

ADMINISTRATIVE APPEAL DECISION

CONNIE JOHNSON

FILE NO. SAJ-2007-4623 (IP-DEB)

JACKSONVILLE DISTRICT

20 SEPTEMBER 2010

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

Appellant: Connie Johnson

Date of Receipt of Request for Appeal: 8 February 2010

Acceptance of Request for Appeal: 25 February 2010

Appeal Conference: 26 April 2010

Authority: Section 404 of the Clean Water Act (CWA) (33 U.S.C. § 1344)

BACKGROUND

By letter dated 8 February 2010, Connie Johnson submitted a request for appeal (RFA) of the Jacksonville District's decision to deny her permit application. Ms. Johnson requested authorization to fill approximately 1.42 acres of waters of the United States (US) for the construction of an access road (0.75 acres of wetland impacts) and residential development (0.67 acres of wetland impacts) to include seven pile-supported homes, driveways, and septic tank fill pads. The property is located within the city of Freeport, adjacent to Choctawhatchee Bay, south of Piney Point Road and west of Watson Road, Latitude: 30°28'48.55" North / Longitude: -86°11'38.03" West, Walton County, Florida.

The Appellant submitted the initial permit application on 9 August 2007 requesting to impact 0.82 acres of wetlands for the construction of a road to access six residential lots, with 0.85 acres of onsite wetlands being offered as mitigation. Development plans for the residential lots were not included in the initial permit application. By letter dated 26 February 2008, the Appellant revised the project to include a total plan of development, which included the construction of six residential lots that increased wetland impacts from 0.82 acres (access road) to 1.36 acres (residential lots (0.54 acres)).

The application was considered complete, for public notice purposes, on 26 February 2008. The District circulated a public notice for the project on 27 June 2008. By letter dated 13 August 2008, the US Fish & Wildlife Service (FWS) recommended the permit be denied based on concerns for impacts to wetlands and insufficient mitigation. By letter dated 21 August 2008,

the District coordinated the FWS letter with the Appellant along with the District's comments and recommendations. By letter dated 2 October 2008, the Appellant replied to the District's 21 August 2008 letter. Among other things, the Appellant's 2 October letter further revised the application to exclude the 0.85 acres of onsite mitigation and instead use the acreage for a seventh lot. This increased wetland impacts from 1.36 acres to 1.42 acres. The Appellant proposed to purchase 1.06 credits from the Nokuse Mitigation Bank as mitigation for the 1.42 acres of wetland impacts.

By letter dated 8 May 2009, the State of Florida issued water quality certification (WQC) and Coastal Zone Management (CZM) for the project. Through telephone conversations on 29 June 2009 and 24 November 2009, and e-mail correspondence on 23 November 2009, the District advised the Appellant and agent that they were moving toward denying the permit.

On 7 December 2009, the District denied the permit. The denial was based on two grounds: noncompliance with the 404(b)(1) Guidelines (40 CFR Part 230), and a determination that the project was contrary to the overall general public interest. The District's conclusion that the Appellant's project was not in compliance with the 404(b)(1) Guidelines was based on the Appellant's failure to rebut the presumption that there are less environmentally damaging practicable alternatives to the Appellant's proposed project, and failure to "include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem." The District's 7 December letter noting that the project was contrary to the public interest specifically pointed to wetlands, general environmental concerns, and fish & wildlife values as factors supporting denial.

The Appellant contends she exhausted the review of alternatives and none are practicable after taking into consideration availability, capability, cost, existing technology, and logistics. Because of this, the Appellant was limited to the existing property and access easement as the practicable alternative. The Appellant further contends that they have made every effort to avoid, minimize and mitigate for impacts to waters of the US.

SUMMARY OF DECISION

Appellant's request for appeal (RFA) has merit. The administrative record does not contain adequate evidence to support the District's decision to deny the permit based on failure to comply with the 404(b)(1) Guidelines or the project being contrary to the public interest.

INFORMATION RECEIVED DURING THE APPEAL AND ITS DISPOSITION

1. The District provided a copy of the administrative record, which was reviewed and considered in the evaluation of this request for appeal.
2. The Appellant's agent supplied supporting documentation at the time of submittal of the RFA.

3. The District and Appellant's agent supplied information, prior to the appeal conference, in the form of answered questions asked at the conference.

APPELLANT'S STATED REASONS FOR APPEAL

Appeal Reason 1: "This project, as proposed, is in compliance with the Clean Water Act, Section 404(b)(1) Guidelines."

Appeal Reason 2: "Practicable alternatives to this project do not exist."

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

Appeal Reason 1: This project, as proposed, is in compliance with the Clean Water Act, Section 404(b)(1) Guidelines.

Finding: This reason for appeal has merit.¹

Discussion: No permit may be issued under Section 404 of the Clean Water Act unless it is in compliance with guidelines developed by the Administrator of EPA in conjunction with the Secretary of the Army pursuant to section 404(b)(1) of the Clean Water Act, with a potential exception only for situations where navigation and anchorage may be affected. 33 U.S.C. § 1344; 33 C.F.R. § 320.2(f); 40 C.F.R. §§ 230.2 and 230.12. The focus of these "404(b)(1) Guidelines" is on the protection of the aquatic ecosystem. 40 C.F.R. §§ 230.1 and 230.10. The level of effort, procedures, and documentation required to meet the 404(b)(1) Guidelines is to be commensurate with the significance and complexity of the discharge activity, and the seriousness of the potential for adverse impacts. 40 C.F.R. §§ 230.6(b) and 230.10.

The primary restrictions on discharges of dredged and fill material in the 404(b)(1) Guidelines are set forth in 40 C.F.R. § 230.10(a) through (d). See 40 C.F.R. § 230.5(a). These restrictions are: no discharge where there is a practicable alternative with less adverse impact on the aquatic ecosystem and no other significant adverse environmental consequences (230.10(a)); no discharge where it would result in a violation of State water quality standards, toxic effluent standards, or compromise the protection of endangered or threatened species or marine sanctuaries (230.10(b)); no discharge where it will cause or contribute to significant degradation of waters of the United States (230.10(c)); and, no discharge unless appropriate and practicable steps have been taken to minimize potential adverse impacts on the aquatic ecosystem (230.10(d)). In determining whether any one of these restrictions would preclude the issuance of

¹ This decision does not find merit because the project is indeed in compliance with the 404(b)(1) Guidelines, but because the District's decision to the contrary is not supported by substantial evidence.

a permit, the Corps of Engineers may rely in part on information provided by the permit applicant and other government agencies, but in all cases must independently evaluate and verify information in the record without undue deference to other entities to reach its determination.

The practicable alternatives analysis of 40 C.F.R. § 230.10(a) requires the Corps to determine whether “there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.” Practicable alternatives include those “which do not involve a discharge ... into waters of the United States,” as well as “[d]ischarges ... at other locations in waters of the United States.” 40 C.F.R. § 230.10(a)(1). A “practicable” alternative is one that “is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” 40 C.F.R. § 230.10(a)(2). An otherwise practicable alternative is “available” even if it is “an area not presently owned by the applicant, [if it] could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity.” 40 C.F.R. § 230.10(a)(2). If an alternative is unreasonably expensive to an applicant, 45 Fed. Reg. 85343 (Dec. 24, 1980), or does not “provide similar logistical opportunities,” Old Cutler Bay Permit 404(q) Elevation (13 Sept. 1990), it is not a practicable alternative. There is a presumption that practicable alternatives exist if a proposed project is not water-dependent. 40 C.F.R. § 230.10(a)(3).

Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or 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.

40 C.F.R. § 230.10(a)(3). There is an additional presumption that “all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site ... have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.” 40 C.F.R. § 230.10(a)(3). “Special aquatic sites” include wetlands. 40 C.F.R. § 230.41 (subpart E).

The basic principle of the practicable alternatives analysis is one of avoidance: “if destruction of an area of waters of the United States may reasonably be avoided, it should be avoided.” 45 Fed. Reg. 85340 (Dec. 24, 1980). The project purpose and practicable alternatives should be viewed from the perspective of a person or entity in the applicant's position. The practicable alternatives analysis is not susceptible to numerical precision, but requires a balancing of the applicant's needs with environmental concerns.

The burden to clearly demonstrate a lack of practicable alternatives and rebut the 404(b)(1) presumptions lies with the permit applicant. With guidance from the Corps, the applicant must conduct an assessment of practicable alternatives. The practicable alternatives analysis must be supported by appropriate documentation. See 40 C.F.R. § 230.6(b). The ultimate determination of whether the presumption(s) of the 404(b)(1) Guidelines has/have been rebutted is the sole responsibility of the Corps.

Where the 404(b)(1) Guidelines' practicability analysis presumption(s) is/are rebutted, an applicant must still demonstrate that "appropriate and practicable steps have been taken to minimize potential adverse impacts on the aquatic ecosystem" in accord with 40 C.F.R. § 230.10(d). This means that once the least damaging practicable alternative has been identified, steps must be proposed or agreed-to by the applicant to minimize project impacts through project modifications and permit conditions. Corps/EPA Mitigation MOA (1990).

In its 21 August 2008 letter, the District requested that the Appellant provide a practicable alternatives analysis. The letter stated that "[t]he overall project purpose is to construct an access road and septic tanks to service a proposed residential development in the Freeport area." It also provided "[e]xamples of alternative actions [which] include, but are not limited to ...: a. utilizing existing roads, e. using upland to upland bridges, or h. using a combination of the above actions." Attached to the letter was an "Alternative Analysis Package, Suggested Contents" prepared by the District to assist applicants such as the Appellant. The Alternative Analysis Package attachment included four principal parts:

- a. Purpose: Describe the basic purpose of the project. * * *
- b. Avoidance: Include: (1) set of criteria for site selection; (2) a definition of the geographic limits to the search for sites; (3) a system to rate a site against each of the criteria items and a method to comparatively weigh each rating; and (4) a report describing the search for sites, their rating, and a narrative that shows that the project must be located on a wetland and ... could not be changed to a non-wetland location. * *
- c. Minimization: Include: (1) alternate site plans; (2) a method to estimate the environmental consequences of each plan; and (3) a narrative that shows the quantity of fill is the minimum amount practicable. * * * Also, note that minimization must be shown for each of the alternate sites in the analysis of avoidance.
- d. Mitigation: * * *

The Appellant's 8 October 2008 letter stated with regard to the alternatives analysis:

Alternative access, which may result in less wetland impact, was considered prior to applying for a dredge and fill application for this project. The logical alternative evaluated, based on proximity, was access from Watson Road. However, privately-owned land lies between Watson Road and the lots proposed for development. The owner of the property lying north of Watson Road and south of the lots proposed for development was approached early in the alternative access evaluation process; however, the owner was requesting \$250,000 to purchase the lot that would have enabled this alternative access route. This amount was deemed to be significantly higher than market value for comparably zoned land in the area and, as such, further negotiations were not pursued. There are not feasible access routes from Watson Road as it is surrounded by privately-owned property, none of which is owned by any of the owners of the lots proposed for development.

The letter further noted that the 50-foot easement, for the access road, had originally been conveyed in 1974 for access to the project tract. Regarding the examples of alternative actions cited in the District's 21 August 2008 letter, the Appellant stated that

[u]pland-to-upland bridges are cost-prohibitive given the numerous wetland crossings and limited financial resources of the lot owners ..., are not environmentally-justifiable as a cleared, moderately-used trail road already lies within the only portions of the easement where upland-to-upland bridges would be physically possible ... [and] [b]ridges in most of these areas would have to be "built up", [and that] upland-to-upland bridges would be impossible in the southernmost wetlands ... [because] [t]here are no uplands to provide ... connection.

On 15 October 2008, the District and Appellant met to discuss the application. After the meeting, by 19 November 2008 email, the District noted that

the following items are still needed: * * * The project has received objection from the FWS regarding the need to consider alternatives Your alternatives analysis needs to include the information (e.g., inability to utilize neighboring development and other land owned by American Fidelity) you divulged at our last meeting. * * * This is the Corps' final RAI [Request for Additional Information]. * * * Following this period, a final determination will be made.

By 19 March 2009 email, the District requested additional information to complete its review of the project, including: "1. A cost estimate for construction of the proposed road with culverts at each wetland crossing. 2. A cost estimate for procuring an access easement over available uplands between Watson Road and the proposed subdivision. Such an access easement could be used for constructing a private ingress/egress access road." The Appellant responded by 22 June 2009 letter, stating:

It is assumed that the purpose of this request [for a cost estimate for construction of the proposed road] is to enable an analysis of the cost of constructing the proposed access road, including associated mitigation costs, versus the cost of purchasing an entire lot or [alternative] access easement Obtaining a cost estimate from a road construction company was deemed unnecessary based on the response to concern #2 below.

Regarding the cost of an alternative access easement, the Appellant stated that it had explored this option three to four years prior with the owner of a parcel between Watson Road and the proposed subdivision. The Appellant reported that the asking price of \$200,000 "was non-negotiable and deemed to be much higher than market value and presumably much more expensive than the cost of building the proposed access road" Subsequent attempts to contact the parcel owner had been unsuccessful. The owner of another parcel between Watson Road and the proposed subdivision was not willing or able to sell his land for an access easement, and was therefore also not a viable alternative.

The District's 29 June 2009 Telephone Conversation Record indicates that the District advised the Appellant

that the Corps is moving toward denying [the] permit for the project. The reason for denial is based on a presumption that a practicable alternative exists that would be less damaging. I explained that the 6/22/09 info he provided did not provide a cost estimate for the road and that there is property for sale ... off Watson Road that would provide an alternative. * * * [H]e said he would look into the lot for sale.

By 6 July 2009 email, the Appellant's consultant informed the District that

I just got off the phone with the realtor representing the owners of the parcel off Watson Rd. for sale. They are asking \$375,000 for 4 acres and will not entertain an access easement. This price is more expensive than the cost of constructing the access road through the current easement and purchasing mitigation. Conservatively, we could assume the road would cost 75K-100K. Mitigation, for DEP at least, is $1.06 \times \$65,000 = \$68,900$. Even if ACOE were to require double the mitigation (\$137,800), the cost of the road + mitigation would still be much cheaper than purchasing the property. * * * Moreover, even if the property were cheaper or if the owners would entertain an easement, we would still require 2 more access easements ... [which] would not be available based on previous conversations with these property owners. There would also be the costs associated with new survey, environmental review, redesign by the engineers, etc. * * * The easement has been established for decades and is written into each owner's deed. American Fidelity (the owner of the property through which the easement passes) has been approached regarding purchase of an alternative easement that would have less wetland impact and they are not interested in providing one. I believe the alternative analysis has been exhausted.

The District's 30 November 2009 Staff Summary for the permit denial stated that, "[a]s evident by land for sale near the proposed subdivision, the Corps determined that practicable alternatives to the proposed access road may be available." In its 7 December 2009 permit denial letter, the District summed up its conclusion regarding the Appellant's practicable alternatives analysis:

In the analysis of alternatives, your geographic search was limited to the proposed project site. The Corps has determined that there is an available parcel, located near the proposed subdivision on Watson Road, which could be used to construct a residential subdivision. Additional lands within the Freeport area may be available, which would be suitable for a residential subdivision and provide less damaging, practicable alternatives to the project. Therefore, the presumption that there are less environmentally damaging alternatives to the proposed project has not been rebutted.

The District's Environmental Assessment/Statement of Findings (EA/SOF) stated that the available parcel on Watson Road

could be used for more than one residential development, and ... could serve to avoid wetland impacts. Wetland impacts associated with construction of the proposed access road could possibly be avoided by re-aligning the proposed road through uplands located within the American Fidelity tract. The applicant claims that American Fidelity is not interested in pursuing an alternative road alignment to avoid wetlands. [p. 10]

It is the Appellant's obligation to rebut the presumption that there are less environmentally-damaging practicable alternatives. The District is obliged to control the parameters of, guide, and critically evaluate a permit applicant's practicable alternatives analysis. While the District states in its 7 December 2009 denial letter that the Appellant's geographic search was limited to the proposed site, it is evident that both the District and appellant focused their alternatives analysis on the access road. This is understandable given that, when it came to alternatives, the bulk of the impacts and environmental concerns expressed in the EA/SOF were tied to the access road. The examples of alternative actions in the District's 21 August 2008 letter, the discussion of "alternative access" in the Appellant's 8 October 2008 letter, the District's 19 March 2009 email requesting cost data for access easement alternatives and the Appellant's 22 June 2009 letter in reply, and the District's conclusion in its 30 November 2009 Staff Summary recommending permit denial that there was "an alternative access (lot adjacent to Watson Road)" all indicate that the issue was considered to be the access road and access alternatives. As summarized by the District in its 21 August 2008 letter and in the EA/SOF (p. 6), the FWS' concern regarding alternatives was for the applicant and District to address "alternatives to the proposed long access road." While it would not be accurate to describe the Appellant as "proactive" in responding to the District's requests for information (e.g., the cost estimate for the existing access road construction was not provided until 6 July 2009), the Appellant appears to have responded to the specifics of the District's requests for additional information.²

The record does not show the District's practicability evaluation of the cost data submitted by the Appellant in response to its requests for cost information regarding access alternatives. Although noncompliance with the 404(b)(1) Guidelines was found largely based on the appx. 4.0-acre lot (parcel no. 25-1S-20-32000-004-0041) providing a practicable alternative to the applicant's preferred alternative, it is unclear what the District found concerning whether this alternative is practicable and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose. In the EA/SOF, the District appeared to question the Appellant's documentation ("the applicant claims"), though the District's previous consideration of the application does not indicate that they questioned the nature of the documentation supporting the Appellant's analysis.

² In at least one instance, the District's EA/SOF reads more into its 19 November 2008 email than is plainly stated in that communication. The EA/SOF (p. 8) states that "the Corps reiterated [its] previous request for the following information: ... expand alternatives analysis to include use of the upland lot between Watson Road and the residential area." Regarding the alternatives analysis, the email more generally states: "Your alternatives analysis needs to include the information (e.g., inability to utilize neighboring development and other land owned by American Fidelity) you divulged at our last meeting."

Turning to the minimization requirement of the 404(b)(1) Guidelines, the District determined that appropriate and practicable steps had not been taken to minimize adverse impacts on the aquatic system. Specifically, the District stated in its 7 December 2009 letter that “[a]dditional measures which could be used to minimize wetland impacts include the following: reducing the number of proposed residential units, re-alignment of the proposed access road, and accessing the proposed subdivision via navigable waters of Choctawhatchee Bay. Furthermore, the proposed [compensatory] mitigation is not sufficient to offset wetland impacts.” In its EA/SOF (p. 11), the District noted an additional measure which could be used to minimize wetland impacts - “limiting development to the 0.5 and 1.0-acre upland area within the proposed subdivision.”

Regarding reducing the number of proposed residential units, the Appellant stated, on page 2 of the RFA,

Further coordination with ACOE resulted in determining that the original mitigation proposal to preserve 0.85-acre of wetlands within the residential area was not sufficient to offset proposed impacts associated with the revised application. As such, this 0.85-acre lot comprised entirely of wetlands was removed from the mitigation proposal and [a portion of it was] subsequently added to the proposed impact area by adding a pile-supported home, driveway, and septic tank pad.

As a result, the EA/SOF reflects that the proposed wetland fill was increased from 1.36 to 1.42 acres, an increase in direct impact of 0.06 acres. The Appellant explained, on page 5 of the RFA, that

[i]t was financially in the best interest of the applicant to preserve [sic] the 0.85 acre lot as a homesite rather than as partial mitigation since very little mitigation credit would be given for this area. It has been ACOE policy that little mitigation credit is given for a preservation-only scenario and this 0.85 acre site was not in need of any enhancement or restoration.

The Appellant, upon submittal of the original permit application, implied that the six-lot configuration was sufficient for project viability. Only after the Corps deemed the onsite mitigation insufficient, the Appellant decided to add a seventh lot for financial reasons. During the 26 April 2010 appeal teleconference, the Appellant’s agent provided information that all seven lots were purchased in 2004-2005. However, the original permit application, received on 9 August 2007, requested the development of six lots. (One of the lot owners may have been prepared to forego their right to construct a home at the time of the submitted application for unknown consideration). Typically, an increase in wetland impacts would not be consistent with minimization efforts on the part of an applicant. However, in this case, the record is not specific as to the total (direct and indirect) impacts of the increase, while taking account of the effect on the practicability of the six-lot configuration when off-site mitigation proved to be necessary.

Regarding the realignment of the proposed access road, this mitigative measure is discussed in the context of “avoidance” and the practicable alternatives analysis, above. The Appellant asserts on page 4 of the RFA, that “[a]lthough constructing a road through this lot would be a minimization measure since the wetlands are lower quality....purchasing a \$375,000 lot to build a relatively short access road is not an economically practicable ... minimization measure.” Under the 404(b)(1) Guidelines, avoidance or minimization must be practicable. Based on the way in which the practicable alternatives analysis was structured here, the real question would appear to be whether constructing a road through this lot constitutes an element of a practicable alternative in terms of avoidance.

Regarding the minimization measure of accessing the proposed subdivision by boat rather than by a vehicular access road, the Appellant stated, on page 4 of the RFA,

The suggestion by ACOE that the residential area could be accessed via navigable waters...is absolutely impractical. This would require that each owner own a boat, launch it from an undetermined location, navigate to their homesite via the Bay, and build a community boat ramp and docking facility. For obvious reasons, this alternative is economically and logistically impractical and would impose far greater damage on the aquatic environment.

It is not substantiated in the administrative record how this minimization measure is practicable. In the context of avoidance and the practicable alternatives analysis, a practicable alternative must “provide similar logistical opportunities.”

The District stated, on page 11 of the EA/SOF,

Additional measures which could be used to minimize wetland impacts include the following:...limiting development to the 0.5 to 1.0-acre upland area within the proposed subdivision.

The appellant stated, on page 6 of the RFA,

Seven homesites, or even one for that matter, could not be constructed in a 0.5 to 1.0-acre narrow, linear upland area that traverses several lots. Separate, individual ownership of the lots alone precludes this as a practical alternative.

No evidence could be found in the administrative record, besides its reference in the EA/SOF, where the District ever asked the appellant to consider utilizing this 0.5 to 1.0-acre upland area as part of any sort of minimization measure. In addition, the District never explained how this alternative was practicable and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose.

Regarding compensatory mitigation, the Appellant stated, on pages 7-8 of the RFA,

ACOE states that "...The proposed direct and secondary impacts would require approximately 1.40 credits." The fact that ACOE was able to quantify mitigation requirements based on direct and secondary impacts seems contradictory, at least in part, to ACOE's statements that the full direct, secondary, and cumulative effects of the project cannot be determined.

The District stated, on page 18 of the EA/SOF,

The proposed project would result in direct impacts to 1.42 acres, secondary impacts to approximately 3.0 acres, and shading effects to 0.30 acres of wetlands...The full extent of wetland impacts would require a full plan of development, and a delineation of wetlands and waters, which have not been provided...Overall, the full extent of the direct, secondary, and cumulative impacts to wetland and waters of the US...cannot be determined from the information provided.

A functional assessment, based on UMAM, was used to assess the proposed direct and secondary wetland impacts and proposed mitigation. The proposed direct and secondary impacts would require approximately 1.40 mitigation credits.

The administrative record reflects that the District understood the direct and secondary impacts of the proposed project, but believed it did not have enough information to analyze the cumulative impacts. In addition, the District based their mitigation calculations on direct and secondary impacts alone. However, based on the administrative record, it does not appear that the District ever informed the appellant of the amount of compensatory mitigation required for the proposed project. In addition, the District never explained why the lack of credit release from the Nokuse Mitigation Bank was contrary to the "mitigation" public interest factor.

The Appellant contests the District's conclusions regarding the cumulative and reasonably foreseeable effects of the proposed project. While the RFA is focused largely on this issue in the context of the 404(b)(1) Guidelines compliance, it also contests the District's conclusions at pp. 24-29 regarding the public interest review. On page 7 of the RFA, the Appellant states:

ACOE states [EA/SOF, p. 12] that "...Without a complete plan of development for, and delineation of, wetlands within the American Fidelity tract, the project's total wetland impacts could not be evaluated." The applicant has no relationship with American Fidelity and, as such, would not be aware of any plan of development for American Fidelity's land. The applicant is only authorized to physically evaluate the land within the access easement.

Neither the applicant, nor any of her authorized representatives has any permission to access American Fidelity's property outside of the access easement to perform wetland delineations or any other such work.

The Appellant states, on pages 8-9 of the RFA,

ACOE also states several times in the SOF (pages 13, 14, 15, and other pages) that it is reasonable to assume that construction of the proposed access road would “open up” the American Fidelity tract to future development resulting in wetland impacts. This is not a reasonable assumption.... As such, it seems purely hypothetical and insufficient grounds for denying a permit to construct the access road.

Further, the Appellant states on pages 9-10 of the RFA:

On page 25 of the [EA/SOF] ... the issue of reasonably foreseeable development in wetlands within the American Fidelity tract is raised again. * * * On page 27 of the [EA/SOF] * * * ACOE also states that “... reasonably foreseeable development could result in impacts to 52.2 to 129.0 acres of wetlands within the American Fidelity tract.” This is not a reasonable assumption as the ACOE would never permit this level or direct and/or indirect impacts to wetlands in this area

The District stated, under Section 9.a(7)(c) of the EA/SOF (pp. 15-16):

Anticipated future consequences: Future consequences of the proposed project include reasonably foreseeable development of wetlands adjacent to the proposed access road. The full extent of development and the resulting impacts on aquatic resources of Choctawhatchee Bay and Alaqua Bayou have not been fully described * * * Therefore, in light of available alternatives, and considering the potential for additional direct, secondary, and cumulative impacts on wetlands and waters ... the Corps is concerned that the project would set a negative precedent in the area.

In addition, the District repeatedly stated in support of its determination that the project was contrary to the public interest that the project could result in reasonably foreseeable impacts to wetlands adjacent to the access road and/or would allow for reasonably foreseeable development within the American Fidelity tract which could have adverse effects on the aquatic resources of Choctawatchee Bay. [EA/SOF, pp. 19, 20, 21, 25, 26, 27, 28, 30].

“Cumulative impact” is defined in the CEQ’s NEPA regulations (40 CFR Part 1508.7) as the “impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions...” Regulatory Guidance Letter (RGL) 84-09, 3.a., states,

Cumulative Impacts: Both the Corps regulations and the 404(b)(1) guidelines call for assessment of cumulative impacts. The geographic size of the area (e.g., watershed or other readily identifiable geographic area) in which cumulative impacts are to be considered should be established. Within this selected area, a description of historical permitting activity should be developed, along with anticipated future activities in the area. This will provide the decision maker some sense of the rate of development in the

area. Applicable regional or local land use plans or a special area management plan (SAMP), if any exist, should be described in context with the proposed work...

For the purpose of identifying reasonably foreseeable future actions for the purpose of cumulative effects analysis, EPA applies the following guidance in its review of Federal NEPA documents:

The critical question is "What future actions are reasonably foreseeable?" Court decisions on this topic have generally concluded that reasonably foreseeable future actions need to be considered even if they are not specific proposals. The criterion for excluding future actions is whether they are "speculative." The NEPA document should include discussion of future actions to be taken by the action agency. The analysis should also incorporate information based on the planning documents of other federal agencies, and state and local governments. For example, projects included in a 5-year budget cycle might be considered likely to occur while those only occurring in 10-25 year strategic planning would be less likely and perhaps even speculative. For private actions, the analysis should use regional and local planning documents. In the absence of these plans (and to refine expectations where activities have diverged from the plans), the analysis should refer to projected development trends. In all of these cases, the best information should be used to develop scenarios that predict which future actions might reasonably be expected as a result of the proposal. [Consideration Of Cumulative Impacts In EPA Review of NEPA Documents, U.S. Environmental Protection Agency, Office of Federal Activities, EPA 315-R-99-002 (May 1999)]

Local planning documents may include "[l]ocal zoning requirements, water supply plans, economic development plans, and various permitting records [which may] help in identifying reasonably foreseeable private actions." Considering Cumulative Effects Under the National Environmental Policy Act, Council on Environmental Quality (January 1997), p. 19.

It is unclear whether the District was placing the onus on the Appellant to provide a wetlands delineation and complete plan of development for the American Fidelity tract to enable the District to assess cumulative effects, or making a general statement as to some of the data it believed it lacked in order to assess the cumulative effects of the project. If it was the former, the administrative record does not reflect that the District ever asked the Appellant to perform this analysis, and it appears to be unreasonable to require an applicant to provide a complete plan of development, and delineation of wetlands on a tract of land it does not own and for which no plan of development has been identified (see pages 12 and 27 of the District's EA/SOF).

The District examined the past, present, and reasonably foreseeable future impacts on pages 15-16 of the EA/SOF. Section 9.a(7)(c) does not adequately detail the reasonably foreseeable future impacts. The District provided a general statement as to potential future impacts on the American Fidelity tract under Section 9.a(7):

Reasonably foreseeable wetland impacts could be expected from construction of the proposed access road within the American Fidelity tract. The potential wetland area, which could be subject to impact is estimated to range from 52.2 to 129.0 acres, based on GIS analysis.

However, the District never clearly established the geographic area in which to consider cumulative impacts, and did not explain the basis or documentation for its forecasted cumulative effects on wetlands. The District did not address the Appellant's contention in its 2 October 2008 letter that the Walton County Land Development Code residential density restrictions would limit such impacts. The Appellant also contends in its RFA (p. 9) that significant improvement would have to be made to the access road in order for it to serve development on the American Fidelity tract. The Appellant also raises the issue of the Corps' own 404 permitting restraints on development.

The Corps also does not fully explain what negative precedent would be set in the area by issuing a 404 permit for the proposed project. The EA/SOF (p. 15) refers to the Corps' own permitting records for the area.

A search of permitting activity near the project area indicates no past permits for similar residential developments. A similar proposal for an access road in south Walton County was reviewed under SAJ-2006-1351 (NW-DEB). The project was revised to minimize wetland impacts and was verified under Nationwide Permit #14 on 10 October 2007.

While the acreage impact of the access road, itself, permitted under NWP #14 would be somewhat less (NWP #14 is limited to ½ acre impact for non-tidal waters), the distinction between the two access roads in terms of opening future development is not clear.

Actions: 1) Revisit the 404(b)(1) Guidelines practicable alternatives analysis, and with regard to the 4.0-acre lot on Watson Road either: explain how the information provided by the Appellant was insufficient to determine compliance with the 404(b)(1) Guidelines (40 CFR 230.12(a)(3)(iv)); accept the Appellant's analysis and remove this alternative from consideration; or, substantiate how the 4.0 acre lot is the LEDPA by specifically addressing how this alternative is available and capable of being done after taking into consideration cost (including an analysis of the Appellant's 6 July 2009 email and previous cost information), existing technology, and logistics in light of overall project purpose.

2) Revisit the 404(b)(1) Guidelines practicable alternatives analysis, and with regard to a possible realignment of the access road through uplands on the American Fidelity property, either: explain how information provided by the Appellant was insufficient to meet its burden under the 404(b)(1) Guidelines (40 CFR 230.12(a)(3)(iv)); accept the Appellant's analysis and remove this alternative from consideration; or, substantiate how this alternative is a less environmentally damaging practicable alternative to the Appellant's proposed access road.

3) Regarding minimization, a) document the total impacts due to the 7th lot, taking into account the effect on the practicability of the 6-lot configuration of the off-site mitigation requirement; b) clearly explain how accessing the proposed development exclusively via navigable waters is practicable by specifically addressing cost, existing technology, and whether this measure would provide similar logistical opportunities as land access in light of overall project purpose; c) document the practicability of limiting construction of the homesites to the 0.5 to 1.0-acre upland area within the proposed subdivision.

4) Regarding cumulative impact, a) clearly establish the geographic area within which cumulative impact will be considered; b) detail the nature and basis or documentation for forecasted cumulative effects, with reference to pertinent government planning documents, rate of development, private development plans or indicators, etc., including (without limitation) those impacts on the American Fidelity tract that were a focus of the denial; c) explain what negative precedent would be set in the area by permitting the proposed project, the precedential impact on subsequent permit applications, and, for example, whether access restrictions could alleviate some of the precedential impact; and, d) ensure that the burden to determine cumulative impact is not shifted to the Appellant by imposing an obligation to provide a delineation or development plan for real property outside of its control.

5) Explain the District policy of informing applicants concerning mitigation calculations and the use of pending mitigation banks, the manner and timing by which the Appellant was informed in this case, and explain why the lack of credit release from the Nokuse Mitigation Bank was contrary to the "mitigation" public interest factor.

Appeal Reason 2: Practicable alternatives to this project do not exist.

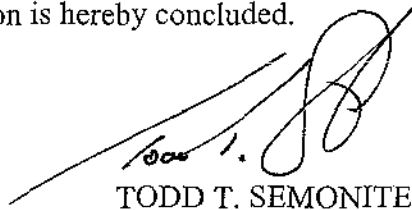
Finding: This reason for appeal has merit.

Discussion: See Appeal Reason 1 above.

Action: See actions under Appeal Reason 1 above.

CONCLUSION

For the reasons stated above, I find that the appeal has merit. The District's administrative record does not contain adequate evidence to support its permit denial as outlined above. The administrative appeals process for this action is hereby concluded.



TODD T. SEMONITE
Major General, USA
Commanding