DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

21 APR 1989

REPLY TO
ATTENTION OF:

CECW-ZA

MEMORANDUM THRU Commander, U.S. Army Engineer Division, Lower Mississippi Valley

FOR Commander, U.S. Army Engineer District, New Orleans

SUBJECT: Permit Elevation, Plantation Landing Resort, Inc.

1. By memorandum dated 3 February 1989, the Assistant Secretary of the Army (Civil Works) advised me that he had granted the request of the Environmental Protection Agency (EPA) and the Department of Commerce (DOC) to elevate the permit case for Plantation Landing Resort, Inc., to HQUSACE for national policy level review of issues concerning the practicable alternatives and mitigation provisions of the 404(b)(1) Guidelines. My review of the case record provided by the New Orleans District (NOD) leads me to conclude that Corps policy interpreting and implementing the 404(b)(1) Guidelines should be clarified in certain respects. Of course, general guidance interpreting the 404(b)(1) Guidelines ideally should be prepared and promulgated jointly by the Corps and the EPA. (See 40 CFR 230.2(c)). Consequently, representatives of the Office of the ASA(CW) and the Corps from time to time have worked with EPA attempting to develop joint interpretive guidance on important issues under the 404(b)(1) Guidelines, but no final inter-agency consensus has resulted to date. Although I hope and expect that eventually we will be able to promulgate joint Army/EPA guidance, in the interim I believe the guidance provided in the attachment is necessary and will serve a useful purpose.

2. Please re-evaluate the subject permit case in light of the guidance provided in the attachment, and take action accordingly.

FOR THE COMMANDER:

Patrick J. Kelly

PATRICK J. KELLY
Brigadier General, USA
Director of Civil Works

Attachment

Attachment

1. The Corps of Engineers permit regulations state the following at 33 CFR 320.4(a):

> "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."

2. The 404(b)(1) Guidelines constitute one of the primary regulatory directives requiring the Corps' 404 program to protect wetlands and other special aquatic sites (defined at 40 CFR 230.3 (q-1)) from unnecessary destruction or degradation. Consequently, proper interpretation and implementation of the Guidelines is essential to ensure that the Corps provides the degree of protection to special aquatic sites mandated by the Guidelines and required by the Corps of Engineers wetlands policy (33 CFR 320.4(b)).

3. One key provision of the 404(b)(1) Guidelines which clearly is intended to discourage unnecessary filling or degradation of wetlands is the "practicable alternative" requirement, 40 CFR 230.10(a), which, in relevant part, provides that:

> " ... no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem ..."

As explained in the preamble to the Guidelines, this provision means that:

> " ... the Guidelines ... prohibit discharges where there is a practicable, less damaging alternative ... Thus, if destruction of an area of waters of the Uni ·d States may reasonably be avoided, it should be avoided." (45 Fed. Reg. 85340, Dec. 24, 1980)

4. The 404(b)(1) Guidelines have been written to provide an added degree of discouragement for non-water dependent activities proposed to be located in a special aquatic site, as follows:

> Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in Subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water dependent"), practicable alternatives that do not involve special aquatic

sites are presumed to be available, unless clearly demonstrated otherwise. (40 CFR 230.10(a)(3))

The rebuttable presumption created by this provision is intended to increase the burden on an applicant for a non-water-dependent activity to demonstrate that no practicable alternative exists to his proposed discharge in a special aquatic site. This presumption is added to the Guidelines' general presumption against discharges found at 40 CFR 230.1(c), which already places the burden of proof on the applicant to demonstrate that his proposed discharge complies with the Guidelines, including the practicable alternative requirement of 40 CFR 230.10(a). (See 45 Fed. Reg. 85338, Dec. 24, 1980)

5. One essential aspect of applying the "practicable alternative" and "water dependency" provisions of the Guidelines to a particular 404 permit case is to decide what is the "basic purpose" of the planned activity requiring the proposed discharge of dredged or fill material. The preamble to the Guidelines provides the following guidance on the meaning of "basic purpose":

> "Non-water-dependent" discharges are those associated with activities which do not require access or proximity to or siting within the special aquatic site to fulfill their basic purpose. An example is a fill to create a restaurant site, since restaurants do not need to be in wetlands to fulfill their basic purpose of feeding people. (45 Fed. Reg. 85339, Dec. 24, 1980; emphasis added)

6. The 404(b)(1) analysis for the Plantation Landing Resort, Inc., application, even when read in conjunction with the Statement of Findings (SOF) and the Environmental Assessment (EA), does not deal with the issues of practicable alternatives and water dependency in a satisfactory manner. The 404(b)(1) evaluation itself is essentially a standard form "checklist" with very little analysis or project-specific information. Nevertheless, when one reads the Statement of Findings and Environmental Assessment for the project, one can determine how the New Orleans District (NOD) analyzed the project for purposes of the 404(b)(1) review.

7. One significant problem in the NOD's approach to the 404(b)(1) review is found in the following, which is the only statement in NOD's 404(b)(1) evaluation document presenting a project-specific reference to the Plantation Landing case with respect to the practicable alternative requirement of the Guidelines:

> Several less environmentally damaging alternatives were identified in the Environmental Assessment.

> The applicant stated and supplied information indicating that these alternatives would not be practicable in light of his overall project purposes. Recent guidance from LMVD states that the applicant is the authoritative source of information regarding practicability determinations, therefore no less environmentally damaging practicable alternatives are available. (NOD's "Evaluation of Section 404(b)(1) Guidelines," Attachment 1, Paragraph 1.a.)

This statement appears to allow the applicant to determine whether practicable alternatives exist to his project. Emphatically, that is not an acceptable approach for conducting the alternatives review under the 404(b)(1) Guidelines. The Corps is responsible for controlling every aspect of the 404(b)(1) analysis. While the Corps should consider the views of the applicant regarding his project's purpose and the existence (or lack of) practicable alternatives, the Corps must determine and evaluate these matters itself, with no control or direction from the applicant, and without undue deference to the applicant's wishes.

8. In the instant case, the NOD administrative record gives the appearance of having given too much deference to the way the applicant chose to define the purpose of his project; this led to characterization of project purpose in such a way as to preclude the existence of practicable alternatives. First, the NOD's Statement of Findings (SOF) concludes the following regarding practicable alternatives:

> " ... alternative site analysis resulted in no available sites occurring on or near Grand Isle that would allow the applicant to achieve the same purpose as that intended on the property he now owns." (SOF at page 7)

Similarly, NOD's Environmental Assessment (EA) makes the following statement:

> "Results of the investigation revealed that a practicable and feasible alternatives site did not exist on Grand Isle or vicinity that would satisfy the purpose and need of the recreational development as proposed on the applicant's own property." (EA at page 85)

9. A reading of the entire record indicates that NOD accepted the applicant's assertion that the project as proposed must be accepted by the Corps as the basis for the 404(b)(1) Guidelines practicability analysis. The applicant proposed a fully-integrated, waterfront, contiguous water-oriented recreational complex, in the form the applicant proposed.

Consequently, NOD apparently presumed that no alternative site could be considered if it could not support in one, contiguous waterfront location the same sort of fully integrated recreational complex that the applicant proposed to build. The EA addresses this point specifically, as follows:

> There appear to be alternative sites for the placement of each component of the project. However, alternate sites are not preferable by the applicant because he owns the project site and wishes to realize commercial values from it. Real estate investigations revealed that Grand Isle at present does not offer a less damaging alternative site which satisfies the applicants purpose and need as proposed on his own property. (EA at pages 89-90)

10. The clearest statement from NOD on this point is the following statement from the SOF, which specifically addresses the practicable alternative issue:

> In a letter dated August 19, 1988, EPA provided to the Corps verbal and graphic descriptions of their identified alternative project designs and/or sites. EPA requested the Corps and the applicant to consider and evaluate the possibility of utilizing one or a combination of their suggested alternatives for the proposed Plantation Landing Resort. The Corps by transmittal letter dated August 29, 1988, forwarded a copy of the EPA alternatives to the applicant's authorized agent, Coastal Environments, Inc. Costal Environments, Inc. by letter dated September 12, 1988, provided to the Corps the applicant's response regarding the feasibility of the EPA alternatives. The applicant's response stated that implementation of any of the EPA alternative project designs and/or sites would result in a disarticulated project ... Corps policy states that "an alternative is practicable if it enables the applicant to fulfill the basic purpose of the proposed project." After reviewing the applicant's response and evaluating the alternatives myself I have determined that EPA proposed alternatives are not feasible or practicable <u>because they would not allow the applicant to fulfill his intended purpose of establishing a contiguous, fully-integrated waterfront resort complex</u>. (SOF at page 10 emphasis added)

11. The effect of NOD's deferring to and accepting the applicant's definition of the basic purpose of his project as a <u>contiguous</u>, <u>fully-integrated</u>, and entirely <u>waterfront</u> resort

complex in the form the applicant had proposed was to ensure that no practicable alternative could exist. Nevertheless, the administrative record nowhere provides any rationale for why the applicant's proposed complex had to be "contiguous" or "fully integrated" or why all features of it had to be "waterfront." The only reason appearing on the record to indicate why NOD presumed that the project had to be contiguous, fully integrated, and entirely waterfront is that the applicant stated that that was his proposal, thus by definition that was the official project purpose which the Corps must use. That is not an acceptable approach to interpret and implement the 404(b)(1) Guidelines. Only if the Corps, independently of the applicant, were to determine that the basic purposes of the project cannot practicably be accomplished unless the project is built in a "contiguous", "fully integrated," and entirely "waterfront" manner would those conditions be relevant to the 404(b)(1) Guidelines' alternative review. The fact that those conditions may be part of the proposal as presented by the applicant is by no means determinative of that point. Once again, the Corps, not the applicant, must define the basic purpose underlying the applicant's proposed activity.

12. When an applicant proposes to build a development consisting of various component parts, and proposes that all those component parts be located on one contiguous tract of land (including waters of the United States), a question of fact arises: i.e., whether all component parts, or some combination of them, or none, really must be built, or must be built in one contiguous block, for the project to be viable. The applicant's view on that question of fact should be considered by the Corps, but the Corps must determine (and appropriately document its determination) whether in fact some component parts of the project (e.g., those proposed to be built in waters of the United States) could be dropped from the development altogether, or reconfigured or reduced in scope, to minimize or avoid adverse impacts on waters of the United States. For example, in the Hartz Mountain Development Corporation application case the Corps' New York District was faced with a "block development project" proposed to be built on one contiguous tract as an integrated project. Quite properly, the Corps refused to accept the applicant's proposal as a controlling factor in our 404(b)(1) analysis. As the U.S. District Court for New Jersey stated approvingly:

> The applicant argued that the shopping center-office park-warehouse distribution center was an inextricably related project which required development on a single interconnected site. This critical mass theory would require any alternative to have the capability of handling the entire multi-faceted project. The Corps of Engineers rejected this theory. The Corps of Engineers considered the project as three separate activities, that is to say, shopping center, office

park, and warehouse distribution center. (National Andubon Society v. Hartz Mountain Development Corp., No. 83-1534D, D.N.J., Oct 24, 1983, 14 ELR 20724; case is cited only for the above-stated point.)

Similarly, the Corps must not presume that the Plantation Landing Resort necessarily needs to be built in one contiguous tract of land, or that it must be "fully integrated", or that all components of it must be "waterfront", or otherwise that the project must be built in the form or configuration proposed by the applicant. Once again, the applicant bears the burden of proof for all the tests of 40 CFR 320.10 to demonstrate to the Corps that his project, or any part of it, should be built in the waters of the United States. The Corps will evaluate the applicant's evidence and determine, independently of the applicant's wishes, whether all the requirements of the Guidelines have been satisfied.

13. The "[r]ecent guidance from LMVD" referred to the NOD's 404(b)(1) evaluation apparently was the 11 March 1987 document whereby the LMVD Commander transmitted to his four District Commanders the HQUSACE guidance letter of 22 April 1986. Clarification of our intentions in the HQUSACE guidance letter of 22 April 1986 is appropriate herein.

14. The language from the 22 April 1986 letter from HQUSACE relevant to this discussion is the following:

> "Our position is that LWF v. York requires that alternatives be practicable to the applicant and that the purpose and need for the project must be the applicant's purpose and need."

The essential point of the HQUSACE policy guidance of 22 April 1986 was that under the 404(b)(1) Guidelines an alternative must be available to the applicant to be a practicable alterative. Thus, in the context of LWF v. York, where the applicant proposed to clear his wetland property to grow soybeans, the fact that other farmers might be able to supply the United States with an adequate soybeans supply would not necessarily preclude the applicant in that particular case from obtaining a 404 permit to clear his land to raise soybeans. On the other hand, if affordable upland farmland was available to the applicant, which he could buy, rent, expand, manage, or otherwise use to grow soybeans, that upland tract might constitute a practicable alternative under the Guidelines. The significance of the HQUSACE 22 April 1986 policy guidance regarding project "purpose" was that project purpose would be viewed from the applicant's perspective rather than only from the broad, "public" perspective. For example, in the LWF v. York case (761 F.2d at 1047) the Corps defined the basic purpose for the applicants' land clearing project as being "to increase soybean production or to increase net returns on assets owned by the company." That approach to project purpose, viewed from the

applicant's perspective, was upheld as permissible under the 404(b)(1) Guidelines. In contrast, the plaintiffs had urged that the Corps view project purpose only from the broad, public perspective, i.e., presumably by defining project purpose as "providing the U.S. public a sufficient supply of soybeans, consistent with protection of wetlands". (Obviously, the U.S. public arguably might get sufficient soybeans from other sources even without conversion of wetlands to soybean production.) The Court held that the Corps is not required by the Guidelines to define project purpose in the manner most favorable to "environmental maintenance", or only from the "public" perspective. However, the Court clearly indicated that the Corps was in charge of defining project purpose and determining whether practicable alternatives exist. Similarly, the HQUSACE guidance of 22 April 1986 was intended to follow the reasoning of the Court in LWF v. York that the Corps' 404(b)(1) analysis should include consideration of project purpose and practicable alternatives from the applicant's perspective. That guidance was not intended to allow the applicant to control those two or any other aspect of the 404(b)(1) Guidelines review, nor to require the Corps to accept or use the applicant's preferred definition of project purpose or to adopt without question the applicant's conclusion regarding the availability of practicable alternatives. One must remember that the Guidelines' "practicability" provision (40 CFR 230.10(a) uses the expression "basic purpose". Although the Corps may try to view a project's basic purpose from the applicant's perspective, that cannot change the Guidelines' mandate to use every project's basic purpose for the Guidelines' practicability review. The Guidelines' concept of "basic purpose" was quoted at paragraph 5, above: e.g., "resturants do not need to be in wetlands to fulfill their basic purpose of feeding people." The concept of basic purpose is further discussed in paragraphs 19 through 21, infra.

15. In addition, the LMVD transmittal letter of 11 March 1987 contains the following statement:

> " ... minimization of cost is a legitimate factor in determining the applicant's purpose and the purpose of the project."

While the applicant's wish to minimize his costs is obviously a factor which the Corps can consider, that factor alone must not be allowed to control or unduly influence the Corps' definition of project purpose or "practicable alternative", or any other part of the 404(b)(1) evaluation. The preamble to the Guidelines states the following on this point:

> The mere fact that an alternative may cost somewhat more does not necessarily mean it is not practicable ..." (45 Fed. Reg. at 85339, Dec. 24, 1980)

This is an important point, because often wetland property may be less expensive to a developer than comparably situated upland property. The Guidelines obviously are not designed to facilitate a shift of development activities from uplands to wetlands, so the fact that an applicant can sometimes reduce his costs by developing wetland property is not a factor which can be used to justify permit issuance under the Guidelines. On the other hand, the 404(b)(1) Guidelines do address the factor of cost to an applicant in the concept of the "practicability" of alternatives, defined at 40 CFR 230.10(a)(2). As the Guidelines' preamble states on this point, "If an alleged alternative is unreasonably expensive to the applicant, the alternative is not "practicable"." (45 Fed. Reg. at page 85343, Dec 24, 1980)

16. The 404(b)(1) Guidelines define the concept of practicable alternative as follows:

> An alternative is practicable if it is available
>
> consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered. (40 CFR 230.10(a)(2); emphasis added)

This provision indicates that a site not presently owned by the applicant but which could be obtained, utilized, etc., to fulfill the basic purpose of the proposed activity qualifies as a practicable alternative. Consequently, the definition of "basic purpose" and "overall project purposes" is central to proper interpretation and implementation of the Guidelines' "practicable alternative" test. Moreover, part of the "practicable alternative" test of 40 CFR 230.10(a) is the "water dependency" provision, quoted in paragraph 4, supra, which also is based upon the concept of a project's "basic purpose." That is, the water dependency test states that a practicable alternative is presumed to exist for any proposed activity which does not have to be sited within or require access or proximity to water to fulfill its basic purpose (thus a 404 permit could not be issued unless the presumption is rebutted). (40 CFR 230.10(a)(3))

17. Acceptance of the applicant's proposal to build a fully-integrated, contiguous, waterfront recreational resort complex led NOD to conclude that:

> " ... the Corps considers the project to be water dependent in light of the applicant's purpose (SOF, page 7)

This determination had the effect of finding that 339 condominium dwellings, 398 townhouse units, a motel, a restaurant, a cafe, a bar, a diving and fishing shop, and a convenience store, were all "water dependent," merely because they were said to be "integrated" with and "contiguous" to marina facilities. This approach is unacceptable, and contrary to Corps policy since 1976. If the approach used by NOD in the instant case were to gain general acceptance, then proponents of virtually any and all forms of development in wetlands could declare their proposals "water dependent" by proposing to "integrate" them with and to build them "contiguous" to a marina, or simply by adding the expression "waterfront" as a prefix to words such as "home", "motel", "restaurant", "bar", etc. The approach used by NOD in the instant case would render completely meaningless the water dependency provision of the Guidelines.

18. NOD's basis for declaring all aspects of the Plantation Landing Resort proposal to be water dependent was the following:

> Individually most components comprising the proposed recreational complex are not dependent upon water to function. However, waterfront availability of proposed facilities is demanded by the public as clearly demonstrated by the success of similar waterfront facilities in adjoining gulf coastal states. Also local demand for waterfront housing is evident by the proposed expansion of Pirates Cove on Grand Isle and the presently ongoing installation of Point Fourchon at Fourchon. (EA at page 85)

One of the primary reasons why regulation of the filling of wetlands is an important Corps environmental mission is precisely because a strong economic incentive (i.e., "demand") exists to fill in many coastal wetlands for housing developments, condominium resorts, restaurants, etc. The fact that "demand" exists for waterfront development, and even the fact that "demand" exists for the filling in of wetlands for waterfront development, is irrelevant to the question of whether any proposed development in a special aquatic site is water dependent under the 404(b)(1) Guidelines. Waterfront development can take place without the filling in of special aquatic sites.

19. Significantly, in 1976 the HQUSACE dealt with essentially the same issues presented in the instant case (i.e., the meaning of "basic purpose" and "water dependency" and the nature of the practicable alternatives review) in the context of a permit case similar to the proposed Plantation Landing Resort case. That 1976 case involved the application of the Deltona Corporation to fill coastal wetlands at Marco Island, Florida, for what at that time was also proposed to be a fully integrated, contiguous, waterfront recreational resort and

housing complex. Although the wording of both the Corps regulations and the 404(b)(1) Guidelines have changed in certain technical respects since 1976, the essential mandate of both remains unchanged. Consequently, the following language quoted from the Chief of Engineers' 1976 decision document for the Marco Island case provides the essential guidance for analyzing the instant case. The Corps will apply the following to the "practicable alternatives" test of the Guidelines:

> The benefits of the proposed alteration must outweigh the damage to the wetlands resource, and the proposed alteration must be necessary to realize those benefits. In determining whether a particular alteration is necessary, our regulations require that we primarily consider whether the proposed activity is dependent upon the wetland resources and whether feasible alternative sites are available. ... I recognize that these ... applications involve part of an overall, master planned development, and that it has been suggested that the location of this particular housing development with its related facilities is dependent on being located in this particular wetlands resource in order to complete the overall planned development. Such, however, is not the intended interpretation of this wetlands policy as the Corps perceives it. The intent, instead, was to protect valuable wetland resources from unnecessary dredging and filling operations to fulfill a purpose such as housing, which generally is not dependent on being located in the wetlands resources to fulfill its basic purpose and for which, in most cases, other alternative sites exist to fulfill that purpose. ... The basic purpose of this development is housing, and housing, in order to fulfill its basic purpose, generally does not have to be located in a water resource. Some have suggested that recreational housing requires such a location. But while a derived benefit of "recreational" housing may be the opportunity to recreate in or near the water resource, the basic purpose of it still remains the same: to provide shelter. (Report on Application for Department of the Army Permits to Dredge and Fill at Marco Island, Collier County, Florida, 6th Ind., 15 April 1976, pages 91-92)

20. It follows that the "basic purpose" of each component element of the proposed Plantation Landing Resort must be analyzed in terms of its actual, non-water-dependent function.

The basic purpose of the condominium housing is housing (i.e., shelter); the basic purpose of the restaurant is to feed people; etc. The Corps will not conclude that housing, restaurants, cafes, bars, retail facilities, or convenience stores are water dependent; they are essentially non-water-dependent activities. Moreover, they do not gain the status of water-dependent activities merely because the applicant proposes to "integrate" them with a marina, or proposes to build them on a piece of land contiguous to a marina, or proposes that any of these non-water-dependent facilities should be "waterfront" or built on waterfront land. The concepts of "integration", "contiguity", and "waterfront" must not be used to defeat the purpose of the "water dependency" and "practicable alternatives" provisions of the Guidelines, nor to preclude the existence of practicable alternatives.

21. In light of the foregoing guidance, your re-evaluation of the proposed Plantation Landing Resort (and comparable future proposals) should proceed as follows. First, determine whether each component part of the project is water dependent or not in light of that component's basic purpose. For example, the proposed marina is water dependent, but the proposed housing units, motel, restaurant, etc., are not. Second, for component parts of the project which are not water dependent, a presumption arises that an alternative, upland site is available. The applicant may be able to rebut that presumption with clear and convincing evidence. Closely related to this inquiry is the question whether the non-water-dependent components of the project actually must be integrated with or contiguous to the water dependent part(s) in such a manner as to necessitate their location in a special aquatic site. Once again, a presumption exists that the non-water-dependent components of the project do not have to be contiguous to or integrated with water-dependent parts (e.g., the marina) to be practicable (e.g., economically viable). As stated before, the applicant may be able to rebut the presumption with clear and convincing evidence. Only if the applicant rebuts these presumptions can the Corps conclude that some (or all) of the non-water-dependent components of the overall project pass the tests of 40 C R 230.10(a)(3).

22. Another problem in NOD's approach to the plantation landing case is the District's assertion that the loss of wetlands which the project would cause is inconsequential, because "... project alterations of wetands represents a very small portion of similar habitat within the project vicinity and coastal Louisiana... only 2.39% of the saline marsh on Grand Isle and only 0.005% of the saline marsh in coastal Louisiana..." (SOF at page 7). While this consideration may have some relevance to the decision of this case, it ignores the fact that the cumulative effects of many projects such as Plantation Landing can add up to very significant wetlands loss. The 404(b)(1) Guidelines and the Corps wetlands policy at 33 CFR 320.4(b) both

deal with cumulative losses of special aquatic sites as a significant concern. For example, the Guidelines define cumulative impacts at 40 CFR 230.11(g)(1) as follows:

> Determination of cumulative effects on the aquatic ecosystem. Cumulative impacts are the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material. Although the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems.

Among the mandatory provisions of the Guidelines which deal with cumulative effects is 40 CFR 230.10(c), which prohibits discharges "which will cause or contribute to significant degradation of the waters of the United States." It follows that the proposed destruction of 22 acres of special aquatic sites by the subject proposed development cannot be dismissed as unimportant.

23. An additional rationale given by NOD in this case to justify issuance of the permit with minimal required compensatory mitigation is the assertion that "the project site is eroding at a rapid rate and will be lost regardless of project implementation..." (SOF at page 7). To the extent that erosion rates can be reliably and accurately determined, the ongoing and predicted erosion of a wetland may be a legitimate consideration under the Corps public interest review. However, NOD's reliance on predicted erosion rates in the instant case is problematical, for at least two reasons. First, substantial doubt and disagreement apparently exist regarding how rapidly the marshland at issue here is likely to erode. Second, even if the more rapid projected rate of erosion is accepted as valid, that fact cannot negate the ecological value of the special aquatic site over time. That is, even if the marsh were to erode at the projected rate of the Environmental Assessment, it would still provide valuable detritus and fish and wildlife habitat for more than fifty years into the future, and would be replaced by ecologically valuable shallow water habitat even after erosion. Consequently, the marsh's status as a special aquatic site under the 404(b)(1) Guidelines remains, regardless of the erosion factor.

24. Of course, notwithstanding all of the above, in a particular, given case (which might or might not be the Plantation Landing Resort application) the Corps public interest review and the 404(b)(1) Guidelines may allow the District Engineer to grant a permit for the filling of wetlands, even for a non-water-dependent activity. This would occur only if the applicant has clearly rebutted the presumptions against filling

wetlands found at 40 CFR 230.10, and has clearly rebutted the presumptions of 230.10(a) with convincing evidence that no practicable alternative exists which would preclude his proposed fill. In such a circumstance the mitigation requirements of 40 CFR 230.10(b), (c), and (d) come into play. For some time the Corps has been working with the EPA to negotiate a mutually agreeable mitigation policy under the 404(b)(1) Guidelines. While no such common policy has yet been promulgated, the circumstances of the instant case demonstrate that some sort of interim guidance on mitigation is important.

25. In the Plantation Landing Resort case the NOD proposed to issue Corps permits authorizing the filling of 22 acres of tidal marsh and 37 acres of shallow bay bottom, according to NOD's Public Notice of 7 Dec 1987 (page 1). The EPA and NMFS contend that the proposed project would adversely impact a total of approximately 102 acres of wetlands and shallow open water bay bottom, considering both direct and indirect project impacts. Regardless of which figure for project impacts is more relevant, the fact remains that the total mitigation requirement which NOD proposed to satisfy 40 CFR 230.10 was to dispose of dredged material from the project's channel dredging operations in a manner which would create five acres of marsh, and to add thereto with subsequent dredged material from future maintenance dredging operations for the resort's channel. For impacts on wetlands and productive shallow bay bottom areas of a project such as the instant case presents, NOD's proposed mitigation requirement appears inadequate.

26. Pending the promulgation of further guidance on mitigation, NOD should require mitigation measures which will provide compensatory mitigation, to the maximum extent practicable, for those values and functions of the special aquatic site directly or indirectly adversely impacted by the proposed development activity. Of course, such mitigation measures should be developed after appropriate consultation with Federal and state natural resource agencies, but the decision regarding how much mitigation to require and regarding the form and nature of the mitigation will be made by the District Engineer.

27. The general conclusion to be drawn from the guidance given above is that the Corps should interpret and implement the 404(b)(1) Guidelines, and for that matter the Corps public interest review, in a manner which recognizes that most special aquatic sites serve valuable ecological functions, as specified at 33 CFR 320.4(b). Such valuable special aquatic sites should be protected from unnecessary destruction. Consequently, the Corps regulatory program should give potential developers of special aquatic sites the proper guidance to the effect that special aquatic sites generally are not preferred sites for development activities. Moreover, for ecologically valuable wetlands such as those at stake in the instant case, developers should understand that proposed non-water-dependent development activities will generally be discouraged.