

## ADMINISTRATIVE APPEAL DECISION

RFE FARMS, LLC – ROCKY FORD EAST LAKE

FILE NO. SAW-2009-1304

WILMINGTON DISTRICT

8 July 2014

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

**Receipt of Request for Appeal:** 19 February 2013

**Acceptance of Request for Appeal:** 22 February 2013

**Appeal Conference/Site Visit:** 3 April 2013

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

### SUMMARY OF DECISION

The request for appeal (RFA) submitted by RFE Farms, LLC (Appellant)<sup>1</sup> has merit. For the reasons set forth below, the administrative record (AR) does not sufficiently support the permit denial made by the US Army Corps of Engineers, Wilmington District (hereinafter the "District"). The matter is remanded to the District for action consistent with this decision.

In reaching this decision, I find that:

1) the District's alternatives analysis is insufficient to support the conclusion that the proposed project does not comply with the 404(b)(1) Guidelines. [Appeal Reason 1: Other practicable alternatives to the proposed multi-lake site do not exist.]

2) the permit requirement is not and cannot be waived; the 60-day period for processing a permit application was not applicable because Appellant did not timely submit information to the District and, even if the 60-day period had applied, neither the Clean Water Act nor implementing regulations allow for a waiver to the permit requirement. [Appeal Reason 2: The Army Corps exceeded the mandatory timeline for processing of applications; therefore, the 404 permit should be waived.]

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<sup>1</sup> Mr. Edward Neill (father) and Mr. James Clayton "Clay" Neill (son) are the two members of RFE Farms, LLC.

## **BACKGROUND**

On 6 October 2005, Neill Grading & Construction Company<sup>2</sup> was issued a Department of the Army individual permit to discharge fill material into 300 linear feet of stream to construct two dams and impound approximately 3,600 linear feet of perennial and intermittent stream to construct an 18-acre water ski lake near Newton in Catawba County, North Carolina. The lake was constructed and is known as Rocky Ford West Lake.

On 13 July 2009, the District received Appellant's 9 July 2009 permit application for authorization to impact approximately 4,267 linear-feet of stream channel and 0.14 acres of wetlands for the construction of a 21-acre ski lake adjacent to Rocky Ford West Lake. The new ski lake is to be known as Rocky Ford East Lake. The property is located on the east side of Rocky Ford Road and to the east of US Highway 321, near Newton<sup>3</sup> in Catawba County, North Carolina.

On 27 July 2009, the District notified Appellant that the application was incomplete. Appellant responded on 14 August 2009, and the District sent an e-mail on 21 August 2009 acknowledging receipt of the additional information and identifying information that had not been provided. By letter dated 17 December 2009, the District informed Appellant that information initially requested by letter and also during the 1 September 2009 site meeting still had not been provided.

When the District did not receive a timely response to its 17 December 2009 letter, the District placed a memorandum for record in the AR, on 27 July 2010, noting the lack of a response from the Appellant. Approximately twenty months after the District sent its 17 December 2009 letter, Appellant responded by letter dated 31 August 2011 and provided sufficient information for the District to issue a Public Notice (PN).

On 3 October 2011, the District issued a PN for the proposed project and, on 29 November 2011, the District sent to Appellant the public comments it had received and outlined information that was still needed regarding the purpose and need, alternatives analysis, and mitigation. Appellant requested an extension to respond after the deadline of 31 January 2012, which the District granted and allowed Appellant to provide comments by 16 March 2012. On 22 March 2012, the District received Appellant's response dated 16 March 2012. After evaluating the Appellant's proposed project, the District denied the permit via letter dated 10 December 2012 and provided its Environmental Assessment and Statement of Findings (EA/SOF).

The District's denial was based on noncompliance with the regulations in 40 C.F.R. Part 230 (known as the Section 404(b)(1) Guidelines). Specifically, the District concluded that the project purpose of providing a second lake to be able to host regional and national competitive

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<sup>2</sup> Mr. Edward Neill is President of Neill Grading & Construction Company, Inc.

<sup>3</sup> Although the EA/SOF and Public Notice identify the city as Newton, the two Approved Jurisdictional Determinations identify the area as Startown.

water ski events did not justify the impacts to aquatic resources associated with the construction of an impoundment. The District concluded there to be two practicable alternatives – Rocky Ford West Lake (a single lake) and another site, named Little Mountain Ski Lakes, which has two lakes in close proximity to each other.

On 19 February 2013, Appellant submitted a RFA of the District's decision to deny its permit application.<sup>4</sup> In the RFA, the Appellant asserts that use of the Little Mountain Farms ski lakes<sup>5</sup> is not practicable because one of the lakes is not available and the Rocky Ford West lake is a single lake and, therefore, does not meet the overall project purpose. In addition, the Appellant asserts that the District failed to process his permit application within the timeline established for individual permits and, therefore, the requirement for a permit should be waived.

### **INFORMATION RECEIVED AND CONSIDERED IN DECIDING THE APPEAL**

1. The District AR, which was provided to the Appellant and RO.
2. Supporting documentation that Appellant submitted with the RFA. This supporting documentation did not amend the AR.
3. The District's and Appellant's responses to RO questions seeking clarification, which the RO sent after the appeal conference.

### **APPELLANT'S STATED REASONS FOR APPEAL**

Appellant asserts the following two reasons for appeal: (1) other practicable alternatives to the proposed multi-lake site do not exist; and (2) the District exceeded the mandatory timeline for processing its application and, therefore, the 404 permit requirement should be waived.

### **EVALUATION OF THE REASONS FOR APPEAL, FINDINGS, DISCUSSION, AND ACTIONS FOR THE WILMINGTON DISTRICT COMMANDER**

**Appeal Reason 1:** Other practicable alternatives to the proposed multi-lake site do not exist.

**Finding:** As set forth below, this reason for appeal has merit. I find that the District's alternatives analysis is insufficient to support the conclusion that the proposed project does not comply with the 404(b)(1) Guidelines.

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<sup>4</sup> "The Notification of Administrative Appeal Options and Process and Request for Appeal" is dated 4 December 2012 and the District's denial letter is dated 10 December 2012, but the EA/SOF was not signed until 19 December 2012 and was not mailed to the Appellant until 20 December 2012. Consequently, the 60-day timeline was calculated based on the 20 December 2012 mailing date and was determined to be 19 February 2013.

<sup>5</sup> The AR also refers to this site as "Little Mountain Ski Lakes" and "Little Mountain site."

**Discussion:** Appellant asserts in the RFA that other practicable alternatives to the proposed project do not exist. Appellant argues that the District's analysis, which concluded that the existing ski lake at Rocky Ford West and the two ski lakes at Little Mountain are practicable alternatives, is flawed because the use of the lake at Rocky Ford does not meet the overall project purpose of hosting national water ski events, which requires a minimum of two adjacent lakes. The Appellant further argues that the Little Mountain site is not available and does not logistically satisfy the hosting requirements and, therefore, is not practicable.

As explained below, there is insufficient information in the AR to support the District's conclusion that Little Mountain Ski Lakes and Rocky Ford West Lake are practicable alternatives that meet the overall project purpose of hosting regional *and* national recreational water ski events.

### Section 404 and Implementing Regulations

Under Section 404, the Secretary of the Army, acting through the Corps, has authority to permit the discharge of dredged or fill material into waters of the United States. The term "waters of the United States" is defined at 33 C.F.R. § 328.3, as supplemented by policy and guidance issued by the Army and EPA. For the proposed project, the District determined there to be jurisdictional wetlands present within the project area, which are "waters of the United States." Also, the District determined there to be two relatively permanent waters (RPWs) that flow into a traditional navigable water (i.e., the Catawba River), and the wetlands directly abut one of these two RPWs. Specifically, the proposed project requires issuance of a Department of the Army permit because the construction of the dam will discharge fill material into .04 acres of jurisdictional wetlands and fill approximately 145 linear feet of stream channel, and approximately 4,122 linear feet of stream channel and .10 acre of wetlands will be flooded as a result of the dam construction.<sup>6</sup>

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

The Guidelines generally prohibit the permitting of projects where there "is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic

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<sup>6</sup> These impacts are described on page 2 of the EA/SOF. Pages 10 and 26 of the EA/SOF do not seem to specify the identical impacts (that is, p. 10 describes the impacts to aquatic resources to be approximately 4,267 linear feet of stream channel and .10 acre of wetlands, but Section 7.e. on p. 26 describes these impacts to be 4,122 linear feet of stream channel and .10 acre of adjacent wetlands). The District clarified in its 6 September 2013 responses to RO questions that the correct impacts are 145 linear feet of stream channel and .04 acre of wetlands due to placement of fill for the dam which will subsequently flood 4,122 linear feet and .10 acre of wetlands – totaling impacts of 4,267 linear feet of stream and .14 acre of wetlands.

ecosystem, so long as the alternative does not have other significant adverse environmental consequences.”<sup>7</sup> To be “practicable,” an alternative must be “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.”<sup>8</sup> For projects that are not water dependent, the Guidelines establish a presumption that there are practicable alternatives unless it is clearly demonstrated otherwise.<sup>9</sup> A water dependent project “requires access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose.”<sup>10</sup>

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

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

#### Project Purpose and Water Dependency Determination

The District defined the basic project purpose as the development of a secondary lake for recreational water skiing. The District determined the project was not water dependent because a water ski facility can be constructed in an upland area. Because the proposed project is not water dependent, alternatives that do not involve impacts to special aquatic sites are presumed to be available to Appellant, unless it is clearly demonstrated that such alternatives are not available.<sup>11</sup> It is the responsibility of the Appellant to rebut this presumption.<sup>12</sup>

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<sup>7</sup> 40 C.F.R. § 230.10(a).

<sup>8</sup> 40 C.F.R. § 230.10(a)(2).

<sup>9</sup> 40 C.F.R. § 230.10(a)(3).

<sup>10</sup> 40 C.F.R. § 230.10(a)(3).

<sup>11</sup> 40 C.F.R. § 230.10(a)(3).

<sup>12</sup> 40 C.F.R. § 230.10(a)(3). If an activity is determined not to be water dependent, the Guidelines establish the following two presumptions that the applicant is required to rebut before satisfying the alternatives analysis requirements: (1) practicable alternatives that do not involve special aquatic sites are presumed to be available; and (2) all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem.

### Guidelines Alternative Analysis

The 9 July 2009 cover letter for Appellant's permit application described the project purpose as follows:

... to construct a competition grade waterski lake in close proximity to an existing competition grade waterski lake such as to create a multi-lake site capable of hosting a regional and/or national championship.<sup>13</sup>

Taking into consideration the Appellant's described project purpose, the District determined that the overall project purpose was "[t]o develop a secondary lake for recreational water skiing in which regional and national competition events can be held."<sup>14</sup> The District then set forth the following criteria to apply in its evaluation of alternatives: size/configuration of the lake (with lakes of 18-23 acres typical); availability to host regional and national water skiing events (with multiple lakes, increased on-site infrastructure, and abundance of hotel/restaurants and recreational options required); presence of nearby municipalities (focusing on the close proximity of hotels and restaurants); and access/presence of a second water ski lake (for hosting a U.S. National event, to include having adequate infrastructure).<sup>15</sup> In its analysis, the District applied the term "regional" using the definition of the American Water Ski Association (AWSA), which includes Alabama, Florida, Georgia, Kentucky, North Carolina, South Carolina, and Tennessee.<sup>16</sup> For the term "national," the District defined it as those competitive water ski events associated with the one-time annual "U.S. national" tournament event.<sup>17</sup>

The District analyzed eight alternative sites using the criteria listed above<sup>18</sup> and carried forward two alternatives for further analysis - Rocky Ford West (as capable of hosting regional events and available to Appellant) and Little Mountain Ski Lakes (as capable of hosting regional and national events). The other six off-location sites (McLeod Ski Lake, Clear Lake, Skyview Lake, Lake Norman, Lake Hickory, and Rhodhiss Lake) were not carried forward for further analysis "due to access to existing lakes owned/available by the applicant immediately adjacent to the site (Rocky Ford West and Little Mountain)." The District appears to have carried forward Rocky Ford West and Little Mountain Ski Lakes and excluded the other six alternative sites based on ownership/availability. Although "availability" is one of the factors used to determine whether a site is practicable, the District did not document a sufficient analysis/explanation as to why these other sites are not practicable alternatives, taking into consideration the overall project purpose.

In addition to the above alternatives, the District considered information which Appellant submitted concerning a different configuration of the lake footprint. While the stream-channel

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<sup>13</sup> AR, p. 422.

<sup>14</sup> EA/SOF, p. 2; AR, p. 32.

<sup>15</sup> EA/SOF, pp. 10-12; AR, pp. 39-41.

<sup>16</sup> EA/SOF, p. 11; AR, p. 40.

<sup>17</sup> EA/SOF, pp. 11-12; AR, pp. 40-41.

<sup>18</sup> EA/SOF, pp. 13-17; AR, pp. 42-47.

impacts of the different configuration would be less (that is, 986 linear feet of stream channel impacts associated with fill and 1,000 linear feet associated with flooding), the estimated additional project cost was stated to be one million dollars.<sup>19</sup> The District also considered the alternative of excavation solely in uplands, but this alternative was determined not to be practicable or reasonable due to the amount of earthwork involved and high associated costs.<sup>20</sup>

Regarding the Appellant's preferred alternative (Rocky Ford East, combined with the existing Rocky Ford West), the District concluded there to be inadequate infrastructure in place to host a national event. The District stated that infrastructure improvements would likely be needed based on an analysis of sites that previously hosted a national championship event and requested additional information from the Appellant regarding this matter. Ultimately, the District lacked sufficient information to assess the proposed project's total impacts to jurisdictional waters<sup>21</sup> because the Appellant did not provide the requested information.

#### *Practicable Alternative - Rocky Ford West*

The District determined Rocky Ford West to be a practicable alternative for regional events because the Appellant owns and operates the existing water ski lake and the site is of adequate size and configuration for such water ski events. The District also considered that the site is approximately 8 miles (14 minutes travel time) to Hickory/Conover in which there are sufficient hotels and restaurants to accommodate event participants.

#### *Practicable Alternative - Little Mountain Ski Lakes*

The District concluded Little Mountain Ski Lakes to be a practicable alternative because it has two existing lakes of adequate size and configuration that are within walking distance to each other. The District considered that the site has been used for past water ski events, and the site is within 15 miles (24 minutes travel time) of Mooresville, which has an abundance of hotels and restaurants. The District determined this site to be available to the Appellant because Mr. Edward Neill is a member of the Appellant and is also the registered agent of the company, Little Mountain Farms Limited Partnership, that owns this site.

In its EA/SOF, the District noted Appellant's disagreement that Little Mountain Ski Lakes was available and considered Appellant's reasons, which are that "the entities which owns [sic] the properties at Rocky Ford and Little Mountain are distinct and separate and the ownership parties and organization structures of these entities is different" and "concerns over

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<sup>19</sup> The District stated on page 19 of the EA/SOF (AR, p. 48) that the applicant submitted information which evaluated the lake footprint reconfiguration and, based on applicant's submitted information, the District described the resulting impacts. The District further stated, "The applicant estimated that the increased earthwork and grading associated with this configuration would result in an additional project cost of \$1,000,000." However, no documentation was found in the AR that provides or explains the basis for this increased cost.

<sup>20</sup> EA/SOF, p. 19; AR, p. 48.

<sup>21</sup> EA/SOF, p. 17; AR, p. 46.

privacy for the principal residence located at Little Mountain as well as conflicts with insurance, farm operation, and livestock make the Little Mountain site unavailable for tournaments of the scale of a Regional or Nationals". The District acknowledged that the Rocky Ford West and Little Mountain sites are owned by separate entities but concluded that because Mr. Edward Neill had a common ownership interest in both properties, a joint venture was possible.

The District did not consider Appellant's general statements to be sufficient to overcome the presumption that Little Mountain Ski Lakes is a practicable alternative. The AR contains only the Appellant's general statements, with no documentation or specific information to support the assertions about privacy concerns or that there would be conflicts with insurance, farm operations, and livestock. Based on Appellant's general statements, the District reasonably concluded that the Appellant did not rebut the presumption that the Little Mountain site was a practicable alternative.

#### *Overall Project Purpose and Multi-lake Requirement*

The Appellant's project purpose statement essentially is to construct a lake adjacent to an existing lake so that the two-lake site can host regional and national water ski events.<sup>22</sup> Appellant's position is that two adjacent lakes are needed to host a 3-event Regional Championship as well as to host the AWSA Water Ski National Championships. Appellant's statement regarding a two-lake requirement for regional events is in the Appellant's 16 March 2012 letter, which states there is a "need for 2 lakes in close proximity in order to host not only the AWSA Water Ski National Championships but also a Regional Championship."<sup>23</sup> Appellant stated in this letter that he submitted a letter from Steven Locke of USA Water Ski asserting that there is a two-lake requirement for certain regional and national water ski competitions. A letter from Steven Locke was not found in the AR,<sup>24</sup> but the AR contains an undated letter from Dana Reed, the founder and President of Pro Slalom Events LLC, in which he states that "[a] 2 lake site is mandatory to host [the Southern Regional Tournament]."<sup>25</sup> The Appellant also submitted a letter from Brandon Wolfe, the Director of Competition for USA Water Ski, which does not address requirements to host the AWSA Southern Regional Tournament but states that a minimum of two lakes is required to be eligible to bid on the Water Ski National Championships.<sup>26</sup>

The District defined the overall project purpose to be development of a secondary lake for recreational water skiing in which regional and national competition events can be held. In

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<sup>22</sup> Appellant's letters do not consistently provide the same purpose statement. Specifically, Appellant's statement regarding a two-lake requirement for regional events is in the Appellant's 16 March 2012 letter, which states that there is a "need for 2 lakes in close proximity in order to host not only the AWSA Water Ski National Championships but also a Regional Championship." The "Purpose and Need Statement" in Appellant's 31 August 2011 letter, however, focused solely on the need for a minimum of two lakes to be eligible to bid on the Water Ski National Championships.

<sup>23</sup> Appellant's 16 March 2012 letter; AR, p. 73.

<sup>24</sup> The only documents in the AR that include Steven Locke are several email messages on which Steven Locke was copied. AR, Bates Stamp 335 and 336.

<sup>25</sup> AR, Bates Stamp 288.

<sup>26</sup> AR, p. 64.

its EA/SOF, the District noted that the purpose and need statement supplied by the Appellant has two components, and the District stated that its analysis focused on the two components.

However, the District ultimately did not agree that a two-lake site is required to host regional events, and the District documented in the AR its conclusion that only one lake is required. Specifically, the District stated, "We also do not agree with the applicant's claim that two adjacent lakes are needed to host regional events based upon an analysis of existing lakes that host regional events."<sup>27</sup> The District agreed, however, with the conclusion that a minimum of two adjacent lakes is required to be eligible to host the Water Ski National Championships.<sup>28</sup>

Documentation in the AR indicates that the District considered the same regional event as the one specified by the Appellant – which is the AWSA Southern Regional Tournament. The District took into account information provided by the Appellant, to include statements of other individuals that the Appellant submitted to the District. However, the District reached a different conclusion that is supported by the "AWSA Southern Region Policies & Procedures Manual."<sup>29</sup> This Manual identifies the number of boat drivers needed if the AWSA Southern Regional Tournament is held on a one-lake site versus a site with two or more lakes<sup>30</sup> and provides an application in which the use of one, two, or three lakes can be selected.<sup>31</sup>

Because the District concluded that only one lake is needed to host regional events, it identified the Rocky Ford West site as a practicable alternative to host regional events. Consistent with the District's conclusion that a minimum of two lakes is needed to host the Water Ski National Championships, the District determined Little Mountain Ski Lakes to be a practicable alternative. However, to reach its determination regarding the practicability of the Rocky Ford West site, the District essentially applied the two project purpose components (regional *and* national events) as being independent of each other (regional *or* national events) and identified the Rocky Ford West site as an alternative. However, without further documentation, it appears that Rocky Ford West only satisfies a part of the overall project purpose.

The District's apparent bifurcation of the overall project purpose and independent application of the components in the alternatives analysis (that is, as if the overall project purpose was the ability to host "regional *or* national events") resulted in the District's identification of an alternative (Rocky Ford West site) that does not appear to satisfy all of the overall project purpose (that is, the ability to host "regional *and* national events"). The Corps, however, should identify alternatives that satisfy the overall project purpose, not a portion of the overall project purpose. Without further documentation, it appears in this case that in order to satisfy the overall project purpose, practicable alternatives must be capable of hosting a regional event and the Water Ski National Championships. Another issue is that the District's

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<sup>27</sup> EA/SOF, p. 8; AR, p. 37. A similar statement is on pages 9 and 11 of the EA/SOF.

<sup>28</sup> EA/SOF, p. 11; AR, p. 40.

<sup>29</sup> AR, pp. 342-353.

<sup>30</sup> Section 1.1.7 of the Manual; AR, pp. 346, 352.

<sup>31</sup> Appendix III of the Manual (Standard Bid Form), AR pp. 351-52.

ultimate disagreement regarding two lakes being required to host a regional event resulted in the District setting forth an overall project purpose to which it partially disagreed was really a need.

The District's statement regarding the lack of information from the Appellant to justify why Rocky Ford West (a single lake site) "in its current state cannot host regional/national events..."<sup>32</sup> is confusing and, in light of other information in the EA/SOF, appears to be a misstatement. Elsewhere in the EA/SOF, the District differentiates the requirements for a regional versus national ski event and sufficiently documents its conclusion that one lake is required to host the AWSA Southern Regional Tournament while two adjacent lakes are needed to host the AWSA Water Ski National Championships.<sup>33</sup>

**Action:** Review the overall project purpose and ensure it is adequately documented in light of a single versus multi-lake requirement for regional *and* national ski events. Once documented, consistently apply this to the alternatives analysis, specifically to the Rocky Ford West site, and to other alternatives as appropriate.

**Appeal Reason 2:** The Army Corps exceeded the mandatory timeline for processing of applications; therefore, the 404 permit should be waived.

**Finding:** This reason for appeal does not have merit.

**Discussion:** The 60-day period for processing a permit application was not applicable because Appellant's application was not complete when it was submitted, and Appellant did not timely respond to the District's requests for information and submit information that the District needed for its evaluation. Furthermore, even if the 60-day period had applied, neither the Clean Water Act nor implementing regulations allow for a waiver to the permit requirement.

The applicable regulations state, "District engineers will decide on all applications not later than 60 days after receipt of a complete application, unless ... (iv) A timely submittal of information or comments is not received from the applicant ...."<sup>34</sup>

Documentation in the AR establishes that the District notified the Appellant on 27 July 2009, which was two weeks after initial receipt of the application, that the application was incomplete. Appellant responded about two and a half weeks later, to which the District responded one week later to inform the Appellant that all of the needed information was still not provided. The District sent a letter on 17 December 2009, to which Appellant responded approximately one year and eight months later. On 3 October 2011, about one month after receiving Appellant's belated response, the District issued a PN with a 2 November 2011 comment deadline date but granted an extension to several resource agencies and allowed public comments to be accepted through 9 November 2011.

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<sup>32</sup> EA/SOF, p. 15; AR, p. 44.

<sup>33</sup> EA/SOF, pp. 8-9, 17; AR, pp. 37-38, 46.

<sup>34</sup> 33 C.F.R. § 325.2(d)(3).

The District received all public comments by 9 November 2011 and provided them to the Appellant within 3 weeks. In its 29 November 2011 cover letter providing the public comments, the District informed the Appellant that the District still needed adequate information about infrastructure. On 22 March 2012, about 4 months after receiving the public comments and District's request for information, Appellant submitted a response which the District concluded did not contain any new information. The District then conducted its analysis, generated the EA/SOF, and on 10 December 2012, issued its permit decision.

Based on the facts from the AR regarding the sequence of events and correspondence, the District did not receive a timely submittal of information or comments from the Appellant on more than one occasion. Furthermore, the District informed Appellant several times and as late as 29 November 2011 that adequate information about the location of infrastructure was needed. The correspondence shows that the District was timely in its actions and communications with Appellant, and the legal requirement for a Department of the Army permit was not and cannot be waived. Therefore, this reason for appeal does not have merit.

**Action:** None required.

### **CONCLUSION**

For the reasons stated above, I find that the appeal has merit. The District's AR does not contain sufficient documentation to support its permit denial. Although the appeal has merit, I do not find that the District was arbitrary or capricious or abused its discretion. The administrative appeals process for this action is hereby concluded.

  
DONALD L. WALKER  
COL, EN  
Commanding