

ADMINISTRATIVE APPEAL DECISION
Mr. Steve Demarest & Mrs. Deborah Demarest
Permit Denial with Prejudice
Jacksonville District
SAJ-2009-04278

Division Engineer: BG Zachary L. Miller, South Atlantic Division¹

Review Officer: Jonathan Swartz

Appellant/Applicant: Steve and Deborah Demarest

Regulatory Authority: Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403)

Date Acceptable Request for Appeal Received: April 5, 2025

Date of Appeal Conference: May 22, 2025

Summary of Appeal Decision: The Request for Appeal submitted by Steve and Deborah Demarest (Appellant) has merit. As will be detailed below, the administrative record (AR) does not sufficiently support the permit denial made by the U.S. Army Corps of Engineers, Jacksonville District (hereinafter the "District"). The matter is remanded to the District for action consistent with this decision. This determination is based on findings that the administrative record lacks sufficient documentation to support the District's key determinations and that the decision-making process suggests application of an undocumented policy rather than individual project evaluation, despite evidence that similar structures have been permitted in the same waterway.

Background Information: The subject property is located adjacent to Mavin D. Adams Waterway (MAWW) at 12 Bass Avenue, Key Largo, Monroe County, Florida (RE#00553750-000000). The proposed project involves the installation of a 24,000-pound capacity inclined elevator boat lift measuring 12 feet long by 14 feet wide (*extending 12 feet into the waterway*)² within the MAWW, a navigable water of the United States.³

¹ Pursuant to 33 C.F.R 331.3(a), the Division Engineer has the authority and responsibility for administering the administrative appeal process. Signature authority can, and has, been delegated to the Chief of Operations and Regulatory Division for Approved Jurisdictional Determinations with merit. While the review officer served to assist in reaching and documenting the Division Engineers decision, the Chief of Operations and Regulatory Division retains the final Corps decision-making authority for the Approved Jurisdictional Determination.

² AR 0004 This was incorrectly cited by the District in the decision document where it stated the boat lift would extend 14' instead of the actual 12' into the waterway. This is corrected here.

³ 33 CFR 329

On June 17, 2024, Mr. and Mrs. Demarest submitted a Department of the Army (DA) permit application, SAJ-2009-04278, to the District, seeking authorization for the proposed boatlift. The purpose of the boatlift is to lift a Nimbus T-11 vessel at the existing dockage.⁴

On April 4, 2025, the District denied the permit application with prejudice, citing concerns that the proposed project, alone and in combination with existing and reasonably foreseeable future similar structures, would pose a hazardous obstruction to navigation, recreation, and safety and is contrary to the public interest.⁵

On April 4, 2025, the District provided the applicant with a Notification of Administrative Appeal Options and Process (NAP) form. On April 5, 2025, the South Atlantic Division (SAD) received a Request for Appeal from Mr. Demarest. The Request for Appeal outlined nineteen (19) reasons for appeal challenging the District's decision.

By letter dated April 14, 2025, the Review Officer (RO) notified the appellant that the Request for Appeal was complete and acceptable and that the District was requested to provide the AR.

Information Received and its Disposition During the Appeal

Upon receipt of the acceptable Request for Appeal, the Review Officer (RO) requested the AR from the District. The electronic AR, consisting of 1,062 Bates-numbered pages, was received by the RO on April 29, 2025. A copy of the AR was also provided to the Appellant.

On May 15, 2025, the RO provided the Appellant and the District with an agenda for the May 22, 2025, appeal site visit and conference, including a list of clarifying questions for both parties (Appendix A).

On May 19, 2025, and May 20, 2025, the Appellant submitted written responses to the RO's clarifying questions, with citations to the AR (Appendix B). The Appellant provided additional comments on May 29, 2025, May 31, 2025, and June 2, 2025. The additional comments have been incorporated into and are attached to the final conference MFR (Appendix E).

On May 19, 2025, and May 20, 2025, the District submitted written responses to the RO's clarifying questions, with citations to the AR (Appendix C). The District provided additional comments on June 6, 2025. The additional comments have been incorporated into final conference MFR (Appendix E).

⁴ AR 0010

⁵ AR 0050-0051

On April 11, 2025, the Appellant emailed the RO, forwarding prior communication with Deputy Sanchez⁶ and posing additional questions regarding the AR. To clarify this information, the RO sent follow-up questions to the District on May 15, 2025, and received responses on May 19, 2025. The RO responded with further clarifying questions on May 19, 2025, which the District answered on May 21, 2025. These topics were discussed during the conference meeting and are documented in the appeal conference MFR. The email chain is included (Appendix D).

On May 21, 2025, the RO and Travis Morse (assisting RO) conducted an unaccompanied site visit of the project area and surrounding waterways, including the MAWW, South Creek, and Port Largo.

On May 22, 2025, an appeal site visit and conference were held at the project site and the Murray Nelson Government Center in Key Largo. A Memorandum for Record (MFR) documenting the proceedings of the site visit and conference was prepared. On May 29, 2025, a draft version of the appeal conference MFR was provided to all attendees for review and comment. Comments on the MFR were provided to the RO on May 29, 2025, May 31, 2025, June 2, 2025, and June 6, 2025. All comments provided were considered while finalizing the MFR. The final MFR is incorporated into this appeal decision document by reference (Appendix E).

Evaluation of the Appellant's Reasons for Appeal, Findings, and Instructions to the District Engineer

The original Request for Appeal contained a large number of individual reasons for appeal (Reason(s)), which, upon closer analysis and particularly after the clarifying discussions during the appeal conference, were found to be interconnected and overlapping. The appeal conference served to highlight that many of the individual Reasons were, in fact, different facets of three overarching themes. To facilitate a more focused and efficient review, the RO determined that it was appropriate to consolidate these individual points into three overarching themes: Reason 1: Concerns Regarding the Public Interest Review Process, Reason 2: Concerns Regarding Application of Undocumented Policy and Insufficient Documentation in the Decision-Making Process, and Reason 3: The Appellant raised concerns, designated in the agenda as Reason 3b and Reason 6b. Reason 3b alleges that the District made inaccurate statements about the waterway's connection to Pennekamp Park, while Reason 6b points to the District's acknowledgement of not verifying the compliance of other structures along the waterway.

By consolidating the original reasons for appeal into these three overarching themes, the RO seeks to provide a clearer analysis of the key issues in the appeal. This approach also avoids unnecessary repetition and ensures that the decision document focuses on the most significant aspects of the District's decision-making process.

⁶ See Reason 2 discussion section below for context. *The AR indicates the MCSO comments were not shared with the Appellant. The RO notes that the appeal process revealed these comments were taken out of context by the District and should not have been used in the review process.*

Relevant Regulations for Reasons 1 and 2:

- 33 CFR 320.4(a) - General policies for evaluating permit applications: Requires a balanced public interest review, considering all relevant factors.
- 33 CFR 322.5(d)(1) - Special policies and procedures: Structures for small boats: States that, "In the absence of overriding public interest, favorable consideration will generally be given to applications from riparian owners for permits for piers, boat docks, moorings, platforms and similar structures for small boats. Particular attention will be given to the location and general design of such structures to prevent possible obstructions to navigation with respect to both the public's use of the waterway and the neighboring proprietors' access to the waterway."
- 33 CFR Part 325, Appendix B, Paragraph 8a, states, "The EA should include a discussion of the environmental effects of the proposal and each alternative." This means that the District must analyze the environmental impacts of each alternative, including the proposed project.
- The Corps' Regulatory Program has a mission to "protect the nation's aquatic resources, while allowing reasonable development."⁷ This suggests a collaborative approach that seeks to find solutions that balance environmental protection with the needs of the applicant.

Reason 1: Concerns Regarding the Public Interest Review Process: The Appellant contends that the District failed to adequately document its public interest review, as required by 33 CFR 320.4(a) and 33 CFR 322.5(d)(1), resulting in insufficient support in the administrative record for the permit denial. The Appellant contends that this is evidenced by several factors, including the justification for not issuing a public notice, the consideration of project-specific circumstances, the alternatives analysis, and the consideration of recreation, safety, and property sale information.

FINDING: This reason for appeal has merit.

DISCUSSION: The Appellant contends that the District failed to conduct a properly balanced public interest review, as required by 33 CFR 320.4(a) and 33 CFR 322.5(d)(1)⁸, leading to an unbalanced assessment of the project's benefits and detriments. The Appellant contends that certain aspects of the review process raise questions regarding the *adequacy* of the justification for not issuing a public notice, inadequate consideration of project-specific circumstances, a flawed alternatives analysis, inappropriate consideration of recreation and safety, and property sale information, and a failure to demonstrate why the proposed project could not be authorized under a general permit.

⁷ 33 CFR 320.1(a)(1)

⁸ The regulation's directive for 'favorable consideration' creates a presumption in favor of approval for small boat structures, which the District must overcome with substantial evidence of overriding public interest concerns. The AR does not adequately document such overriding concerns sufficient to rebut this presumption.

1. **Concerns Regarding the Decision to Forgo Public Notice:** The Appellant argues that the District lacked adequate justification for not issuing a public notice as required under standard regulatory procedures. The District provided its rationale for not issuing a public notice,⁹ citing 33 CFR 325.8(b) which references the authority to deny permits if the District Engineer (DE) “*determines that the activity will **clearly interfere with navigation**...*” and stating:¹⁰ “*Since the Corps concluded, based on previous application denials and recent review efforts of the current applications, that the proposed project would **clearly interfere with navigation**, no public notice was required for this project*” (emphasis added in bold). The District stated that, despite not issuing a public notice, coordination was conducted to obtain “current position letters” from multiple agencies.¹¹

The Appellant argues that a review of the agency coordination comments reveals what *appears* to be inconsistencies and a *potential* reliance on information that the Appellant claims is deficient (nullified,¹² superseded,¹³ outdated¹⁴ and/or inaccurate data/information¹⁵). When the District coordinated internally with its USACE Navigation Section (CNS) for a navigation determination¹⁶ the District provided, among other things, the following: The U.S. Coast Guard (USGC) letter dated July 24, 2008 which states “*any construction that extends past the seawall would be considered an **obstruction to navigation***” but goes on to say “*if the **boat lift is permitted... lighting the obstruction should be considered***”¹⁷ (emphasis added in bold); Florida Fish and Wildlife Conservation Commission (FWC) letter dated December 1, 2008, which cites the 2008 USGC letter.¹⁸ Neither of the 2008 letters directly objects to the structure being constructed waterward of the seawall. The FWC letter cites Captain Luher’s analysis of the

⁹ AR 0010

¹⁰ AR 0010

¹¹ AR 0010

¹² Nullified: Referring to the 2009 USGC letter which on May 9, 2017, the USGC (AR 0788) informed the District their current position was to concur with the previous 2008 USGC letter (obstruction that can be mitigated), thus nullifying the 2009 USGC letter.

¹³ Superseded: Referring to the 2008 USGC and FWC letters, superseded by the USGC letter dated December 11, 2024 (AR 0456), and the FWC letter dated December 13, 2024 (AR 0455).

¹⁴ Outdated: Particularly any of the prior denials referenced by the District that relied on the now nullified, superseded, or inaccurate data. See discussion 1 of RFA 2 below.

¹⁵ Inaccurate data/information: Particularly referring to the Captain Luher’s analysis of the MAWW (AR 0703, 1005), which was based on an incorrect channel width of 60’ (20’ less than the actual channel width of 80’). Based on the assumption of a 60’ wide channel, Captain Luher stated “*If two vessels are on lifts directly across the cut from one another the two lifts would encroach approximately 24-30 feet out into the cut. This will only leave approximately 30 feet for any vessels to take appropriate action...*” The Appellant states that correctly applying the 25/50/25 rule to the accurate width of 80’, and proposed boat lift extension of 12’ would only use 15%, and if both sides were limited to 15%, it would leave 70% or 56’ of unobstructed navigable channel. The RO notes the Captain’s analysis is referenced by multiple agency letters and comments to support their positions.

¹⁶ AR 0475, 0697

¹⁷ AR 0700

¹⁸ AR 0701

MAWW,¹⁹ which was based on an incorrect channel width of 60' (which is 20' less than the actual channel width of 80'); The March 30, 2020 DA denial for the Powell proposed boat lift²⁰; and, the now superseded and nullified, 2009 USGC letter dated March 16, 2009²¹ that stated "*any construction that extends beyond the seawall would be considered an **obstruction that is hazardous to navigation***," (emphasis added in bold) which on May 9, 2017, the USGC²² informed the District their current position was to concur with the previous 2008 USGC letter (obstruction that can be mitigated), thus nullifying the 2009 USGC letter, therefore, any use of the term "**hazard to navigation**" (emphasis added in bold) citing the 2009 USGC letter such as in the initial permit denial to the Appellant or in prior DA denials, would be inappropriate for this review to support the District's determination of "**hazard**," "**undue**," or "**clearly interfere**," (emphasis added in bold) and may have influenced a negative comment from the CNS. The CNS then stated, in light of the 2020 DA denial, and objections from the 2008 USGC and FWC letters (*the RO notes neither referenced letters object, but in fact inferred the structures would be considered an "obstruction" that could be mitigated by use of lighting*), that they "*object[ed] to issuance of this permit.*" The RO additionally notes that the AR does not provide any specific data (such as traffic reports, incident or crash reports, tide charts... etc.) analyzed to make their determination. After the CNS issued its determination on August 9, 2024,²³ the USGC provided an updated letter on December 11, 2024,²⁴ which aligns with the 2008 USGC letter, which again does not object to the project yet mentions potential lighting requirements to mitigate potential obstruction. The FWC provided an updated letter on December 13, 2024,²⁵ which also did not object to the project.

The District's rationale for determining the proposed structure would "**clearly interfere with navigation**" (emphasis added in bold) is located in the decision document,²⁶ where the District states "*Based on information received from federal, state, and local agencies, as well as knowledge of the waterway,*" and comments of "swift" or "powerful" currents, "high volumes of traffic," and a perceived potential increase of vessel collisions or property damage if the proposed project is constructed. (*See Reason 2 discussion section below for further analysis of these statements*)

The District cites 33 CFR 320.4(g)(3) throughout the AR which states that the Corps will generally deny permits for proposals that "create undue interference with access to, or use of, navigable waters." The word "undue" suggests that the

¹⁹ AR 0703, 1005

²⁰ AR 0716

²¹ AR 0715

²² AR 0788

²³ AR 0697

²⁴ AR 0456

²⁵ AR 0455

²⁶ AR 0028-0029

interference must be significant and demonstrably harmful, not just a minor inconvenience. The District cites this regulation throughout the decision document, AR, and appeal process; however, the AR indicates that the determination of “undue” was not clearly defined or sufficiently supported and is based on a potentially flawed navigation review from the CNS, past permit denials on the MAWW (which may be based on deficient information), and a potentially putative cumulative impact analysis. Notably, the District's cumulative impact analysis acknowledges that the proposed project individually 'might have only a minimal impact on safe navigation.'²⁷ This admission undermines the District's determination that the project would 'clearly interfere with navigation' and raises questions about whether the cumulative analysis was used to circumvent the individual project's minimal impacts rather than conduct a proper assessment.

The RO notes that the AR demonstrates solicited comments and cumulative analysis that led to the District's determination this proposed project would "clearly interfere with navigation" or create “undue interference” were produced after the determination to forgo a public notice was made. The lack of adequate documentation supporting the 'clearly interfere with navigation' determination at the time the public notice decision was made demonstrates insufficient support in the administrative record for this key finding.

In summary, the Appellant argues that the AR raises questions regarding whether the determination that the proposed project would “clearly interfere with navigation” was adequately supported by factually based comments and determinations at the time the decision was made to forgo public notice pursuant to 33 CFR 325.8(b). The Appellant further argues that this *raises concerns* about the objectivity of the public interest review process.

2. **Concerns Regarding the Alternatives Analysis:** The Appellant argues that the District's alternative analysis raises concerns. When the initial denial letter was sent to the Appellant, the District proposed several alternatives, including a boat cut (known to both parties to be disallowed by the county) and inadequately sized davits (also known to both parties to be insufficient). Furthermore, the Appellant claims and the AR demonstrates that alternatives were submitted by the Appellant, however the AR provides limited documentation of attempts to engage in meaningful discussions with Appellant about potential practicable alternatives or mitigative measures, such as lights (as the USCG suggested in their 2024 comment²⁸ and 2008 comment²⁹, and the 2008 FWC letter³⁰), buoys, or markers, that could alleviate navigation concerns. The District stated during the appeal conference that it considered lights, flagging, and buoys as mitigation measures,

²⁷ AR 0029

²⁸ AR 0456

²⁹ AR 0700

³⁰ AR 0701

but that its consideration of these types of alternatives were not documented.³¹ The District proposed the “no action” alternative of using the existing davits, which are noted to be structurally incapable of lifting the Appellant’s vessel.³² The District also proposed the alternative of seeking approval to create a new boat notch, even though the District notes the County does not allow “new dredging.”³³

The Appellant argues that the AR demonstrates multiple attempts were made to initiate dialog and offer alternatives, however, they were not adequately considered by the District in the decision document.³⁴ Notably, the Appellant proposed several alternatives to limit the distance of the waterward structure thus complying with a cited general District-wide guideline commonly referred to and referenced throughout the AR as the “25/50/25 rule,” and avers it is commonly applied by the District under multiple General Permits (GP) for similar projects.³⁵ The AR also demonstrates that throughout the review process the Appellant argued that applying the 25/50/25 rule to an 80’ width would leave 40’ of clear navigation if property owners on both sides fully used the full 25%. But that the proposed boat lift extension of 12’ would only use 15%, and if both sides were limited to 15%, it would leave 70% or 56’ of unobstructed navigable channel. The District clarified during the appeal process that the “25/50/25 rule” is a rule of thumb based on practical experience to provide 50% clearance for general navigation.³⁶ The CNS referenced the rule stating “The general local navigation 25% rule-of-thumb (adopted by Monroe County) whereby 25% of available canal width is allocated along each shoreline for mooring of vessels and leaving 50% of available canal width along the center of the canal for vessel transit and navigation.”³⁷ However, neither the District or CNS provide further discussion about how this project would or would not comply with this general rule or how the Appellant’s proposed reduction in the boat lift arm’s length would or would not affect the District’s concerns about obstructing navigation, thus demonstrating an unwillingness to consider a reasonable range of alternatives, as required by 33 CFR 320.4(a).

Further, the AR demonstrates that alternatives were dismissed primarily on the basis of the property being for sale, not meeting the Appellant’s purpose, or the possibly flawed determination of effect to navigation (see discussion above Reason 1.1.). Examples of this include On-site alternatives 1 and 2 the District were dismissed on the basis of the property being listed for sale, as the District states *“however, the property is for sale. If the applicant sells the property, he may have no need for a boat lift to store said vessel or any other vessel, or*

³¹ see Final-Appeal Conference MFR and Attachment C of the Final-Appeal Conference MFR

³² AR 0021

³³ AR 0055

³⁴ AR 0019-0025

³⁵ see Attachment B of the Final-Appeal Conference MFR

³⁶ see Attachment C of the Final-Appeal Conference MFR

³⁷ AR 0698

*similar size or otherwise” and “however, the property is for sale. As such, the applicant has not substantiated his need to lift a particular vessel; it appears the applicant simply wishes to increase the potential sale price for his property.”*³⁸

On-site alternative 3 was dismissed by the District stating it would “*pose the same obstruction to navigation as the applicant’s proposed alternative, albeit for four feet less*” with no discussion about how reducing length of the arms would affect impacts to navigation, thus the Appellant’s claims that the District holds an unwritten policy that all permanent structures waterward of the seawall are hazards to navigation.³⁹ Also see discussion point 2 of Reason for Appeal 2 below.

In summary, the Appellant argues the AR raises concerns regarding whether the District adequately evaluated a reasonable range of alternatives, as required by 33 CFR 320.4(a). While the District proposed several alternatives, the AR suggests that all were not truly practicable or well-suited to meeting the Appellant’s stated purpose and need. More significantly, the District did not mitigate measures or to explore the Appellant’s proposed alternatives. This lack of meaningful dialogue resulted in the summary rejection of alternatives without evidence of thorough consideration as required by 33 CFR 320.4(a), which mandates evaluation of a reasonable range of alternatives. Furthermore, the District dismissed alternatives based on the fact that the property was listed for sale. This inadequate alternative analysis demonstrates a lack of sufficient documentation in the administrative record supporting the District’s conclusion that no reasonable alternatives exist.

3. **Concerns Regarding the Weight Given to the Property Sale Listing:** The Appellant argues that the District’s emphasis on the property listing as a factor, which was cited over a dozen times throughout the decision document alone, and throughout the AR, while perhaps relevant to the applicant’s stated purpose and need, *raises concerns* that it may have been given undue weight in the overall balancing process. Examples of this are demonstrated in the AR by the use of sale listing to justify the “no action” alternative of using existing davits;⁴⁰ to support dismissal of On-site alternatives 1 and 2 as discussed above in discussion point 2 of reason for appeal 1; and in the Public Interest Review section of the decision document where the District states “*with the property for sale the need to install a boat lift is questionable.*”⁴¹ While the property listing may have some relevance to the applicant’s stated purpose and need, the District’s repeated emphasis on this factor throughout the decision document and AR suggests it may have been given disproportionate weight relative to other public

³⁸ AR 0021-0022

³⁹ see Final-Appeal Conference MFR and Attachment B of the Final-Appeal Conference MFR

⁴⁰ AR 0020

⁴¹ AR 0030

interest factors. The AR does not demonstrate how the property sale status materially affects the project's impacts on navigation, the aquatic environment, or other relevant public interest factors required to be considered under 33 CFR 320.4(a). Finally, the Appellant argues that riparian rights belong to the property and not the owner, which, the Appellant contends, diminishes the relevance of the property sale listing. The disproportionate emphasis on the property sale without adequate documentation of its relevance to public interest factors demonstrates insufficient support in the administrative record for this aspect of the District's decision.

4. **Concerns Regarding Consideration of Authorization Under a General Permit:**

The AR demonstrates that Appellant originally applied for an RGP-82, District notified the Appellant the application would not be reviewed under RGP-82,⁴² the Appellant requested *"Please advise your reasoning on not taking RGP into consideration"*⁴³ as well as inquired about other types of GPs and provided his rationale as to why his project should be evaluated under a GP.⁴⁴ The District replied citing discretionary authority, *"Corps notified Mr. Demarest that special condition for all work #4 of the RGP-82 states, "4. Discretionary Authority: The District Engineer reserves the right to require that any request for authorization under this RGP be processed under as an Individual Permit." Due to concerns that structures on the Adams Cut waterway pose **hazards to navigation**, this project is being reviewed under a standard permit"*⁴⁵ (emphasis added in bold). And *"As previously informed, all the application under review for MAWW are not eligible to be processed under SAJ-20 due to the explained reasons (history of **previous unfavorable decision** at this location, the **type of proposed action**, the **confirmed concerns from other stakeholders regarding navigation safety**, etc.)."*⁴⁶

The RO notes the DE has authority to exercise discretion,⁴⁷ however, in this case (see discussion regarding the determination of "undue" and "clearly will interference" with navigation above in Reason 1.1.), the Appellant argues that if the determination that the structure poses **hazards to navigation**" is based on

⁴² AR 00605

⁴³ AR 0606

⁴⁴ AR 0310-0313

⁴⁵ AR 0605

⁴⁶ AR 0105

⁴⁷ 33 CFR 325.2(e)(2): This regulation addresses the discretionary authority of the District Engineer (DE) to require an individual permit. It states: "The district engineer may require, on a case-by-case basis, that any activity otherwise covered by a general permit be processed as an individual permit if he determines that the concerns for the aquatic environment and other relevant factors warrant individual review."

deficient information, as well as **stakeholder concerns**, and “**previous unfavorable decisions**” that used that deficient information as a basis for denial, this raises questions regarding whether the District’s rationale for not reviewing the application under a GP warrants reconsideration. Regarding the “**type of proposed action**” as stated by the District above as a reason for elevated individual review, the Appellant claims that structures/actions such as this proposed boat lift are generally considered “minor” throughout the District under NWP-2, RGP SAJ-82, SAJ-20, and the SPGP.⁴⁸ To support this claim, the Appellant drew attention to similar boat lifts in the area, particularly a boat lift on the MAWW that was approved by the District under the RGP-82, letter dated April 18, 2024.⁴⁹ In both the AR and during the appeal process the District stated this RGP-82 was “erroneous and that it is pursuing a remedy”⁵⁰ citing “workload distribution,” and lack of regional “requisite historical data/information”⁵¹ Further explanation was not provided by the District or sufficiently documented in the AR as to why the determination was made that this proposed project would “pose hazards to navigation” or what exactly is the “requisite historical data/information.” The AR does not adequately demonstrate why the proposed project could not be authorized under an existing GP. The fact that a different office within the same District was assigned a similar project on the MAWW and concluded that it would meet the terms and conditions of the RGP-82, raises questions about why this project could not be authorized under the same RGP. , The AR provides limited support as to why this project would not be appropriate for review under a GP. The lack of adequate documentation supporting the District's rationale for rejecting general permit authorization further demonstrates insufficient support in the administrative record.

In summary, these concerns collectively demonstrate that the administrative record lacks sufficient documentation to support the District's public interest determination. The AR does not adequately document the basis for forgoing public notice, the alternatives analysis, the weight given to various factors, or the rationale for rejecting general permit authorization. Additionally, the District did not adequately document consideration of the project's potential benefits, including the favorable consideration required for small boat structures under 33 CFR 322.5(d)(1). This insufficient documentation fails to meet the requirements of 33 CFR 320.4(a).

ACTION: The District is directed to reconsider its permit decision with adequate documentation supporting its determinations. First, the District must thoroughly evaluate

⁴⁸ NOTE* The RO is limited to an admirative review of the AR and information provided during the review process, as such the RO did not review the terms and conditions of these GPs.

⁴⁹ AR 0815

⁵⁰ See FINAL-Appeals Conference MFR page 5

⁵¹ AR 0253

the project for authorization by general permit, and if a general permit is not appropriate, provide clear documentation of that determination. The District must then ensure its review adequately documents consideration of all relevant factors consistent with 33 CFR 320.4(a) and 33 CFR 322.5(d)(1), including appropriate consideration of private benefits and the favorable consideration directive for small boat structures. This reconsideration must include the following:

- a. **Evaluate General Permit Options:** The District should thoroughly evaluate whether the proposed project could be authorized under an existing Regional General Permit (RGP), State Programmatic GP (SPGP), or Nationwide Permit (NWP), and provide clear and defensible rationale if it determines that such authorization is not appropriate. This rationale should address the specific terms and conditions of the relevant general permits and explain why the proposed project does not meet those requirements.
- b. **Re-evaluate the Decision to Forgo Public Notice:** The District must re-evaluate the basis for its determination that the proposed project would "clearly interfere with navigation," as required to forgo public notice under 33 CFR 325.8(b). The AR must clearly document the factual, site-specific evidence that supported this determination at the time the decision was made.
- c. **Conduct a Thorough Reassessment of Project-Specific Circumstances:** The District must ensure that the AR provides a more thorough, factual, and detailed assessment of the project's specific circumstances, including the potential for the boat lift's design to minimize impacts to navigation, the actual width of the waterway, and the existence of the previously approved docking facility.
- d. **Meaningful Alternatives Analysis:** The District must explore and document consideration of potential practicable alternatives and mitigation measures with the Appellant. The AR should reflect an effort to find a solution that balances the applicant's needs with the public interest.
- e. **Justify Weight Given to Property Sale Listing:** The District must carefully consider the relevance of the property listing to the applicant's stated purpose and need and ensure that this factor is not given undue weight in the overall public interest balancing process.
- f. **Document Policy Basis:** If the District maintains that structures in MAWW require special consideration, it must generate a record that provides an adequate basis to support decision making.
- g. **Provide Detailed Factual Support:** All assertions about waterway characteristics (traffic volume, current speeds, navigation hazards) must be supported by quantifiable data, studies, or documented observations rather than conclusory statements.

Reason 2: Concerns Regarding Application of Undocumented Policy and Insufficient Documentation in the Decision-Making Process: The Appellant argues that the District applied an undocumented policy regarding structures in this waterway and failed to adequately document its decision-making process, which may be inconsistent with the Corps' requirement to base decisions on individual project evaluation as outlined in 33 CFR 320.1(a)(2). The Appellant argues that these actions constitute an arbitrary and capricious decision, subject to being set aside under 5 USC 706.

FINDING: This reason for appeal has merit.

DISCUSSION: The Appellant contends that the District applied an undocumented policy regarding structures in this waterway and failed to adequately document its decision-making process, which may be inconsistent with the Corps' regulatory requirements. The Appellant raises legitimate concerns regarding the District's basis for its permit denial and the lack of sufficient documentation in the administrative record to support the decision.

Specifically, the Appellant identifies the following concerns:

- 1. Concerns Regarding the Use of Information and Selective Presentation of Evidence:** (emphasis added in bold) The Appellant points out that the District referenced the 2009 USCG letter and use of its terminology (**hazard or hazardous to navigation**) despite a 2017 communication directing reference to the 2008 letter (**obstruction to that can be mitigated for with lighting**), as well as referencing deficient information.

As discussed above and summarized here:

- The 2008 USGC letter states “*any construction that extends past the seawall would be considered an **obstruction to navigation***” but goes on to say, “*if the boat lift is permitted... lighting the obstruction should be considered.*”⁵²
- The 2009 USGC letter that states “*any construction that extends beyond the seawall would be considered an **obstruction that is hazardous to navigation***”.⁵³
- On May 9, 2017,⁵⁴ the USGC informed the District their current position was to concur with the 2008 USGC letter, regarding the 2016 Powel permit application for a similar proposed boat lift, thus nullifying the 2009 USCG letter (which had stated structures would be “hazardous to navigation”).
- Captain Luher’s analysis of the MAWW,⁵⁵ which was based on an incorrect channel width of 60’ (20’ less than the actual channel width of

⁵² AR 0700

⁵³ AR 0715

⁵⁴ AR 0788

⁵⁵ AR 0703, 1005

80'⁵⁶). This analysis is referenced by multiple agency letters and comments to support their positions.

The District's initial permit denial letter cited the 2009 USCG letter, which stated the project “*would be considered an obstruction that is **hazardous to navigation***”⁵⁷, as well as referencing multiple prior DA permit denials for similar projects on the MAWW that may have been based, at least in part, on the 2009 USCG letter, and inaccurate data.⁵⁸ However, the District stated that reliance on the 2009 USCG letter rather than the 2008 USCG letter was not purposeful.⁵⁹

The AR indicates that the District included multiple previous DA denials⁶⁰ in the AR and referenced them during the review process. The Appellant argues that these denials were used to justify the denial of the proposed project.⁶¹ The RO notes that the administrative review is limited to the AR and information received during the appeal process. The AR references these prior DA denials and includes some documentation related to them, but the complete decision documents for these prior denials were not included in the AR provided to the RO, limiting the ability to fully evaluate the basis for those decisions.

Regarding the Appellant's claim of **selectively presenting information to support a pre-determined denial**, the AR contains several examples that support this claim. First, the comments from the MCSO⁶² that were found to be unrelated and out of context;⁶³ Further, the AR includes the 2024 USCG letter that concurs with the 2008 USCG, and the 2024 FWC letter that references the 2024 USCG letter (letters previously discussed above). While the District used the language from these letters to support its determination that project would pose a hazard to navigation, there was no discussion provided by the District regarding the absence of objections from these letters or the comments regarding potential mitigative measures. In fact, the only objection provided to the District during the review process was by its own Navigation Section, which cited non-existing or nullified objections,⁶⁴ which in turn, raises questions regarding the validity of the CNS's analysis.⁶⁵ Additionally, the Appellant solicited and provided to the District comments from adjacent property owners on the MAWW. The

⁵⁶ This was demonstrated and confirmed by the RO during the site visit with a laser measuring tool, as well as plats and surveys in the AR. CNS comment also cites 80'

⁵⁷ AR 0691

⁵⁸ AR 0703, 1005

⁵⁹ see page 13 of the Appeal Conference MFR

⁶⁰ AR 0007: SAJ-2008-01982 (10/20/09), SAJ-2009-02701 (9/27/10), SAJ-2007-05714 (10/20/09), SAJ-2007-04737 (3/8/10), SAJ-2009-04278 (9/27/10), and SAJ-2001-04908 (3/24/20)

⁶¹ AR 0008

⁶² AR 0011

⁶³ see Attachment B of the Final-Appeal Conference MFR

⁶⁴ AR 0698, referencing the superseded 2009 USCG letter

⁶⁵ AR 0698

District included these comments in the AR and in the decision document,⁶⁶ all of which appear to be in support of the project, however the District did not provide any discussion or evaluation of these comments, suggesting it's unclear if these comments were considered. The District cited⁶⁷ an "objection from a law office representing several property owners along Adams Waterway (dated 6 March 2006),"⁶⁸ but does not document where this letter came from or even if it is specific to this project.

Moreover, The Appellant contends that the District made several assertions about MAWW characteristics to support its determination without providing factual data or documentation to substantiate these claims. Examples of this include:

- Referring to the MAWW as "relatively narrow"⁶⁹ (channel width of 80') but does not explain what is meant by "relatively narrow," or provide comparisons to demonstrate, relatively, what is meant by "relatively narrow"; having "swift" or "powerful" currents,⁷⁰ but also does not define what this means or provide any factual data to support this purported characteristic;
- Having a high volume of boat traffic,⁷¹ but only cites other agency comments⁷², a TripAdvisor user comment⁷³, and a screenshot of USCG mapping then stating "A review of vessel traffic on Marine Cadastre website depicts the high volume of traffic," but provides no quantifiable traffic data leaving the reader to question the meaning of "high traffic volumes" and leaving open the potential for interpretation and misrepresentation;
- The District included a comment from Monroe County⁷⁴ that referenced the Monroe County Regulatory code citing various regulations to include the following, "*...(a)All docking facilities shall be constructed so as not to interfere with normal navigation or reasonable access to adjacent docks or moorings.*"⁷⁵ As noted by the Appellant,⁷⁶ the CNS,⁷⁷ and the County's own regulations they provided to the District,⁷⁸ the County has adopted the previously discussed "25/50/25 rule"⁷⁹, but the District does not mention or discuss that this rule commonly is applied at the County regulatory level. If this rule is indeed commonly applied by regulatory agencies, then one may reasonably conclude a project that would occupy less than 25% (15% as proposed) would be within "normal navigation" limits. As such, the Appellant contends the AR demonstrates

⁶⁶ AR 0012-0014 (Comments 6-12)

⁶⁷ AR 0007 (Section 1.4 of the decision document)

⁶⁸ AR 1019

⁶⁹ AR 0011, 0024, 0028, 0029, 0031, 0032

⁷⁰ AR 0005, 0011, 0022, 0024, 0028, 0032, 0034

⁷¹ AR 0005, 0007, 0011, 0022, 0024, 0028, 0029, 0031, 0032, 0033, 0034

⁷² AR 0456, 0455

⁷³ AR 0192

⁷⁴ AR 0012, Comment 5

⁷⁵ AR 0012 (decision document), AR 0446 Monroe County email with regulations

⁷⁶ AR 0137, Attachment B of the Final-Appeal Conference MFR

⁷⁷ AR 0476, 0698

⁷⁸ AR 0460

⁷⁹ RFA 1.2 of this document

the District did not give “full consideration to the views of State and local agencies on questions of State law and policy” as required by 33 CFR 320.4(j).

Further, the Appellant asserts that by selectively including certain information, the District *appears* to be presenting information to support a pre-determined denial.

This selective consideration of information without adequate documentation demonstrates a lack of sufficient support in the administrative record for the District's conclusions. The Appellant argues that the reliance on what the Appellant claims to be deficient information *raises concerns* that the District may have had a predisposition for denial. 33 CFR 320.4(a) requires the Corps to base its permit decisions on an evaluation of the “probable impacts” of the proposed activity. To make a reasoned determination of the probable impacts, the Corps must rely on accurate and up-to-date information. The District's consideration of the available information appears inadequate, as it focused primarily on information supporting denial while not adequately addressing information that could support approval, such as the mitigative measures suggested in agency correspondence. This selective consideration undermines the reliability of the impact assessment. As well as making non-factual statements to support a decision could suggest the District may have been arbitrary and capricious in their review process pursuant to 5 USC 706 Administrative Procedure Act.

2. **Application of undocumented policy:** The Appellant argues that the AR suggests the District applied an undocumented policy of denying all waterward expansion within the MAWW. This policy is not publicly available and lacks documentation in the administrative record. The Appellant points to evidence that the District coded the project as “red” for SPGP compliance before formal review, indicating the application of predetermined criteria not based on individual project merits.

The AR indicates the District stated, “*If you are asking whether I made the determination that this project should be coded “red” for SPGP compliance based on internal guidance I had been provided by my leadership then the answer is yes*”.⁸⁰ The Appellant also submitted a FOIA requesting any written “*policy document pertaining to boat lifts on Adams Cut.*” The District stated, in response “*our record holders confirmed that we have no responsive documents regarding written policy on the Adams Waterway.*”⁸¹ Additionally, during the appeal conference, in response to questions from the RO, the District acknowledged that it follows an undocumented policy of elevating permit requests using discretionary authority and subsequently denying requests for boat lifts along the MAWW. This approach is inconsistent with individual project evaluation requirements and lacks support in the administrative record, particularly given that a similar structure has been permitted in the same waterway under general permits. This application of an undocumented policy demonstrates that the District's decision was not based on individual project evaluation supported by adequate documentation in the administrative record.

⁸⁰ AR 0305

⁸¹ AR 0359

- 3. Withheld information:** The Appellant argues that pertinent information was not shared with the Appellant that was either integral to the denial decision or could have altered the outcome of the denial decision if the Appellant would have had the opportunity to comment, address, or know about during the application process. Specifically, The Appellant points to the CNS review,⁸² Monroe County Sheriff's Office (MCSO) Deputy's comments,⁸³ and the project area's prior approval for a docking facility in 2002.⁸⁴

The AR indicates that these documents were not shared with the Appellant during the initial review process. The District summarized and shared the CNS comments in the initial permit denial letter,⁸⁵ however, the AR does not indicate the CNS review/determination in its entirety were shared with the Appellant until after the denial action was finalized and the Appellant received the AR.

The AR indicates the MCSO comments were not shared with the Appellant. The RO notes that the appeal process revealed these comments were taken out of context by the District and should not have been used in the review process.⁸⁶ The 2002 DA authorization was not shared with the Appellant until the AR was distributed during the appeal process, additionally, the AR indicates the 2002 DA authorization was referenced along with the 2010 boat lift DA permit denial by the District in the decision document, however only the 2010 denial was forwarded to the Appellant⁸⁷ which, the Appellant argues, may suggest a lack of impartiality. During the appeal conference the District acknowledged that the comments were not shared, and that the Appellant was not provided with an opportunity to respond to or rebut negative comments. The District stated that it is not its policy to share every concern raised in its consultation.

While there is not a specific regulation or policy that states all comments or information must be shared with an applicant during the review process, it is *often* practice of the Corps to share comments received during the review process with an applicant that would be considered pivotal in the decision-making process.

33 CFR 320.1(a)(2) mandates that the Corps' regulatory program "be administered in a fair, flexible, and balanced manner." In summary, the omission of the 2002 DA authorization while simultaneously sharing the 2010 DA permit denial; not sharing the full CNS navigation review while basing the final DA permit denial on it; and taking out of context and utilizing the comment from the MCSO to support the denial while not sharing it. The omission of this information

⁸² AR 0578

⁸³ Comment 2 of the Decision Document (AR 0011, 0771)

⁸⁴ AR 1038

⁸⁵ AR 0691

⁸⁶ see Attachment F of the Final-Appeal Conference MFR

⁸⁷ AR 0008

did not provide the Appellant the opportunity to provide meaningful feedback for consideration in the ultimate permit decision. While not all internal communications need to be shared with applicants, key information that forms the basis for permit decisions should be made available to allow for informed response and meaningful participation in the regulatory process. This selective sharing of information prevented the development of a complete administrative record that would adequately support the permit decision.

These concerns, considered collectively, demonstrate that the District applied an undocumented policy rather than conducting individual project evaluation with adequate documentation. The administrative record lacks sufficient support for the District's decision and suggests the application of predetermined criteria that are not documented or justified in the record, which is inconsistent with the requirement for reasoned decision-making supported by substantial evidence.

ACTION: The District is directed to take the following steps on remand:

- a. **Re-evaluate Reliance Guidance and Ensure Accuracy of Data:** The District must ensure that its decision is based on the most up-to-date and relevant guidance. If the District determines that the 2009 USCG letter is applicable, it must provide a clear and supportable rationale for this determination, documenting its reasoning in the AR. Furthermore, the District must ensure that all data used in its analysis, including studies, analysis, or statements regarding the waterway, are accurate, factual, and reliable.
- b. **Adherence to Regulatory Process:** The District is directed to ensure adherence to the standard regulatory process, including if an individual permit is indeed required, then issuing a public notice and providing the Appellant with an opportunity to comment on all relevant information. All comments and responses should be documented in the AR.
- c. **Review All Information:** The District must review comments from local, state, or other federal agencies, to ensure a clear understanding of the agency's comments and positions.
- d. **Document Decision-Making Rationale:** The District must clearly document the specific basis for its permit decision, including any policies or criteria applied, and ensure such decision is supported by documentation included in the administrative record.

Reasons for Appeal Determined to Not Have Merit: Reason for Appeal 3b and Reason for Appeal 6b: The Appellant raised concerns, designated as Reason 3b and Reason 6b, regarding the District's permit decision. Reason for Appeal 3b alleges that the District made inaccurate statements about the waterway's connection to Pennekamp Park, while Reason for Appeal 6b points to the District's acknowledgement of not verifying the compliance of other structures along the waterway.

FINDING: This reason for appeal is without merit.

DISCUSSION: While 33 CFR 320.4(a) mandates a careful evaluation of all relevant factors in Corps decisions, the reasons for appeal presented here are without merit. Even if an

inaccurate statement existed concerning the waterway's connection to Pennekamp Park, the permit decision was primarily driven by factors related to navigation and safety within the waterway itself. This makes the inaccuracy tangential and unlikely to have had a substantial impact on the decision.

Furthermore, while the District admitted to not verifying the compliance status of other structures, the District's regulatory purview does not extend to proactively ensuring such compliance; the focus of a permit decision is on the project under review and its direct impacts. Therefore, these issues do not, individually or collectively, invalidate the District's permit decision, nor do they demonstrate a failure to carefully evaluate all relevant factors as required by 33 CFR 320.4(a).

ACTION: No action required.

CONCLUSION:

Based on the foregoing analysis, I conclude that Reason for Appeal 1: Concerns Regarding the Public Interest Review Process, Reason for Appeal 2: Concerns Regarding Application of Undocumented Policy and Insufficient Documentation in the Decision-Making Process, both have merit. The AR reveals potentially significant deficiencies in the District's record. Therefore, the District's decision to deny permit application SAJ-2009-04278 is hereby **REMANDED** to the District for reconsideration. The District should undertake a comprehensive reevaluation of the application, adhering to the instructions outlined in this decision document. This constitutes the final decision of the Division Engineer on the merits of this administrative appeal, thereby concluding the administrative appeal process. The Jacksonville District Engineer retains the authority to render the final Corps decision on the permit application following this remand and shall provide that final decision to the South Atlantic Division Engineer and the Appellant upon completion of the reevaluation.

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August 18, 2025

Zachary L. Miller
Brigadier General, U.S. Army
Commanding

[Date of Appeal Decision]