact impoundments along this stretch of the Banana River. The three impoundments are nearly 300 acres of contiguous, intact but unconnected, mosquito impoundments north of the subject site." The MFR, page 11, continues "The Corps determined that the integrity of the impoundment as a viable habitat corridor for wildlife is important to maintain. Preservation of wetlands immediately adjacent to the Banana River which are not segmented by roads or house pads is essential for preserving the habitat functions." However, the District has failed to identify these as national issues and demonstrate how these concerns are overriding (of the state and local decision) in importance. The District must clearly identify these issues, within the decision document, and explain how they are overriding in importance when issuing a decision contrary to state and local decisions.

Reason 2: "Irene Sadowski has insisted on the appellant going back through experimental wastewater septic permitting which is not provided by ordinance in Brevard County, has never been permitted in Brevard County, and is not provided in rules or ordinances promulgated by the State of Florida or Brevard County. In this unreasonable insistence on an unlawful procedure shows the result of judgement of arbitrary and capricious personal preference – not sound environmental science based on established principle. The argument that the property owner can't know until after the application has been filed is meaningless in these facts. The property owner has been through years of alternative site selection on this property with ACOE and FDEP."

FINDING: The appeal does not have merit.

ACTION: No action required.

DISCUSSION: As mentioned above, the District suggested the applicant consider the PBS systems as an alternative sewage treatment, which may minimize impacts to wetlands by reducing the size of proposed house pad. The applicant responded by referring to a letter from the Brevard County Environmental Health Service (BCEHS) that stated that these types of systems were not an option that was available to BCEHS when they first entertained the permitting requirements for the property in question. BCEHS added, "If you would like some guidance on performance-based systems, I'd be happy to direct you towards the assistance you would need..." The applicant further stated, "There are some theoretical deep-well septic injection that was discussed at the meeting which may cut down the pad size some, but the waste treatments have been investigated thoroughly and have been determined to be experimental/conceptual performance-based systems only – not recommended for subject sites under existing laws and regulations." There is no indication that this type of system was considered in any other permit requests for similar activities along this portion of the Banana River. In the evaluations of permit applications by Anderson, Skowron, and Stewart (see Reason 3 below) a self-contained package plant was evaluated and it was concluded that it "would require much more filled land than that presently proposed." The applicant provided no documentation of its investigation that would aid the District in concluding whether or not a performance-based septic system is a viable option.

I find that the District's request was an appropriate effort to identify methods to potentially reduce wetland impacts and that the applicants' response was inadequate.

Reason 3: "The ACOE has treated the applicant entirely different from applicants in similarly situated conditions, especially in regard to the Micah Savell property, immediately to the south of the instant applicant's property, where the property owner was allowed to disturb 100% of the ACOE jurisdictional property including digging a pond for the house pad and access fill. In all prior conversations with Irene Sadowski it was made clear to the property owner that no pond would be allowed to be dug on the subject property."

FINDING: The appeal does not have merit.

ACTION: No action required.

DISCUSSION: Regulations at 33 CFR 320.4(a)(1) state " The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case." 33 CFR 320.4(a)(3) continues "The specific weight of each factor is determined by its importance and relevance to the particular proposal. Accordingly, how important a factor is and how much consideration it deserves will vary with each proposal. A specific factor may be given great weight on one proposal, while it may not be present or as important on another."

The permit for the Micah Savell property, immediately south of the Hulse/Paul property, was issued on January 13, 1987. The permit allowed the placement of fill material in 0.9 acre of wetlands for the construction of a single-family dwelling. A pond was to be excavated on-site and the excavated material was to be used as fill. The house pad was located on the eastern side of the property, near the Banana River. The geomorphology of the Savell property was similar to the subject property. However, according to the Statement of Findings (SOF), dated January 6, 1987, for the Savell permit, "There is a berm on the north of the property that effectively separates this area from the wetlands to the north. There is a canal that runs along the north side of this berm, however, the canal provides no flow to this property. The area at one time was flooded by flowing wells that were capped by the Mosquito Control Districts within the last year. The area is now reverting to upland vegetation at a rapid rate."

In the evaluation of the permit application, the District considered three alternatives. The first was to construct the house entirely on uplands with a wooden walkway over the wetlands for viewing the water. They stated that there "is sufficient room to construct a house, but because the house would have to be constructed next to a major highway this is not desirable since there would be noise, traffic and loss of privacy." The second alternative was for the construction of the house pad and driveway in wetlands. "This would allow the applicant to have a house near the water, but would not allow a yard and would be unpleasing esthetically to the applicant." The third alternative was the construction of the house pad on the eastern side of the property, as proposed, near the Banana River. "Since there is no export of detritus from the site and since the area is drying out, the value of the wetlands is low. This alternative is deemed to be the most practicable in view of the mitigation and low quality of the wetlands."

The SOF addressed the cumulative impact of the Savell proposal by stating "[f]rom this property north there are no berms and the wetlands are contiguous. The issuance of this permit will set a precedent for future development from this property south...If all the sites to the south are developed in similar fashion to this one there will be minimal net loss of wetlands."

The District evaluated the Micah Savell permit application on its own merit. The District recognized that the value of the wetlands had changed within this particular mosquito impoundment with the capping of the free flowing well within it and made its decision based on that fact. There is no evidence that the District provided preferential treatment to Mr. Savell.

Subsequent to the issuance of the Savell permit, from 1988 to 1995, nine other permits for house pads were issued for property to the south as follows: (a) William Brant (198800357) issued December 1988, consisted of a 1.4 acre parcel with a 0.59 acre fill on the eastern side of the property, with mitigation; (b) David King (198801130) issued December 1988, consisted of a 1.4 acre parcel with a 0.59 acre fill on the eastern side of the property, with mitigation; (c) Steven Young/John Crissy/Sanders (198800301) issued March 1989, consisted of a 2.4 (approx.) acre parcel with a 1.3 acre fill on the eastern side of the property, with mitigation; (d) Mr. Anderson (199102086) issued April 1994, consisted of a 3.5 (approx.) acre parcel with a 1.01 acre fill in the central portion of the property, with boardwalk access and mitigation, existing pond; (e) Mr. Skowron (199102085) issued April 1994, consisted of a 1.86 acre parcel with a 0.43 acre fill in the central portion of the property, with boardwalk access and mitigation, existing pond; (f) Mr.

Stewart (199102087) issued April 1994, consisted of a 2.8 (approx.) acre parcel with a 0.88 acre fill in the central portion of the property, with boardwalk access and mitigation; (g) Edward Poe (199400539) issued February 1995, consisted of a 1.38 acre parcel with a 0.44 acre fill – plan was revised and moved west, immediately adjacent to SR 3, with mitigation; (h) Mary Murphy (199400538) issued February 1995, consisted of a 1.45 acre parcel with a 0.47 acre fill – plan was revised and moved west, immediately adjacent to SR 3, with boardwalk access and mitigation; (I) Betty Parrish (199400537) issued February 1995, consisted of a 1.27 acre parcel with a 0.49 acre fill – plan was revised and moved west, 100 feet from SR 3, with boardwalk access and mitigation.

Each of these permit requests was evaluated on its on merit. Even though the District acknowledged that the issuance of the Savell permit would set a precedent for future development from the Savell property south, the District was consistent in working with applicants to minimize impacts to wetlands and mitigate for those that could not be avoided. Since 1988, as the permit summaries above indicate, the District has made an effort to encourage development on the western portion of the various sites, along SR 3, and to effect mitigation on the eastern portion, near the Banana River.

A thorough review of the application submitted by Mr. Hulse indicates that "digging a pond for the house pad and access fill" was not included as a part of the request for Department of the Army authorization. The excavation of a pond as a source of fill, for construction the house pad and access road, was not included in the FDEP Environmental Resource Permit issued on December 10, 1998. Furthermore, the Administrative Record contains no information regarding written or verbal requests for the digging of a pond for house pad and access fill on the subject property.

Reason 4: "The intentional imposition of frustration due to unreasonable delay. The property owner was compelled to involve its congressional representatives after over a year with no action."

FINDING: The appeal does not have merit.

ACTION: No action required.

DISCUSSION: the District received the subject application on December 1, 1998. The public notice was issued on December 10, 1998. By letter dated January 8, 1999, the USEPA requested an extension of the comment period until February 8, 1999. The District granted this request. By letter dated March 9, 1999, the District forwarded comments to the applicant and requested a response within 30 days. By letter of April 8, 1999, the applicant's attorney provided a partial response to concerns and tentatively scheduled a meeting with the District for April 22, 1999. A meeting to discuss/resolve issues was held on April 22, 1999. By letter to the applicant's attorney, dated April 30, 1999, the District reiterated the need to receive information requested at the meeting. By letter dated July 16, 1999, the applicant provided a response to comments received and District concerns. By letter dated October 1, 1999, the applicant's attorney expressed frustration over time delays, reiterated that requested information had been submitted to the District in the July 16 letter, and requested the status of the application. The RFA (page 3)

states "The permit was not acted on for more than a year due to computer errors and eventually the property owner had to enlist the aid of congressional members to end the delay". The chronology above indicates the permit evaluation was on track with regard to time. At the appeal conference held on July 13, 2000, Ms Sadowski stated that "When the decision document was being prepared the computer locked up and the decision document was lost...This caused a two-month delay in completing the decision document." This was a rare and unfortunate occurrence for which we express our regret. We apologize for any frustration this may have caused. However, the decision to issue or deny a permit is based on the merits of the proposal and the ability to resolve outstanding issues, not the time involved in the evaluation. The delay in reaching a decision for this proposal was not intentional.

By letter dated January 12, 2000, the applicant's attorney also stated "It is a Corps rule that the Corps will respond to applications with a denial or granting with conditions within One Hundred Twenty (120) days after the application date." Under the Government Performance and Results Act of 1993, the Civil Works Regulatory Program identified a Program Goal to: "(1) Administer the Regulatory Program in a manner that renders fair and reasonable decisions for applicants; and, (2) Administer the Regulatory Program in a manner that Provides for efficient decision making." The Regulatory Program developed a Program Performance Measure (Indicator) as follows: "Individual Permits Complete within 120 days." A Performance Target was established as follows: "Have 70% of Individual Permits completed in 120 days." There is not a requirement that each specific individual permit application be evaluated within 120 days.

In comparison to the subject application, completed in 457 days, the permit completion time for other applications identified in the FRA and the MFR are as follows: Savell – 230 days; Brant – 222 days; King – 222 days; Young/Crissy/Sanders – 364 days; Anderson – 868 days; Skrowon – 868 days; Stewart – 868 days; Poe – 375 days; Murphy – 374 days; and Parrish – 433 days. The average completion time for these 11 permit applications is 480 days. The permit applications for Anderson, Skrowon, and Stewart followed a path similar to the subject application. A previous application (89IPT-90672) for this site was denied without prejudice on August 20, 1990, due to denial of water quality certification by the FDEP. After re-submittal of these three applications on November 20, 1991, they were considered withdrawn by the District, from August 5, 1992, to December 22, 1993, until revised project plans were received. These 504 days spanning this period are included in the 868 days of completion time indicated above.

The Administrative Records of the permit activities in the vicinity of the subject permit document the consistency of the District to minimize impacts to wetlands with efforts to adjust the project footprints to conform to existing impacts, move the fills to the west, and through mitigation. The long lapse of time involved in the evaluation of these proposals, including the subject proposal is due to the complex issues brought about by past wetland impacts, changing attitudes toward the resource, varying agency opinions, and the pressure to develop near the water.

Reason 5: "The requirement for the property owner to reiterate state and local permitting which led to the present house pad location. The property owner would be compelled to refile State and local government applications, risk renewed denial, administrative and legal remedies."

FINDING: The appeal does not have merit.

ACTION: No action required.

DISCUSSION: Regulations at 33 CFR 320.4(j) state that "[p]rocessing of an application will proceed concurrently with the processing of other required Federal, state, and/or local authorizations or certifications." In this case, after the initial denial by the FDEP and the subsequent denial by the USACE, the applicant pursued the hearing process and the required Environmental Resource Permit from the FDEP independent of the USACE involvement. The fact that the FDEP issued a permit for a specific location does not preclude the USACE from reaching its own conclusion. The FDEP's permit informed the applicant that the USACE "may require a separate permit", and that "[t]his authorization does not relieve you from the requirements to obtain all other permits and authorizations". The application submitted to the District was a joint application with the FDEP and, as stated above, coordination between the District and the FDEP was limited. There was no indication that the FDEP would have required a new public interest review to allow for modification of their permit. The activity to be permitted would require water quality certification and coastal zone consistency from the FDEP prior to the issuance of a permit.

As stated above, in Reason 4, the permit applications for Anderson, Skrowon, and Stewart followed a path similar to the subject application. In a letter to the District, dated April 9, 1992, in response to an earlier letter from the District, their attorney, Mr. J. Alan Fox, stated "your letter indicated that DER [FDEP] agrees with the project modifications and relocation of the house pads set forth in your proposed drawing. Based on my conversations with Barbara Bess, I believe the Department strongly objects to the proposed changes and distinctly prefers the plans approved in the respective DER [FDEP] permits for these parcels. Those permits were the result of extensive site work between DER [FDEP] and the applicant's consultants as well as protracted negotiations by the parties. He continued, "not all "uplands" is situated farther away from the river... DER [FDEP] recognized this fact and directed my clients to redesign their projects, as they now appear in the COE applications...the permits were issued without administrative hearings because Messers Skowron, Anderson, and Stewart voluntarily redesigned their projects to incorporate the changes requested by DER [FDEP]."

In a letter dated October 22, 1992, Mr. Cox stated "When we met on site in May 1992, it was to resolve the District's concerns and the differences between the Corps' and DER's [FDEP] directives to the landowners... As a result...my clients agreed to request that DER [FDEP] allow modification of their permits...Don Meldon...[FDEP] indicated that should be acceptable to DER [FDEP] as a minor modification of the permit." Mr. Cox added, "The request for modification will be filed with DER [FDEP] after the Corps permit is received." In a letter dated November 9, 1993, he stated "Because the Corps has requested changes in the site plans previously approved by DEP [FDEP], it will be necessary for my clients to secure revised permits from that agency once the Corps permits are issued." This permit activity indicates that FDEP is amenable to modifications of their permits.

Regarding local permits, the implied requirement by BCEHS for a 200' by 200' house pad to accommodate a traditional septic system would remain the same regardless of where the house is

located on the property so long as the appropriate setbacks from open water are met. There is no evidence in the administrative record of the absolute size requirement for the traditional septic system. Size requirements are based on the size of the facility and the number of bedrooms. The June 21, 1999, letter, from Plata Engineering, Inc., states the "septic system has been designed to meet the absolute minimum size requirements as set forth by the Chapter 64E6, Florida Administrative Code (Standards for onsite Sewage Treatment and Disposal System) with regards to sizing and minimum system set-backs of 75 ft. from wetlands and water bodies." There is no indication that the septic field size was based on an "executive home" verses a "home" on each lot. Scaled drawings in the application indicate the septic fields for each house pad are approximately 1100 square feet (26' by 42' for Hulse and 24' by 46' for Paul). The 200' by 200' houses pads are 0.918 acre with the septic fields centrally located on each. Both site plans indicate 75' setbacks of the septic fields from the boundaries of the house pads. By letter dated June 1, 1999, the Brevard County Board of Commissioners stated "[t]he proposed plot plans currently being reviewed by the Army Corps of Engineers...are the result of the October 1998, Permit Mediation between the owners and the Florida Department of Environmental Protection...the FDEP originally denied the permit application, then sent the owners to the State of Florida Department of Health and Rehabilitative Services ... in 1996 for a variance from the setback requirements between the proposed septic systems and the surface waters. The variance request was denied...Consequently, the FDEP worked closely with our office to help determine the "best fit" scenario, which by the way, was the one that was agreed to as a result of the 1998 mediation." As stated above, the applicant did not provide a serious response to the District regarding the request to consider a PBS sewage treatment system even though the Brevard County Environmental Health Services stated they would be happy to direct the applicant towards the assistance they would need.

There is nothing in the Administrative Record to indicate that the BCEHS would require additional, protracted, permitting requirements if the proposal were modified.

The applicant did not furnish the Corps with comments from Brevard County concerning the piping or relocation of the west ditch.

I find that agreements reached among the applicant, FDEP and BCEHS were independent of the USACE involvement and that the attempts by the District to reduce impacts to wetlands, which may have required further coordination with State and local agencies, were appropriate.

Reason 6: This is a compilation of other issues identified by the appellant as misrepresentations or errors in the MFR. The appellant states "There are many points brought out in that Memorandum which are erroneous or at issue in this appeal: The conclusions reached by Irene Sadowski are a result of personal preference and not the result of scientific study or environmental analysis." These issues, not identified and addressed in the previous five reasons for appeal, include:

a. The RFA states "The most disturbing finding that is an intentional misrepresentation...Irene Sadowski makes the transition from writing about the artificial wetlands on this berm site to the cumulative impacts on the lagoon system...It is unclear what she means by her use of the term "lagoon system."

FINDING: The appeal has merit.

ACTION: The decision is remanded to the DE to define the terms used for the various aquatic ecosystems discussed within the decision document and revise the decision document so that it is clear to the reader which aquatic ecosystem is being discussed in the context of any specific issue.

DISCUSSION: The appellant presented an argument in the FRA that in the MFR, "Conclusions of Alternative Analysis" (page 15), the interchanged terms "lagoon system", "Indian River Lagoon", "impoundment", and "Banana River" are confusing and represent an intentional misrepresentation of the alternative analysis and cumulative impact issues which were used in the basis for denial.

The appellant makes the statement, regarding conclusions reached, in the MFR, about secondary effects on the aquatic ecosystem, "applicant is entitled to know what those effects would be and what aquatic ecosystem...is even referring to."

During the appeal conference, Ms. Sadowski was asked what is meant by the term "lagoon system" as used in the MFR, page 15, and paragraph 7.d.? "Does this refer to the Banana River, the Indian River Lagoon, the impoundments, or other?" She stated "this refers to the Indian River Lagoon System including the Banana River. She referred to page one of the MFR which referenced the Indian River Lagoon Comprehensive Conservation and Management Plan (IRLCCMP). Although the IRLCCMP is explained later in the MFR, there is no explanation of the use of the terms, listed above, within the decision document.

b. The appellant pointed out in the RFA that in the MFR (page 24), "Cumulative and Secondary Impacts" the issue "[t]he segmentation/fragmentation of the impoundment would hinder mosquito control efforts the [sic] within the impoundment should the need arise. Intrusion of homes into the impoundment would hinder aerial inspection and treatment and will likely increase human/mosquito contact." He points out that the decision document "does not cite any policy or findings within the 404(b)(1) Guidelines that talks about mosquito control." He adds "the ...BCMCD...is still influencing the application though the BCMCD has no legal authority to impose any regulations on this property."

FINDING: The appeal has merit.

ACTION: The DE should further document the present and reasonably foreseeable future cumulative environmental impact analysis, evaluate the relationship of prior environmental impacts to present and potential future cumulative impacts, and then reconsider the associated conclusions.

DISCUSSION: The appellant is correct in that the 404(b)(1) Guidelines do not talk about mosquito control and the BCMCD has no legal authority to impose any regulations on this property. However, the 404(b)(1) Guidelines at 40 CFR 230.11(g)(2) defines cumulative effects as "the changes in an aquatic ecosystem that are attributable to the collective effect of a number

of individual discharges of dredged or fill material. Although the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems." Continuing at (g)(2), "Cumulative effects...should be predicted to the extent reasonable and practical. The permitting authority shall collect information and solicit information from other sources about the cumulative impacts on the aquatic ecosystem. This information shall be documented and considered during the decision making process...." Emphasis added. The District was correct by including in the decision document the concerns, identified by the BCMCD, regarding mosquito control. (See below – the NEPA definition of effects..."health").

In addition, the 404(b)(1) Guidelines at 40 CFR 230.11(h)(1) defines secondary effects as "effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged for fill material." Continuing at (h)(2), "Some examples of secondary effects on an aquatic ecosystem are fluctuating water levels in an impoundment and downstream associated with the operation of a dam, septic tank leaching and surface runoff from residential or commercial developments on fill." Also, below, see the "NEPA" definition of indirect effects.

In addition to complying with the 404(b)(1) Guidelines, the USACE decision document must meet the requirements of the National Environmental Policy Act (NEPA). The NEPA definition of cumulative impacts (40 CFR 1508.7) states " "Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."

The NEPA definition of effects (40 CFR 1508.8) states " "Effects" include: (a) Direct effects, which are caused by the action and occur at the same time and place. (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems...Effects includes ecological... aesthetic, historical, cultural, economic, social, or health, whether direct, indirect, or cumulative."

Elsewhere in the RFA the appellant quoted from the MFR (page 16), "Cumulative effects on the aquatic ecosystem" which states "Development along the shoreline of the Banana River will result in the degradation of seagrasses by the addition of sediments, pesticides, herbicides, insecticides, and petroleum products into the system. The degradation will effect the entire food chain." The appellant continues, from the MFR (page 17),"Secondary effects on the aquatic ecosystem", "Development of land immediately adjacent to the Lagoon will result in the degradation of the aquatic ecosystem. Seagrass beds are abundant throughout the Banana River and are the primary base of the food chain." Emphasis added. He uses these quotations in the context of the confusing terminology associated with the term "lagoon system" addressed above

in Reason 6.a. However, he is also taking issue with the "speculative conclusion that there will be secondary effects on the "aquatic ecosystem" as a result of this project...."

The MFR discussed ten prior permit activities in the mosquito impoundment immediately south of the subject impoundment and permit site and discussed reasonably foreseeable cumulative impacts associated with this project. Other than discussions of onsite avoidance and mitigation for the prior permits, the decision document provided minimal details regarding specific present and reasonably foreseeable cumulative impacts related to those activities.

The MFR did not discuss whether there were other ongoing or potential cumulative impacts to the aquatic environment, outside the control of the USACE regulatory program, which have or continue to contribute to adverse impacts to the surrounding ecosystems. Potential sources of impacts might include industry, road construction, residential development, and other potentially environmentally adverse activities.

It is undisputed that there are likely to be environmental impacts in the foreseeable future. However, past and ongoing activities are an important component regarding reasonably foreseeable impacts on issues such as water quality and the vitality of seagrass beds.

It is reasonable to assume approving a series of projects with similar environmental impacts could result in a cumulative increase in those impacts. However, the MFR did not describe the nature of the present condition of water quality and seagrass beds, in relation to anticipated future cumulative environmental impacts to water quality and seagrass beds in detail.

The MFR (page 15) states that "Direct impacts of filling and segmentation of the impoundment will significantly degrade the Lagoon system by setting precedents resulting in adverse cumulative impacts..." The MFR (page 17) states "should this project be issued as proposed, precedents will be set for the remaining property owners within the impoundment... Development along the shoreline of the Banana River will result in the degradation of seagrasses by the addition of sediments, pesticides, herbicides, insecticides, and petroleum products, into the system...Seagrass beds are dependent on good water quality (clarity and sunlight) ... Development will increase sedimentation, pollutant load...septic seepage into the lagoon system resulting in negative effects on the aquatic ecosystem." Emphasis added. As noted above, according to the project manager, references to the "lagoon system" and "system" means the Indian River Lagoon System including the Banana River.

I find that the administrative record does not support reaching this conclusion because the present and future cumulative adverse environmental impacts of the project have not been adequately defined or explained.

Based on the past history of residential fills in the area, if this permit is approved, the District is likely to receive additional residential fill permit requests in the future. Authorization of this project could (vs. will as emphasized above) contribute to the cumulative impacts in the future if additional residential fills were authorized. Approving this project would not automatically produce cumulative impacts associated with additional residential fills that the district has not yet authorized. For such cumulative impacts associated with additional authorized residential fills to

occur, applicants would have to request, and the district would have to approve, additional residential fills in the area. Although such cumulative impacts could be evaluated as reasonably foreseeable as part of a cumulative environmental impact analysis, they should be characterized as potential impacts that could occur, not impacts that would definitely occur.

The district could determine this project would produce a cumulatively major detrimental environmental impact in combination with other environmental impacts outside control of the USACE regulatory program. The decision document did not identify such impacts. Additional supporting information regarding the specific type of cumulative impacts that could occur would be needed to support such a conclusion. Perhaps the IRLCCMP and other entities, familiar with environmental condition of the Indian River Lagoon System, have such supporting information.

b. "[T]he applicant takes exception to the Finding by Joe R. Miller, District Engineer, that this would not be an unanticipated taking."

FINDING: This appeal does not have merit.

ACTION: No action required.

DISCUSSION: The appellant states "The absence of sufficient study, the intentional delays, misrepresentations of the Memorandum in support of denial, the unequal treatment of these property owners and the speculative and confusing cumulative impact analysis are fertile grounds for this property owner to base a takings case in Federal Court."

This issue arises from the statement in the MFR that the DE complied with the requirements of Executive Order 12630 and the Attorney General's Guidelines for the evaluation of Risk and Avoidance of Unanticipated Takings by reviewing and considering the Takings Implication Assessment prepared for this permit. The DE "concluded that the denial of this permit does not indicate a takings implication.

The TIA is an internal working document not subject to applicant or public review or release under the Freedom of Information Act. The TIA is not an action forcing mechanism, but provides the decision-maker with full disclosure of the takings implications and fiscal impacts of the proposed action.

J. RICHARD CAPKA
Brigadier General, USA
Commanding