ADMINISTRATIVE APPEAL DECISION

PERMIT DENIAL

MR. AND MRS. MATTHEW HOLIBAUGH

FILE NUMBER 2005-7604

JACKSONVILLE DISTRICT

DATE: OCTOBER 31, 2007

Review Officer: Michael F. Bell, US Army Corps of Engineers, South Atlantic Division, Atlanta, Georgia

Appellant Representatives: Attorney at Law E. Owen McCuller, Jr., Esq., and Consultant Daielle Fondren

Request for Appeal (RFA): April 20, 2007

Appeal Accepted: May 21, 2007

Appeal Conference/Site Visit: June 26, 2007

Summary of Decision: I find the appeal has merit as follows: a. the District's 404 (b)(1) Guidelines Analysis did not address whether the Appellants' particular alternative is practicable in regards to cost, existing technology, and logistics in light of the overall project purpose; b. the District's public interest review did not include the Appellants' specific proposal in weighing the review factors of economics and safety; and c. the District did not identify significant national issues and how they are overriding in importance in light of the Florida Department of Environmental Protection's decision to issue a water quality certificate. Additionally, the District did not coordinate with the state certifying agency or EPA concerning water quality issues in denying the Appellants' permit. The District's Supplement to the 1985 SOF omitted any discussion of the lot adjacent to the Appellants' property (lot 28) in its consideration of alternatives. This matter is remanded to the District Engineer for further analysis, coordination, and/or reconsideration of the permit decision consistent with the instructions in this administrative appeal decision.

Background Information: In November 1985, in a separate permit action, the Jacksonville District issued a Department of the Army (DA) permit authorizing the discharge of fill material into 0.2 acres of wetlands adjacent to the southern shore of the Mill Creek area of the St. Johns River. The project is located along Broad Water Drive, Section 01, Township 02 South, Range 27 East Jacksonville in Duval County, Florida.

The project purpose was for nine parking pads and driveways for future raised individual houses on pilings.

The 1985 DA permit authorized a small amount of wetland fill for parking pads on adjacent lots and the Appellants' Lot (29). The intent of the 1985 permit was to allow the construction of residences on pilings adjacent to each parking pad.

Prior to this authorization, the District denied a permit request for residential development at the same location. The denied project consisted of filling 2.2 acres of adjacent wetlands for nine house pads with garages, driveways, and septic fields. The 1985 permit authorized filling only 0.2 acres for garage pads and driveways. Subsequently, two residences were constructed in the ensuing twenty years.

Realtors requested a letter from the District to supply to prospective buyers stating that houses built on pilings would be exempt from jurisdiction under the Clean Water Act. In response, the District notified adjacent lot owners (30, 32, 35, and 36) by letter of May 3, 2005, that a permit was not required to construct pile-supported structures next to the filled pads for driveways and garages.

On December 20, 2005, Mr. and Mrs. Matthew Holibaugh submitted a DA permit application to the Jacksonville District to discharge fill into 0.37 acres of wetlands for the construction of a single-family residence, garage, and driveway on lot 29. Lot 29 was one of the lots that was subject to the 1985 permit. Fill placement would be in disturbed and/or transitional wetlands adjacent to the southern shore of the Mill Creek area of the St. Johns River. After the issuance of the Public Notice, the Appellants further minimized wetland impacts by reducing the fill amount to .196 acres. The proposed work consists of building a two-story house as opposed to a ranch style house and constructing a retaining wall at the east edge of the fill to minimize wetland impacts. The proposed work also includes construction of a single-family moorage facility. The Appellants propose to mitigate for the proposed project Impacts by purchasing mitigation credits from the Loblolly Mitigation Bank.

The District Engineer denied the permit request by letter, February 20, 2007, stating the project is not in the public interest and does not comply with the Section 404 (b)(1) Guidelines of the Clean Water Act. The Appellants disagreed with the decision and appealed the permit denial to the South Atlantic Division Commander on April 20, 2007. The South Atlantic Division Review Officer (RO) accepted the appeal on May 21, 2007.

Site Visit: On June 26, 2007, the RO conducted an on-site investigation with the Appellants and their consultants to review and discuss the permit area and surrounding environment. During the site visit, the RO found that the subject area compared favorably with the existing site conditions described in the District's Supplement to Department of the Army Environmental Assessment and Statement of Finding (Supplement).

Mill Cove (St. Johns River) borders the 0.85-acre project site to the northeast, and there is a bay hammock wetland to the southeast, a single-family home to the northwest, and a road to the southwest. Lot 29 consists of high quality, mature bay hammock wetlands. The property is a sloping sandy hill that drops off into the tidally influenced Mill Cove marsh. Loblolly bay, red bay, sweetbay, water oak, and southern magnolia dominate the bay swamp. The understory consists of juvenile trees and wax myrtles. Grapevine and Chinese tallow invade the perimeter of the lot due to adjacent land disturbance. The soils on the site are organic muck.

The RO concluded the field investigation and the attendees adjourned to the Jacksonville District office for the appeal conference.

Appeal Conference Participants: Michael Bell
Melanie and Matthew Holibaugh, Appellants
E. Owen McCuller, Jr., Esq., and Daielle Fondren
Appellant Representatives
Beverly Lawrence, Jacksonville District (PM)

APPEAL EVALUATION, FINDINGS and INSTRUCTIONS to the Jacksonville District Engineer (DE)

*** The Appeal Reasons below are transferred verbatim from the RFA**

Appeal Reason I: Incorrect Application of Law, Regulations, and Official Policy; Procedural Error

Part (A.) Use of 1985 SOF: The SOF [Statement of Findings] states that the Corps District decided to "sustain the [1985] denial" in its denial of the Application. The Corps District has incorrectly and improperly denied the Application based on the 1985 SOF, that was prepared for a permit denied 22 years ago, for a different application, fill location, fill amount, among other factual differences... As a consequence, the specific reasons for denial of the subject Application are not encumbered in the SOF.

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: During the Appeal Conference, the Appellant frequently stated that the District's use of the 1985 decision document was inappropriate. As stated in the background information, the 1985 SOF evaluated nine lots and not each lot individually. The District admitted that the 1985 decision document was dated and wrote a Supplement to the SOF in March 2007. According to the National Environmental Policy Act (NEPA) regulations, a Supplement to Environmental Impact Statements (and, by extension, Environmental Assessments) should be prepared when substantial changes

to the proposed action are proposed and/or significant new circumstances or information exists.

NEPA Regulations at Section 1502.9, Draft, final, and supplemental statements, states that Agencies:

- Shall prepare supplements to either draft or final environmental impact statements if:

    The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

    There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

Providing a Supplement to the 1985 SOF was appropriate since physical changes at the subject lots had occurred in the form of home construction and invasive plant species. The Supplement also discusses the construction on the nine lots that had occurred since 1985, and the Appellants project purpose, description, minimization, and mitigation efforts.

On page 1, the Supplement on page 1 discusses the following project history:

> A small amount of fill in wetlands for parking pads was authorized under permit number 85IPX-20647. The homes were to be constructed on pilings. Clearing, minor fill and construction work began on most of the lots, but the homes were not built. The 8 lots were subdivided and sold. This proposal is for one of the lots. Grape vine and Chinese tallow invaded the perimeter of the site due to the land clearing disturbances. A small stormwater pond was excavated within this lot and the adjacent lot. The remaining lots (30-32 and 34-36) have not been developed and site conditions are similar to lot 29. A house on pilings was constructed on lot 33...

On page 6, the Supplement continues:

> The project site is located within a nice bay hammock wetland system. The functions and values of the wetland have not changed significantly since the Corps denied the proposal on 1985. A home on pilings on lot 33 was built and has not disturbed the wetland system...A home on pilings with minimal fill is a viable alternative and would decrease nutrients, sediments and turbidity within the St. Johns River.

The District correctly identified changes since the 1985 SOF in the Supplement and evaluated the proposal on its own merits.

Regarding the use of the 1985 SOF in the Supplement, Corps regulation at 33 CFR 320.4, which address general policies for evaluating permit applications, 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***. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources. ***All factors which may be relevant to the proposal must be considered including the cumulative effects*** thereof... [emphasis added]

Clearly, the contents of the 1985 SOF are properly used as bearing on the factors to be used in evaluating the Appellants' application.

Part (B.) 404 (b)(1) Analysis. The 404(b)(1) Guidelines have not been specifically applied to the Application. Instead, the SOF incorporates the 1985 SOF 404 (b)(1) analysis. There has been no express determination under the current facts that an elevated structure is a practicable alternative and would have less adverse impact than the proposed structure. There has been no consideration of the cost and logistics of an elevated structure in light of project purpose, not of the safety of children on an elevated structure. There has been no consideration given that the alternative of an elevated structure has a cost substantially greater than the costs normally associated with this type of project. (Corps Standard Operating Procedures for Regulatory Program, April 8, 1999)...The District failed to make a determination made that an elevated residence was the least environmentally practicable alternative.

FINDINGS: This reason for appeal has merit. The District's 404 (b)(1) alternatives analysis in the 1985 SOF or in the Supplement did not address whether the Appellants particular alternative is practicable, in regards to cost, existing technology, and logistics in light of overall project purpose.

ACTION: Regarding the alternatives and minimization analysis, the decision is remanded to the District to clarify the Section 404 (b)(1) analysis, and if necessary as a result of that clarification, revisit the decision that the project did not comply with the Guidelines. It is recognized that the Appellants supplied non-specific information on the different costs associated with their alternative.

Discussion: At the Appeal Conference, the Appellants repeatedly stated that there has been no express determination under the current facts that an elevated structure is a practicable alternative that would have less adverse impact than a structure on fill.

Additionally, there has been no consideration of the cost, logistics, and safety of an elevated structure in light of project purpose. The administrative record (Record) contains a January 7, 1985, Memorandum for Record which is an evaluation of the Section 404(b)(1) Guidelines for the 1985 Application. The analysis discusses the practicability of the alternatives and minimization efforts for the entire subdivision. The District correctly identified some physical changes since the 1985 SOF in the Supplement but did not evaluate the Appellants efforts to avoid and minimize the impacts of their proposal.

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 sitting 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 is to have a single-family home located on a foundation instead of being elevated over wetlands. The Supplement identified that the basic project purpose is to construct a single-family residence with water access. The Appellants want to be on the waterfront. Housing does not require access or proximity to or sitting within a special aquatic site (wetlands), to fulfill its basic purpose and is therefore not water dependent.

Regulatory Guidance Letter (RGL) No. 84-9[1] 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.

The Appellants supplied information in the Record that other waterfront lots in the area are more expensive. They also asked a neighbor with an elevated residence his costs in constructing a house on pilings. The neighbor stated the cost to build an elevated residence raised the construction costs by 30%. The Appellants did not present actual engineering reports or written cost estimates to prove that an elevated house would cost

[1] This RGL is officially expired, but still offers useful guidance under these circumstances.

more or much more that a house on a solid foundation. The Appellants also expressed safety concerns for any future children falling from an elevated structure. Since the house does not have to be located in wetlands, an elevated structure would not be required at another upland location.

The District's determination that a raised residence is a practicable alternative is guided in part by the required presumption that less environmentally damaging practicable alternatives to the Appellants' proposed project are available. "Practicable" is defined in the CWA 404(b)(1) Guidelines at 40 CFR 230.3 as:

> The term *practicable* means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose.

The Appellants provided information to the District that the cost of building an elevated structure and the safety issues surrounding such a structure would make this alternative impracticable. The District did not conduct a Section 404 (b)(1) analysis using this information. Therefore, the decision is remanded to the District Engineer to determine if the Appellants' proposal is practicable, taking into consideration cost, existing technology, and logistics in light of the overall project purpose.

Part (C.) American Heritage River: The District cites as a general basis for denial that the St. Johns River is designated as an "American Heritage River" (AHR) under Executive Order No. 13061. The American Heritage River designation is not a regulatory classification and is not a funded federal project. The EPA, which administers the AHR program, expressly acknowledges that the AHR "initiative" is "without any new regulations on private property owners," but rather "is about making more efficient use of existing federal resources, cutting red-tape, and lending a helping hand." ... The Corps is, in effect, asserting an unadopted policy that all structures over 200 feet from the St. Johns River must be elevated, regardless of flood plain location, state water quality certification or quality of wetlands impacted.

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: In the RFA and during the Appeal Conference, the Appellant states that the District is using the St. Johns River designation as an AHR as a policy and gives too much weight to the designation in the decision making process. The District stated in the Appeal Conference that it considered the impacts of the proposal on the AHR in the Supplement to the 1985 SOF. The District also considered the other public interest factors discussed in the 1985 SOF to make a permit decision.

Regarding the public interest review, Corps regulations at 33 CFR 320.4, which address general policies for evaluating permit applications, state in its entirety:

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

The Corps' promulgated general policies for the public interest review plainly state that the listed public interest factors are not intended to be an exhaustive list. Section 320.4(a)(1) states that "all factors ... must be considered ... [and] among those are ...." The 1985 SOF discusses the listed public interest factors. The Supplement keys the impacts to the AHR to the listed public interest factor of water quality from the 1985 SOF. The District, in the Supplement on page 5, states:

> The St. Johns River was selected [as an AHR] due to community concerns about water quality impairment to the river resulting from nutrients, sediments and turbidity. Considering the applicant has an alternative available that would minimize the wetland impacts, the Corps has decided to sustain the denial decision.

The District appropriately used this factor in evaluating the permit application.

Part (D.) Public Interest: The decision document did not discuss all relevant public interest review factors and incorporate this review, as required under the Standard Procedures.

FINDINGS: This reason for Appeal has merit. The District's public interest review did not specifically address the impact of the Appellants' alternative on economics and safety in weighing the review factors.

ACTION: The decision is remanded to the District to include the Appellants' specific proposal in weighing the public interest review factors of economics, logistics and safety, and if necessary because of that clarification, revisit the decision that the project is not in the public interest. It is recognized that the Appellants did not supply cost estimates comparing of the alternatives.

Discussion: During the Appeal Conference, the Appellants re-stated that the District did not address the public interest factors that are specific to their application. The public interest review was not specifically applied to the Appellant's facts concerning cost and safety. The Supplement did state that the Appellants' proposal would fill more wetlands than a residence on pilings and would therefore have a negative impact on the wetland system.

As discussed in the above appeal reasons, Corps regulation at 33 CFR 320.4, requires:

> All factors which may be relevant to the [Appellants'] proposal must be considered, including the cumulative effects thereof: among those are conservation, ***economics,*** aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, ***safety,*** food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people... [emphasis added]

Therefore, the District must weigh the costs and safety of the Appellants' proposal in conducting the public interest review.

Part (E.) Water Quality Certification/Local Approval: The District failed to show and explain how significant national issues are overriding in importance, in denying the Application, in light of the State of Florida's issuance of the dredge and fill permit and water quality certification and local land use approvals (33 CFR 320.4(j)(2) and (4) and 325.2 (a)(6).

FINDINGS: This reason for appeal has merit

ACTION: The permit decision is remanded to the DE to determine whether the project impacts significant national issues and explain how they are overriding in importance when issuing a decision contrary to the State's position.

Discussion: During the appeal conference, the Appellants stated that the District made a decision that was contrary to the state of Florida's decision to issue a Water Quality permit for the project. The District did not include in the decision document how

significant national issues would be overriding in importance over the State's action. The PM conceded at the Appeal Conference that the District did not document how significant national issues would be overriding in importance over the State's action.

Corps regulations at 33 CFR 325.2(a)(6) state:

> If a district engineer makes a decision that 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.

The District has identified, although not as a national issue, the importance of the wetlands on the site throughout the 1985 SOF and the Supplement. However, the District has failed to identify what the national issues are and demonstrate how they are overriding 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.

In addition, Corps of Engineers Regulatory Guidance Letter 90-04[2] advises how the Corps Project Managers should consider water quality concerns.

The Guidance Letter further states:

> Although the state certification still satisfies the CWA Section 401 requirement in such cases, the DE must make his own independent judgments regarding compliance with 40 CFR 230.10(b)(1) and the consideration of water quality issues in the public interest review process. In exercising his judgment, the DE shall coordinate his actions with the state certifying agency and EPA.

The District did not coordinate with the state certifying agency or EPA in regard to water quality concerns.

Part (F.) NWP 29: The Application, on its face, meets the criteria for authorization as a Nationwide Permit for single-family residences (NWP 29). The District failed to follow the procedures in 33 CFR 330.5(d) in suspending or revoking a case specific activity's authorization under NWP 29 and Jacksonville District Permits, Final Regional Conditions, May 2000. The District failed to acknowledge that the adverse effects from the proposed single-family residence are more than minimal after considering mitigation.

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: During the Appeal Conference, the District stated that they followed proper procedures is determining that the permit application did not qualify for a

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[2] This RGL is officially expired, but still offers useful guidance under these circumstances.

nationwide permit. The District decided that the proposed project would cause more than minimal impacts and asserted discretionary authority over the activity. As a result, the Applicants had to apply for a standard (individual) permit.

The March 9, 1999, Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers (33 CFR Parts 320, 326, and 331) contains a discussion on comments received on the Proposed Rule. A number of comments requested that the appeal process be expanded to include the assertion of discretionary authority. The Final Rule on page 11708 states:

> The assertion of discretionary authority to require an individual permit for an activity is often based upon preliminary indications that the potential adverse effects of a particular project on the environment, or other aspects of the public interest, may be more than minimal. In such cases, the individual permit process is needed to investigate the probable effect of the project on public interest before making a final permit decision. In addition, the assertion of discretionary authority only addresses the form of authorization that is being considered, and not whether the proposed project will be authorized...Accordingly, at this time, we are limiting the administrative appeal process to denied permits, and to proffered individual permits that have been declined by the applicant.

The decision by the District to assert discretionary authority is not an appealable action.

Appeal Reason II: Omission of Material Facts

Part (A.) Distinction between Lot 29 and Lot 33: The Corps District failed to acknowledge or distinguish the factual differences between Lot 29 and Lot 33, cited by the Corps District in the SOF as representing the required degree of "minimization". Lot 29 is located on the periphery of the noted "bay hammock", with "disturbed", "invasive" vegetation, whereas Lot 33 is in the center of the previously undisturbed hammock. Also, omitted is the fact that the permitted elevated structure on Lot 33 wholly eliminates detritus production from mature bay hammock. Also, omitted is the fact that Lot 33 applicant originally applied for an elevated house. The subject Applicant did not. Also omitted, the Lot 33 applicant sought to locate its house significantly closer (122 feet) to navigable water, and further from the exiting road, than the subject Applicant. The Lot 33 applicant did not place the house as close as possible to the roadway, as did the subject Applicant. Omitted is the discussion of the fact that the Applicant's house would be outside of the 100-year flood plain. Unlike Lot 33, Lot 29 contains a retention pond, which has already altered the normal sheet flow on Lot 29. The record shows that the overall quality of the Lot 29 wetland to be filled "is lower in relation to the larger contiguous wetland system" in the 1985 denial and 'not of particular significance nor distinguishable from numerous other permitted wetlands". This key fact difference was omitted. Finally, omitted is the fact that the Applicants' house would be located in the same "footprint" that was approved in the 1985 Permit, whereas the Lot 33 house is

located in a different location, water ward of the 1985 Permit, but nonetheless was issued a permit.

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: The decision document compares lots 33 and 29. The Supplement on page 6 states:

> The project site is located within a nice bay hammock wetland system. The functions and values of the wetland system have not changed significantly since the Corps denied the proposal in 1985. A home on pilings was built on lot 33 and has not disturbed the wetland system...A home on pilings with minimal fill is a viable alternative and would decrease nutrients, sediments and turbidity within the St. Johns River.

During the Appeal Conference, the PM discussed the house on lot 33 and stated that the aquatic vegetation under the house had disappeared due to lack of light penetration. However, the other wetland functions of nutrient, turbidity and sediment retention remained. Lot 29 had invasive species but retained the same wetland functions. The residence on lot 33 was exempt from regulation so the Distinct did not extensively evaluate the impacts.

Corps 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 that the proposed activity may have on the public interest requires a careful weighing of all those factors, which become relevant in each particular case.

The District did compare the impacts of the two lots, but the comparison could have been more detailed. However, each permit must be evaluated on its own merits and the Record contained the material facts to evaluate the impacts on lot 29.

Part (B.) 1985 SOF: The incorporated "sustained" 1985 SOF contains numerous contradictory and omitted facts and analysis relative to the subject Application and SOF. The 1985 SOF addresses an application for 2.2 acres of fill, whereas the Application is for .196 acres. The 1985 SOF characterizes the "affected wetlands" as part of a "mature bay head," whereas the Application and SOF note "invasive grape vine and Chinese tallow" in the area of the proposed activity. The Corps reviewer, in fact, noted, "The fill would be placed in disturbed and/or transitional wetlands". The 1985 SOF "public interest" review is inapplicable to the Application's proposed fill activity, and a current public interest review is omitted from the SOF. The 1985 SOF 404(b)(1) Guidelines review is, likewise, inapplicable to the Application, in

material part, and omits discussion of many of the distinguishing facts between the 1985 Denial and the Application. For example, the 1985 SOF noted that these were state and federal agency objections, whereas there were no objections issued for the Application.

FINDINGS: This reason for appeal has no merit.

ACTION: None required.

Discussion: At the Appeal Conference, the issues discussed under Appeal Reason (A.) were re-visited when discussing this appeal reason. No new information was discovered in relation to omission of material facts.

The District provided a supplement to the 1985 SOF since physical changes at the subject lots had occurred in the form of home construction and invasive plant species. The Supplement also discusses the Appellants' project purpose, description, minimization, and mitigation efforts.

Part (C.) Lot 28: The Corps District failed to acknowledge and discuss the significance to the fact that the lot adjacent to Lot 29, Lot 28, was also included in the 1985 Denial application, and is now completely cleared and developed, with an on-grade house. The SOF omits the fact that the complete clearing of Lot 28 has had and effect on the quality of the wetlands to be impacted on Lot 29 resulting in "more facultative and nuisance plants on Lot 29 than would be normally expected."

FINDINGS: This reason for appeal has merit

ACTION: The Supplement did not discuss how or why lot 28 was granted a permit, or if a violation had occurred. On reconsideration, the District needs to include a comparison of the distinctions and similarities between lot 28 and lot 29. Without such a discussion, the District's action to deny the permit action appears arbitrary.

Discussion: During the field visit, the attendees observed that Lot 28 was filled and the fill disturbance had provided nuisance vegetation on lot 29. The house was not elevated, but was apparently built on fill. The Supplement did acknowledge that nuisance vegetation did encroach onto lot 29 but the lot still exhibited valuable wetland functions and values.

During the Appeal Conference, the PM did not have any information on the permitting associated with lot 28. No violations had been reported. A violation could have occurred in the past and was not reported. The District must ultimately evaluate each permit on its own merits. However, the District expressly relied upon the 1985 SOF and permit (which included all 9 lots) in its decision, and itself compared lot 29 with lot 33 as part of its evaluation. Without a discussion of lot 28, the consideration of alternatives is incomplete.

Part (D.) Elevated Structure: The Corps District failed to provide the factual basis for the conclusion that an elevated structure would provide any materially enhanced stormwater treatment than an on-grade structure located outside of a floodplain, on a lot with previously altered sheet flow and using the "Hydro-Mulch" stormwater treatment system required under the FDEP permit. There is no factual basis given for the SOF conclusion that "a home on pilings ...has not disturbed the wetland system." There is also no factual basis given for the SOF conclusion that construction of a home on pilings "would decrease nutrients, sediments and turbidity within the St. Johns River." (This conclusion, in fact, contradicts the Corps' expressed concern over blocking detritus transport to the river). The Corps' District failed to address the conflicting conclusion reached by the Applicant's environmental consultant that the Applicant's house would not significantly affect these functions. The Applicant's consultant concluded the "elevated structure would not prevent wetland loss nor achieve any drainage of flood abatement purpose given the site drainage works and above flood plain location of the residence". The SOF failed to also acknowledge and discuss the effect of the existing, recorded conservation easement encumbering Applicant's Lot 29, which provides a 200+ feet vegetated buffer between the proposed fill and navigable waters.

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: During the Appeal Conference, the PM and the Appellants stated that the 200 foot vegetated easement has been changed by the State and has little bearing in this Appeal. The State can apparently change the easement with each permit action.

The Supplement addresses most of the remaining relevant appeal issues associated with an elevated structure. The Record did not omit relevant material facts concerning an elevated structure.

Part (K.) American Heritage River Impact: Though the AHR initiative should not have formed the basis for the Corps permit decision, the Corps District, in any event, provides no factual support for the assertion that the proposed, .196 acre fill would have a negative effect on the American Heritage River initiative or lead to "further degradation of the river system." The SOF, in fact, concludes, contradictorily, "the effects of the project appear to be limited to the project area". The Public Notice also states the proposed fill "would not have a substantial adverse impact on Essential Fish Habitat or federally managed fisheries". Even the 1985 SOF recognized that 2.2 acres of fill would have a "negligible effect on shoreline erosion". Any concern over water quality impact to the river was conclusively addressed by Applicant's receipt of state water quality certification (33 CFR 320.4 (d), which conclusion also was not acknowledged by the Corps District.

FINDINGS: This reason for appeal has merit

ACTION: The permit decision is remanded to the DE to determine whether the project impacts significant national issues and explain how they are overriding in importance when issuing a decision contrary to the State's position.

Discussion: At the Appeal Conference, the issues discussed for Appeal Reason I, Parts (C.) and (E.) were re-visited when examining this reason appeal. Part (C.) addressed AHR impacts and Part (E.) discussed associated water quality issues.

Appeal Reason III: Use of Incorrect Data

Part (A.) Wetland Characterization: The SOF's description of the wetlands within the overall site is inconsistent with and incorrectly applied to the site wetlands to be impacted. The SOF characterizes the project site as consisting of a "nice bay hammock wetland system" and high quality, mature bay hammock wetlands; however, the area of impact is described as being "invaded by grape vine and Chinese tallow". The Applicant's environmental consultant described the quality and type of wetlands to be affected, as being of "much lower quality than the avoided on-site flood plain due to its minimal hydrologic or water quality functions and previous disturbance" and "not of particular significance nor desirable from numerous permitted wetlands". Therefore, the District has incorrectly characterized the impacted wetlands by ascribing the higher quality of non-impacted on-site wetlands...

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: At the Appeal Conference, the issues discussed under Appeal Reason I Part (A.) were re-visited when discussing this reason for appeal. No new information was discovered in relation to the use of incorrect data. The District provided a supplement to the 1985 SOF since physical changes at the subject lots had occurred in by home construction and invasive plant species. The Supplement states that the Appellants' lot has changed and degraded since 1985 from a vegetation standpoint. The wetland system still exhibits high wetland functions and values.

Part (B.) Changes Since 1985: The SOF incorrectly concluded, "things have not changed" since the 1985 Denial. In fact, at a minimum, there have been the following material changes: nine development lots have been sold to individuals, clearing and on-grade development of the adjacent development lot 28, clearing of Lot 30, construction of retention pond on Lot 29, invasive vegetation established on Lot 29, construction of the development roadway and connection to public sewer.

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: At the Appeal Conference, the issues discussed under Appeal Reason I Part (A.) were re-visited when discussing this reason for appeal. No new information was discovered in relation to the use of incorrect data. The District discussed the changes to the area in the supplement to the 1985 SOF since physical changes at the subject lots had occurred in the form of home construction and invasive plant species. .

Part (C.) Agency Comments: The incorporated 1985 SOF contained recommendations for denial from state and federal agencies. There were no recommendations for denial for the Application, and incorporation of the 1985 SOF, in its entirety, without acknowledgement of this critical fact, is incorrect.

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: At the Appeal Conference, the issues discussed under Appeal Reason I Part (A.) were re-visited when discussing this reason for appeal reason. The 1985 SOF referenced correspondence from concerned resource agencies recommending permit denial. The Supplement clearly affirmed that the same resource agencies did not respond to the public notice advertising the Appellants' proposal.

Part (D.) Economics: The incorporated 1985 SOF states that "deletion" of the 9 lots "should not have a significant affect in the economics of the total scope of development." This conclusion is incorrectly applied to the Application, given that the "deletion" of the Applicant's lot 29 will have a material adverse effect on the Applicant's economics. The 1985 SOF states that the applicant failed to document how the failure to develop the 9 lots will create a financial hardship and concluded the "public need" for the 9 additional lots does not out weigh the damage to the wetland resources." The Applicant, on the other hand, has documented the finical hardship of having to acquire another similar lot based on family income and record evidence shows that the construction costs for an elevated house would be increased by 30%. The Applicant's lot 29 cannot be "deleted" without a total "taking", and the referenced agencies did not object to the Application.

FINDINGS: This reason for Appeal has merit. The District's public interest review did not specifically address the impact of the Appellants' alternative on economics, and safety in weighing the review factors.

ACTION: The decision is remanded to the District to consider the Appellants' specific proposal in weighing the public interest review factors of economics and safety, and if necessary, because of that clarification, revisit the decision that the project is not in the public interest.

Discussion: At the Appeal Conference, the issues discussed under Appeal Reason (D.) were re-visited when discussing this appeal reason. No new information was discovered in relation to the use of incorrect data.

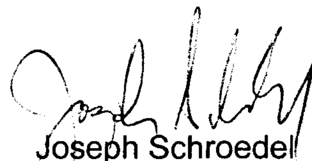
(E.) Lot 33 Impacts: The SOF incorrectly concluded that the lot 33 house on pilings "has not disturbed the wetland system." The lot 33 house footprint, on its face, has completely eliminated the pre-existing forested wetlands and "vegetative detritus produced by the mature bay hammock.

FINDINGS: This reason for appeal has no merit

ACTION: None required

Discussion: At the Appeal Conference, the issues discussed under Appeal Reason II Part (A.) were re-visited when discussing this reason for appeal. No new information was discovered in relation to the use of incorrect data.

CONCLUSION: As my final decision on the merits of the appeal, I find the appeal has merit as follows: a. the District's 404 (b)(1) Guidelines Analysis did not address whether the Appellants' particular alternative is practicable in regards to cost, existing technology, and logistics in light of the overall project purpose; b. the District's public interest review did not include the Appellants' specific proposal in weighing the review factors of economics and safety; and c. the District did not identify significant national issues and how they are overriding in importance in light of the Florida Department of Environmental Protection's decision to issue a water quality certificate. Additionally, the District did not coordinate with the state certifying agency or EPA concerning water quality issues in denying the Appellants' permit. The District's Supplement to the 1985 SOF omitted any discussion of the lot adjacent to the Appellants' property (lot 28) in its consideration of alternatives. I hereby return this matter to the Jacksonville District for additional analysis, coordination, and/or reconsideration of the permit decision consistent with the instructions in this administrative appeal decision.



Joseph Schroedel
Brigadier General, US Army
Commanding