ADMINISTRATIVE APPEAL DECISION

TURTLE BEACH, LTD
SUNLAND COMPANY OF HOBE SOUND
MARTIN COUNTY LAND TRUST

FILE NUMBER SAJ-2004-2216 (IP-AAZ)

JACKSONVILLE DISTRICT

DATE: May 7, 2006

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

Appellant Representative: Tom Kenny, Appellant, Turtle Beach LTD
Erin Deady, Appellant Representative, Lewis, Longman, and Walker
Robert Diffenderfer, Appellant Representative, Lewis, Longman, and Walker
Buz Divosta, Landowner, Turtle Beach LTD
Rudd Jones, Consultant, Appellant Representative
Paul Ezzo, Consultant, Appellant Representative

Date of Receipt of Request for Appeal (RFA): September 29, 2005

Date of Appeal Conference / Site Visit: December 5, 2005

Summary of Decision: I find the appeal has merit. I find that the Section 404(b)(1) Guidelines analysis of alternatives and minimization must be clarified to ensure compliance with law and regulation, and that the District did not support a portion of the decision-making process with substantial evidence in the administrative record.

Background Information: The proposed project, known as Harmony Ranch, is located on agricultural pasture lands west of Interstate 95 (Florida Turnpike), north and south of Bridge Road, Sections 17- 21, and 28-33, Township 39 North, Range 41 East, in Martin County, Florida.

The 4,573-acre site contains 3, 970 acres of uplands and 597 acres of jurisdictional wetlands. The site also contains jurisdictional streams in agricultural ditches. Town and Country Development at Harmony, Inc. owns the site. The proposed site has a future land use category of Agricultural under the Martin County Comprehensive Growth Management Plan and a zoning classification of AG 20A. According to the Martin County Land Development Regulations adopted in 2001, the site is zoned AG 20A-General Agricultural District under which single family homes are a permitted use at a density of 1 unit per 20 acres.

In 2002, the appellant began discussions with Martin County Board of County Commissioners staff regarding a proposed residential community. The community would include the donation, dedication, or restriction of over 2,000 acres, including approximately 650 acres of waters of the United States. The donation would include lands within the footprint of the Palmar Complex – Natural Storage and Treatment Area component of the Indian River Lagoon-South (IRL-S) project for part of the implementation of the Comprehensive Everglades Restoration Plan (CERP). According to the appellant, in order to maintain a financially viable project based on capital and infrastructure investment, the developer requested Martin County to allow "clustering" of the allowable units on the remaining 2,500 acres of the project site. The request, if approved, would have equated to a density of one unit per five acres on uplands with minimal wetland impacts. The Jacksonville District Regulatory Division (Division) concurred with this development concept. The Martin County Board of County Commissioners rejected the donation of the land and the clustering proposal in April 2003. The appellant decided to pursue a Corps permit utilizing the entire property with a one unit per 20-acre development plan on upland areas, including in the designated CERP area.

The District received a permit application on February 17, 2004, to construct 212 housing units at a density of 1 unit per 20 acres on the 4,584 acre site, The developers, with the assistance of consultants and local corps regulatory personnel, designed the project to avoid wetlands and only fill 30.25 acres of regulated streams in agricultural ditches. The District requested and received additional information and a public notice was issued on November 29, 2004. To offset the impacts to waters of the United States, the applicant worked with the District and agreed to construct 240 acres of flow-through marshes and plant desirable upland plant species in the borders surrounding the wetlands. The public interest review revealed that a portion of the proposed project borders and overlaps the eastern boundary of the IRL-S Complex.

Approximately 1,800 acres of the proposed development property are within the CERP boundaries for acquisition and protection for natural area and flood storage. The Jacksonville District CERP representative stated that the IRL-S project area is intended to be restored to native pristine conditions to obtain a natural wetland hydroperiod. Ditches would be filled and the wetland would be allowed to restore naturally over time.

The South Florida Water Management District (SFWMD) issued their permit for the proposed project in July of 2004, concluding that there were other properties to purchase that would be cheaper than the IRL-S property located within the proposed project and still fulfill the CERP requirements.

The US Fish and Wildlife Service (FWS), by letter of June 22, 2005, agreed with the SFWMD finding that the loss of CERP property due to the Harmony Ranch proposal is not critical to the CERP project and suggested the Corps locate other properties to use as flood storage.

The District denied the Appellant's permit request. The District's permit denial letter of August 18, 2005, concluded that the proposed project should be denied because it did not comply with the CWA Section 404(b)(1) Guidelines and is contrary to the public interest. The District's permit denial letter stated that housing units within the CERP project area would not be consistent with the purpose of the proposed IRL-S restoration project at this time (The bill for the IRL-S federal project is awaiting Congressional approval). The Appellant disagreed and appealed.

The District and Appellant representatives conducted a site visit and held an appeal conference on December 5, 2005.

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

Reasons for Appeal as Presented by the Appellant:

Appeal Reason 1: The Corps' decision was arbitrary and capricious.

FINDINGS: This reason for appeal did not have merit.

ACTION: None required.

Discussion: As stated in the RFA, the Appellant states its first reason for appeal as follows: "[a] review of the record shows that without any basis and contrary to the evidence and established rules of law, the Corps reversed itself based on prejudice or preference rather than on reason or fact." The Appellant does not further explain what it means by "prejudice or preference," but appears to be alleging that the denial was governed by some bias, predilection, or improper motive on the part of District decision-makers. The key factor that the Appellant points to as demonstrating an arbitrary and capricious decision is that, in its view, the Corps reversed itself after initially intending to issue the permit. It cites "the agency's shift in decision-making from permit issuance to denial, in less than a week's time."

The "arbitrary and capricious" standard is a stringent standard to meet for a party challenging agency action. Agency decision-making is entitled to a presumption of regularity. The focus of this standard is on the agency's process of reasoning. Where there is a rational connection between the facts found and the choice made, and the agency relied on appropriate factors in analyzing those facts, the agency decision should be upheld.

The characterization of the permit denial as a "reversal" somewhat misstates the situation. There was no previous decision by the District Engineer (or his delegee) on this permit to be reversed. The appellant believes that on July 26, 2005, the Corps arbitrarily changed its position. An email from the southern section regulatory team leader to Colonel Carpenter, on July 26, 2005, states:

> Received a call ... to hold on issuing Harmony Ranch, based on your meeting today. * * * The permit was being reviewed and was to be issued this week by my team leader. * * * I understand that the connection to CERP came up in the meeting today. * * * [T]he CERP coordination indicated that there are other means to accomplish the water storage that was identified as a potential use of part of this area. [Record, 818].

However, the same email reflects the fact that the Appellant's proposal also changed during the permitting process. The original proposal, subsequently rejected by Martin County, would have "preserve[d] a large area of the site with no development (approximately a thousand acres) .... We ... viewed that original proposal as a good watershed approach [but] Martin County said no ...." [Record, 818]. This preserved area would have been located in the footprint of the IRL-S project. [Record, 869].

There are a couple of additional misstatements in the RFA that bear on this reason for appeal. The Appellant states that "[a]ll agencies concluded that either alternative lands could and should be identified or that the CERP goals and objectives would not be compromised." This oversimplifies the record. For example, the Florida Fish and Wildlife Conservation Commission expressed its concern that "[i]f lands that are identified in recommended CERP plans are permitted and subsequently developed they may jeopardize the implementation of the CERP." [Record, 216]. The Appellant also states that "the Corps' own staff states ... that the Harmony project would not adversely affect the implementation of the IRL project." The RFA quotes more than once from an internal Corps email from Michael B. Rogalski which states: "***There is the possibility*** that there are other lands within the IRL-S project area that could be used to replace the lands that the Harmony Development has overlapped ...." [Record, 702, emphasis added]. The recognition of a possibility falls short of a conclusion that there would in fact be no adverse impact.

The District did explain its reasoning for the denial decision in a letter to the applicant and in the Environmental Assessment/Statement of Findings (EA/SOF). By letter of August 18, 2005, the District Engineer stated that as a

> result of [the District's] review, it has been determined that the proposed project would be contrary to the public interest. The proposed project would result in homes being constructed within a portion of an area designated to be restored to a natural hydro-period with native vegetation, in association with the Federal Governments proposed Indian River Lagoon – South (IRL-S) project.... According, it has been determined that your project is contrary to the overall public interest at this time.

The factual basis, factors considered, and rationale for this decision appear in the EA/SOF, which is part of the administrative record. On pages 5 – 6, [Record, 866-867], the concern of the Florida Fish and Wildlife Conservation Commission "that the project would interfere with the goals of CERP" is noted; on pages 8 – 10, [Record, 869-871], internal coordination resulting in the conclusion that the single family residential

development would not be consistent with the goals of CERP, and refusal of Martin County to allow the original plan involving preservation of the CERP overlap, are discussed; on pages 15 – 16, [Record, 876-877], the fact that permit issuance would require redefinition of the CERP boundary is noted; and on pages 18 – 26, [Record, 879-887], the reasons for denial are discussed in some detail in the context of the public interest review factors, including: IRL is the "most biodiverse estuarine system in all of North America"; IRL-S project to provide water quality and water quantity benefits; SFWMD believed to be not fully aware of implementation needs of Federal project; land preserve areas are critical to the success of the IRL-S project; the benefit to fish and wildlife with preservation of this area adverse impact of development; Congressional interest in the IRL-S and CERP projects versus the cumulative effect on the CERP project of permit issuance which would redefine the project boundary of CERP and possibly not meet the goals of the IRL-S full Federal plan.

At the administrative appeal conference, the Appellant emphasized its position that the proposed project would have minimal impacts on the aquatic environment and the District was about to issue the permit, so the change in position is arbitrary and capricious. The District explained at the appeal conference that the field office staff was working with the appellant to produce a permitable project. On July 26, 2005, a meeting was held with the senior District staff, and the decision was made to deny the permit for the proposed project.

Corps regulations at 33 CFR 331.9(b) state that "[t]he division engineer will not attempt to substitute his judgment for that of the district engineer ... if the district engineer's determination was reasonable and within the zone of discretion delegated to the district engineer by Corps regulations." While it is evident that the Corps field office staff was moving toward issuing the permit, senior District staff ultimately disagreed. It appears from the record that the Jacksonville District Engineer made a reasoned decision based on facts identified. Corps staff and decision-makers can disagree in the course of rendering a final decision, and the District Engineer (or his delegee) is not bound to follow the inclinations of staff members. Finally, other than the circumstance evidence of the change in direction, Appellant points to no specific evidence of bias or other improper motive as a determining factor in the permit denial. The Corps' decision was not arbitrary and capricious.

Reason 2: The Corps' decision is plainly contrary to requirements of law, regulation, an Executive Order, or officially promulgated Corps policy guidance.

FINDINGS: This reason for appeal has merit in one respect: the District's alternatives and minimization analysis is inconsistent regarding whether the Appellant minimized the Harmony Ranch project's effect on the aquatic ecosystem.

ACTION: Regarding the alternatives and minimization analysis, the decision is remanded to the District for it to clarify its analysis and conclusions, and if necessary as a result of that clarification, revisit its decision that the project did not comply with the 404(b)(1) Guidelines.

Discussion: The appellant's arguments under this reason for appeal can be broken down into four subpoints: public interest evaluation; scope of analysis, alternatives and minimization analysis; and, cumulative effects. At the outset, it should be pointed out that while the RFA states that "the only basis for denial was the Corps' determination that the project was considered to be contrary to the public interest," the EA/SOF stated that in addition to being contrary to the public interest, the project does not comply with the 404(b)(1) Guidelines. [Record, 888-889].

Public Interest Evaluation.

Regarding the public interest review, the RFA quotes portions of the Corps regulation at 33 CFR 320.4, which address general policies for evaluating permit applications. In its entirety, Section 320.4(a)(1) states:

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

Section 320.4(a)(2) further provides:

> The following general criteria will be considered in the evaluation of every application:
>
> > **(i)** The relative extent of the public and private need for the proposed structure or work:

> **(ii)** Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and
>
> **(iii)** The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.

The appellant's RFA states:

> In these Regulations and factors there is nothing that allows for the unpublished, unadopted public interest factor to deny this permit. There is nothing in these factors that includes the impact of a Corps decision to a future unauthorized project.

At the appeal conference, the Corps representatives stated that at this time, the appellant's proposal is not consistent with the CERP project goals and objectives. The Section Chief read 33 CFR 320.4(g)(5), concerning the interaction between property ownership and certain Federal projects:

> Proposed activities in the area of a federal project which exists or is under construction will be evaluated to insure that they are compatible with the proposed project.

Another provision at 33 CFR 320.4(g)(4) addresses interference with authorized Federal projects in the navigable waters. The federal project involved here does not yet exist, is not under construction, and is not authorized within the meaning of these provisions. The status of the IRL-S project at the time of the permit denial was that "it was pending authorization as part of the Corps Water Resources Development Act (WRDA) 2005." [Record, 837]. While these provisions are not directly applicable to this permit decision, they do reflect relevant policy decisions.

The Corps' promulgated general policies for the public interest review plainly state that the listed public interest factors are not intended to be an exhaustive list. Section 320.4(a)(1) states that "[a]ll factors ... must be considered ... [and] among those are ...." Further, the EA/SOF keys the impacts to the IRL-S project to specifically-listed public interest factors. The IRL-S project is discussed under the public interest factors of Conservation, General Environmental Concerns, Fish and Wildlife Values, Land Use, Water Quality, and Considerations of Property Ownership. [Record, 879-885]. The EA/SOF also noted that the "remaining unresolved conflict" as to resource use was with the IRL-S project, and that this was a "critical element" of the Corps' review. [Record, 886]. The District used appropriate factors in evaluating this permit application, including the impacts on the IRL-S project.

The Appellant further states that "[t]he record is devoid of any consideration of the effects of the Corps' decision making on the actual property ownership of this private

parcel." Presumably, this statement is directed in part toward the use to which the parcel in question might be put. Under the discussion of the Land Use public interest factor, the District noted that the project as proposed would change the land use of the parcel from active agricultural to low density residential/agricultural. The District did not express concerns with the existing agricultural land use, but with the increased difficulty of conversion to preservation once a residential use was established. [Record, 883]. Under the discussion of the Food and Fiber Production public interest factor, the District noted that construction of the proposed residential development would take approximately 4,575 acres out of agricultural use. [Record, 885]. Finally, under the Considerations of Property Ownership public interest factor, the District stated that the landowner had "the ability to attempt to change the land use and utilize the site as industrial, commercial, or residential, or even as preservation." However, the District determined that "[s]ince the bill for the Indian River Lagoon is pending Congressional approval, ... there is a clear public interest" that the portion of the parcel within the IRL-S footprint be used "consistent with the CERP goals." It is not that the District gave no consideration to property ownership and use, generally, but that the District tended to focus on the impact of that property ownership on the IRL-S when it concluded that the public interest factors associated with the IRL-S project outweighed those of property ownership. This issue is discussed further below under Reason 3.

The RFA also states that the District did not conduct a takings impact assessment. The takings issue is discussed below under Reason 3.

The RFA then alleges that "the Record is void of any analysis" of the Economics public interest factor, "including the economic impact of the project on the local economy." However, the economic discussion in the EA/SOF did include the increase in construction-related jobs and decrease in agricultural production; the impacts to local land values; and the public need for employment opportunities, residential housing, and potential increase in the local tax base. [Record, 880, 883, 885]. Thus, these issues were discussed, though not in great detail. It should also be noted that the impact of the project on the local economy was effectively considered by the local county board of commissioners. As discussed in the EA/SOF and in the RFA, the Martin County Board of County Commissioners determined that the Appellant's request to change its development plans to increase density in some areas while donating the portion of the property within the IRL-S project to conservation was not in the interest of the county. This decision by the County impacted the local economic picture.

The District correctly identified and incorporated the public interest factors in its decision consistent with the requirements of law, regulation, and official guidance.

Scope of Analysis

The RFA states that the Corps' determination of the proper scope of analysis "is contrary to the Corps' own guidelines, regulations and standards." The RFA refers to Appendix B in 33 CFR 325, which defines the scope of analysis as:

> The scope of analysis includes the impacts of a specific activity requiring the Corps permit and those portions of the entire project over which the District Engineer has sufficient control and responsibility to warrant federal review.

The Regulatory SOP provides as follows concerning the scope of analysis:

> Scope of analysis has two distinct elements [:] determining [1] the Corps Federal action area and [2] how the Corps will evaluate direct, indirect, or secondary, adverse environmental effects. The Corps determines its action area under 33 CFR 325 Appendix B and C. Generally, the action area includes all waters of the United States, as well as any additional area of non-waters where the Corps determines there is adequate Federal control and responsibility to include it in the action area. The action area always includes upland areas in the immediate vicinity of the waters of the United States where the regulated activity occurs. [SOP, p. 1].

The appellant goes on to make the arguments that the 12.5 acres of jurisdictional ditches to be filled on the 1,800 acres within the IRL-S project do not bring the entire 4,584 acres of the Harmony Ranch project within the Corps' scope of analysis, and that the 30.25 acres of jurisdictional ditches to be filled on the entire Harmony Ranch project do not give the Corps the authority to consider the impact on the entire IRL-S project. Because the jurisdictional ditches are anticipated to be filled in either case, the activities on uplands "are not within the jurisdictional reach of the Corps."

Under Scope of Analysis, the EA/SOF provides that "[t]he Corps' jurisdiction includes the proposed project site and the surrounding areas where construction equipment will be staged/located. * * * Portions of the western property (approximately 1,800 acres) are within a Comprehensive Everglades Restoration Plan (CERP) boundary for acquisition and protection for natural area and flood storage." [Record, 863]. The District appropriately considered the entire 4,584 acres of the Harmony Ranch project and the staging areas as within the scope of analysis. Where jurisdictional waters to be filled are interspersed throughout a project site, it is within the discretion of the District Engineer and consistent with applicable regulations and guidance to exercise jurisdiction over the entire site. Here, Harmony Ranch project documents show that the ditch sections to be filled are scattered through each of the four Harmony Ranch project sections. [Record, 112-115]. With regard to the impact of the Harmony Ranch project on the IRL-S, the District did not focus on the impact of the project sections outside of the IRL-S footprint, but on those within the IRL-S project. The fact that these ditches might be of lesser ecological value does not diminish the fact or scope of the Corps' jurisdiction. Similarly, the fact that a subsequent activity might have the same impact on those jurisdictional waters does not alter the Corps' obligation to consider the impacts proposed by a particular permit application, including for purposes of establishing the scope of analysis.

The District correctly identified the scope of analysis consistent with the requirements of law, regulation, and official guidance.

Alternatives and Minimization Analysis

The District determined that "the project does not comply with the [404(b)(1)] Guidelines because there may be a practicable alternative with fewer impacts within the CERP boundary." [Record, 879]. As noted above, noncompliance with the 404(b)(1) Guidelines is a separate basis for permit denial. See 33 CFR 320.4(a)(1). In essence, the Appellant asserts that the alternatives and minimization analysis may not properly take into account an as yet unauthorized Federal project as part of the aquatic ecosystem. The alternatives and minimization discussion in the EA/SOF appears somewhat contradictory. While it initially states that "[t]he project has minimized the adverse impacts on the aquatic environment to the maximum extent possible," [Record, 870], it later states after further discussion of the impacts on the IRL-S project:

> Conclusions of Alternatives Analysis: The project as proposed may not represent the least environmentally damaging practicable alternative due to the potential to further avoid and minimize impacts of the project on the aquatic environment. [Record, 870-872].

Later, under the Cumulative and Secondary Impacts discussion of the public interest section of the EA/SOF, it is stated:

> The proposed project will not have an adverse cumulative effect on the aquatic ecosystem because the impacts are minimal in scope and the remaining impacts have been fully compensated. However, the cumulative impact on the CERP project as a result of permit issuance would be redefining the project boundary of CERP and possibly not meeting the goals of IRL-S full Federal plan.

A primary goal of the IRL-S project is aquatic ecosystem restoration through improvement of water quality. [Record, 879]. The focus of the Section 404(b)(1) Guidelines is on the "aquatic ecosystem," 40 CFR 230.10(a), of which both the Harmony Ranch development and the IRL-S project might be seen to be a part. While pending aquatic restoration initiatives might be considered in appropriate circumstances as part of an alternatives and minimization analysis, the record here is inconsistent as to what the District actually concluded regarding the relationship of the IRL-S project and CERP, and the relevant aquatic ecosystem for this permit action.

The District should clarify its analysis and conclusions, and if necessary, revisit its decision that the project does not comply with the 404(b)(1) Guidelines.

Cumulative Effects

The RFA states "there is no support in the Record for the Corps determination on cumulative effects." Cumulative environmental effects are defined in 40 CFR 230.11(g) as "the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged and fill material." While the Appellant states, for example, that "[t]here is nothing in the Harmony [Administrative] Record

concerning any pending [permit] applications," the determination of cumulative effects is not limited to only pending applications currently before an agency.

The Council on Environmental Quality ("CEQ")'s National Environmental Policy Act ("NEPA") implementing regulations define cumulative impacts as:

> ... the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 CFR 1508.7.

Cumulative effects are properly part of the 404(b)(1) analysis. The 404(b)(1) Guidelines state that "[e]xcept as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause *or contribute to* significant degradation ...." 40 CFR 230.10(c) (emphasis added). The EA/SOF states that, "[t]his project may entice further development on the remaining undeveloped lands in the area and within the CERP boundary." [Record, 876]. The District's analysis noted 3 similar "ranchette" developments in the same watershed, and that it believed that "similar development may be proposed on the remaining undeveloped property in the vicinity of the proposed project." Also, the District identified cumulative effects stemming from the fact that the existing CERP boundary would need to be re-defined as a result of permit issuance."

The Appellant appears to misunderstand the District's cumulative effects analysis. While the scope of analysis here was properly limited to the Harmony Ranch project and staging areas, that scope had to be assessed in the context of cumulative environmental effects. The CEQ's regulations expressly provide that the scope of cumulative environmental assessment must include "other past, present, and reasonably foreseeable future actions regardless of [who] ... undertakes such actions." The District's conclusion that it must look beyond the proposed project site at the impacts of other similar developments, and at the combined effect of those impacts on the environment including the IRL-S project and the CERP program as a whole, is reasonable. The District's approach is also consistent with CEQ's nonbinding January 1997 handbook on *Considering Cumulative Effects under the National Environmental Policy Act*, page 12, which states:

> For a project-specific analysis, it is often sufficient to analyze effects within the immediate area of the proposed action. When analyzing the contribution of this proposed action to cumulative effects, however, the geographic boundaries of the analysis usually should be expanded.

The District correctly looked to a larger area than the Harmony Ranch project site to evaluate the cumulative environmental impacts of the proposed activity. Its cumulative effects analysis was within the discretion of the agency and consistent with the requirements of law, regulation, and official guidance.

Appeal Reason 3: The Corps' decision is not supported by substantial evidence in the administrative record.

FINDINGS: This reason for appeal has merit in that there appear to be gaps in the administrative record regarding the deliberations related to the District's decision-making in July and August 2005 to deny rather than issue the permit, and in that the administrative record does not sufficiently document the District's consideration of the impact of the permit denial on the Appellant's property ownership interests.

ACTION: The decision is remanded to the District Engineer to further document the District's decision-making process during the July and August 2005 timeframe, and supplement the administrative record, where necessary and where the supplemental documents are not properly subject to a claim of privilege. It is also remanded for the purpose of allowing the District to more thoroughly account for the impact of its permit denial on the property ownership interests of the Appellant, and to include the usual Takings Implication Assessment note in the record.

Discussion: The Appellant states that a review of the administrative record "shows a number of incomplete documents." The RFA goes on to list a number of documents that are alleged to be either substantively incomplete or lacking referenced attachments. A number of these documents appear to be related to the District's deliberations in July and August 2005 regarding permit denial. Also, as noted above under Reason 1, the Appellant states that "there is absolutely nothing in the administrative record to support the agency's shift in decision making ...."

This reason for appeal cites the substantial evidence standard. The Corps Administrative Appeal regulations at 33 CFR 331.9(b) state that "[t]he division engineer will disapprove the entirety of or any part of the districts engineer's decision only if he determines that the decision on some relevant matter was ... not supported by substantial evidence in the administrative record ...." They further state, "the RO will also conduct an independent review to verify that facts of analysis essential to the district engineer's decision have not been omitted from the administrative record ...." 33 CFR 331.1(b)(2). The substantial evidence standard is a less stringent one than the arbitrary and capricious standard, though any review must still provide deference to agency discretion and expertise.

As mentioned in the discussion section of the first appeal reason, the administrative record evidences that District staff were moving towards issuing the permit until July 26, 2005. The permit was denied on August 18, 2005. Regarding this turning point in the decision-making process, the administrative record appears to lack some identified but unprivileged documents, and does not adequately explain or document the reason(s) for what the Appellant chooses to describe as a "shift in decision-making." While the EA/SOF supports the final decision with a reasoned explanation, the administrative record is lacking regarding why the staff's direction was changed after July 26, 2005.

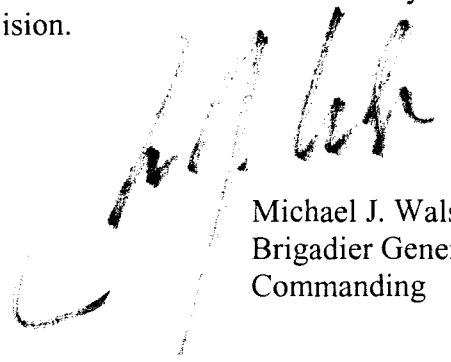
During the appeal conference, the attorney for the District stated that the records, minutes and attendees at the July 26, 2005, meeting were omitted from the administrative record

due to client/lawyer confidentially issues. The Appellant's representatives stated that there is legal precedent that the administrative record must establish a basis for its decision-making process. Where privileged documents are excluded from the record, the documents that remain must still meet the substantial evidence test. Among other things, the administrative record does not reveal what the District Engineer's reasoning was regarding the SFWMD's and FWS's conclusions that less expensive or equally beneficial properties could be acquired to replace the area that would be lost from the proposed project, or what the impact of a change in IRL-S boundaries would be on the pending Congressional authorization. At the least, a summary of the decision-making process from the July 26, 2005, Jacksonville District meetings should be included in the administrative record.

Also, as discussed under Reason No. 2, above, the District failed to discuss the impact of its decision on the property ownership interests of the Appellant. It did evaluate this public interest factor, but from a perspective of the impact of those interests on the use of site and on the IRL-S project. The administrative record should include some recognition of the impact of the permit denial related to a proposed Federal project on private property ownership.

The RFA also questioned whether the Corps prepared a *Takings Implication Assessment* (TIA) since there was no statement in the administrative record that such an assessment was prepared. Legal counsel for the District stated that the TIA findings were confidential, completed and adequate. On remand, a statement that a TIA was prepared should be included in the administrative record rather than release of the TIA.

CONCLUSION: After reviewing and evaluating the entirety of the administrative record, provided by the Jacksonville District, I conclude that the Section 404(b)(1) Guidelines analysis of alternatives and minimization must be clarified to ensure compliance with law and regulation, and that portions of the decision-making process as noted in this decision are not supported by substantial evidence in the administrative record. Accordingly, I conclude that this Request for Appeal has merit. I hereby return this matter to the Jacksonville District for additional analysis as prescribed within this administrative appeal decision.



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