



REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY
SOUTH PACIFIC DIVISION, CORPS OF ENGINEERS
333 Market Street, Room 923
San Francisco, California 94105-2195

Civil Works and Management Directorate
Operations Division

5 Feb 2001

Mr. Bob Brown
Project Manager
Roebbelen Land Company
1241 Hawks Flight Court, Suite 102
El Dorado Hills, California 95762

Dear Mr. Brown:

I have completed my review of your appeal of the Sundance Plaza Project Permit Denial, File Number 199800257, issued August 25, 2000 by the U.S. Army Corps of Engineers, Sacramento District Office (District).

After a detailed review and consideration, I conclude that your appeal does not have merit. The District had determined that less damaging practicable alternatives to your proposed project were available, and was obligated to deny your permit request to meet the substantive requirements of the Clean Water Act, Section 404 (b) (1) "Guidelines for Specification of Disposal Sites for Dredged or Fill Material" 40 CFR Part 230. The District also was required to deny this permit to comply with 33 CFR 325. 2 (b) (1) (ii) because you had not obtained Clean Water Act Section 401 State water quality certification or had such certification waived.

You had also expressed concern about the extended time period required to make this permit decision. I agree that the time period required to evaluate your application was much longer than a typical application, and understand this was a source of dissatisfaction for you. Corps guidance specifies that a more detailed analysis is appropriate and necessary when adverse impacts to the aquatic environment are likely to be more severe. In your case, most of the time spent during the permit evaluation process involved working with you regarding the potential practicality of on-site and off-site alternatives to avoid and minimize impacts to aquatic resources. This was necessary because you proposed to fill wetlands, which are a special aquatic site. Under the substantive requirements of the Clean Water Act, Section 404 (b) (1) Guidelines, the Corps cannot issue a permit to fill a special aquatic site unless the permit applicant clearly demonstrates and rebuts the presumption that no less environmentally damaging practicable alternatives are available, and the Corps finds the action to be in the public interest.

In reviewing your appeal, I found that the District advised you at the close of the public notice period that they, the Environmental Protection Agency, and other regulatory agencies had concluded that your project as proposed did not appear to be the least environmentally damaging practicable alternative. The District then worked with you for 24 months regarding that issue, while completing other legally required interagency consultations. When Roebbelen Land Company indicated that it did not want to further consider potentially practicable alternatives to its proposed project, the District issued a permit denial as it was obligated to do for a proposal that did not comply with the Clean Water Act, Section 404 (b) (1) guidelines and Clean Water Act Section 401 State water quality certification requirements (33 CFR 325. 2 (b) (1) (ii)).

Should you determine in the future you would like to pursue a permit for a modified project such as the District discussed in its decision document denying your permit application, you should contact the Sacramento District Regulatory Office representatives. I hope that completing this appeal process, and receiving this appeal decision document, clarified for you why the District was obligated to deny your permit request. If you have any questions about this appeal decision you may contact my Review Officer, Mr. Douglas R. Pomeroy at (415) 977- 8035.

Sincerely,

original signed by

Peter T. Madsen
Brigadier General, U.S. Army
Division Engineer

Enclosure

Copy Furnished

Commander, Sacramento District
Operations Division, Doug Pomeroy
Reading File

ADMINISTRATIVE APPEAL DECISION

Roebbelen Land Company, Sundance Plaza Project Permit Denial

FILE NO. 199800257

SACRAMENTO DISTRICT

DATE February 5, 2001

Review Officer: Douglas R. Pomeroy, U.S. Army Corps of Engineers (USACE), South Pacific Division, San Francisco, California

Appellant Representative: Bob Brown, Project Manager, Roebbelen Land Company, El Dorado Hills, California.

Receipt of Request For Appeal (RFA): October 26, 2000

Appeal Conference Date: December 20, 2000 **Site Visit Date:** December 20, 2000

Background Information: The Roebbelen Land Company proposed to discharge fill material into 4.8 acres of waters of the United States, including Mound Springs Creek and immediately adjacent wetlands, for the Sundance Plaza Project. The 72-acre project site was located approximately 3 miles west of downtown Placerville, El Dorado County, California just north of U.S. Highway 50 and west of Missouri Flat Road. The project as proposed consisted of 534,150 square foot commercial retail space including 2,670 parking spaces and a four-lane access road. The appellant proposed to mitigate for the fill by using an approved off-site mitigation bank, but considered any on-site measures to avoid or minimize the fill to be impracticable.

The Army Corps of Engineers Sacramento District (District) denied the appellant's permit request concluding the project as proposed was not the least damaging practicable alternative and Clean Water Act (CWA) Section 401 water quality certification had not been received or waived. The District concluded that practicable off-site alternatives were available and that the appellant had not avoided and/or minimized on-site impacts to waters of the United States to the maximum extent practicable. The appellant asserted such alternatives were impracticable. The appellant also asserted that his off-site mitigation proposal was supported by Corps guidance, that the District's evaluations of water quality and endangered species impacts were flawed, and that the District staff was unduly influenced by project opponents and biased against the project.

Summary of Decision: The District reasonably denied the permit because the substantive requirements of the CWA, Section 404 (b) (1) Guidelines (40 CFR Part 230) had not been met, and CWA, Section 401 water quality certification (33 CFR 325.2 (b) (1) (ii)) had not been received. The District's decision was supported by substantial evidence in the administrative record. The appeal does not have merit.

Appeal Evaluation, Findings and Instructions to the Sacramento District Engineer (DE): The reasons for appeal described below are based on the appellant's Request for Appeal but have been rephrased to clearly describe the findings that must be made regarding this appeal.

Reason 1: The District did not correctly determine practicable project alternatives and mitigation during the analysis of consistency with the Clean Water Act (CWA), Section 404 (b) (1) "Guidelines for Specification of Disposal Sites for Dredged or Fill Material" (40 CFR Part 230) (Guidelines) and associated Corps of Engineers and Environmental Protection Agency Memorandum of Agreement (Corps/EPA MOA) of February 8, 1990 regarding "The Determination of Mitigation Under the Clean Water Act Section 404 (b) (1) Guidelines."

FINDING: The appeal does not have merit.

ACTION: None required.

DISCUSSION: The appellant proposed to fill 4.8 acres of waters of the United States, including portions of Mound Springs Creek and adjacent wetlands. The appellant asserted that no practicable alternatives to avoid special aquatic sites were available.

The Guidelines require as stated in 40 CFR 230.10 (a) (3):

"Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not "water-dependant"), practicable alternatives that do not involve special aquatics sites are presumed to be available, unless clearly demonstrated otherwise."

The Corps/EPA MOA states in section II.C:

"The Corps, except as indicated below, first makes a determination that potential impact have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts, and finally, compensate for aquatic resource values."

(Note: None of the exceptions applied in this case.)

The District and the appellant agreed that the basic project purpose was not water-dependant. The District and the appellant agreed that the on-site losses of wetlands and aquatic resource values were more than insignificant (as the term insignificant is used in Section II. C. of the Corps/EPA MOA) and required mitigation. They also agreed that it was appropriate and necessary to follow the mitigation sequence required by the Guidelines and the Corps/EPA MOA to first avoid, then minimize, and then finally compensate for impacts to aquatic resources associated with this project. The District

and the appellant agree that the appellant has the obligation to clearly demonstrate that no off-site or on-site alternatives to the proposed project that would have less adverse impact on environment are practicable. The District and the appellant disagreed as to whether practicable off-site alternatives were available and whether all practicable measures to avoid and/or minimize on-site impacts to aquatic resources had been taken.

There are several factors to be considered in making a determination of whether an alternative is practicable. The Guidelines state at 40 CFR 230.10 (a) (2):

“An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics, in light of overall project purpose.”

The District’s identified the overall project purpose in the decision document was:

“...a retail development to serve the western El Dorado County – Highway 50 corridor market area.”

The appellant stated his overall project purpose in his Revised Alternatives Analysis as:

“...to provide a regional shopping mall with support commercial facilities to serve the western El Dorado County-Highway 50 corridor market area.”

The Corps of Engineers Regulatory Program Standard Operating Procedures (SOP) of April 8, 1999, and the Plantation Landing Permit Elevation Guidance issued April 21, 1989, state that defining the overall project purpose is the responsibility of the Corps. However the SOP also states the applicant’s needs must be considered:

“... in the context of desired geographic area of the development, and the type of project being proposed.”

The District used its definition of overall project purpose rather than the appellant’s for the following reason stated in the decision document:

“Adoption of the applicant’s overall project purpose would constrain on-site alternatives by mandating the placement of commercial activities that may be functionally unrelated to large department store type operations, commonly associated with regional malls, on the project site.”

The District’s use of a more generalized overall project purpose was reasonable and consistent with the SOP as a method to avoid an unnecessarily constrained description of the project for analysis under the Guidelines. Therefore, the appellant’s obligation was to clearly demonstrate that a retail development to serve the western El Dorado County – Highway 50 corridor market area could not be built without impacting on-site wetlands.

The decision document considered the 10 off-site alternatives evaluated in the appellant's Revised Alternatives analysis. Six alternatives were discussed and eliminated in the decision document as either impracticable or unavailable to the appellant. At the appeal conference the District clarified that it considered 3 other alternative sites discussed in the decision document, Alternative Sites 7, 8, and 10, to be unavailable to the appellant. This left Alternative Site 3, the Cambridge Road site, as a potentially practicable off-site alternative.

The 33-acre Cambridge Road site at U.S. Highway 50 was a potentially practicable off-site alternative that could have accommodated most and perhaps all of the appellant's project. The appellant stated several reasons in his Revised Alternatives analysis why the Cambridge Road site was impracticable. The appellant found that the roadways would require a major upgrade in order to use the site, that the site was of insufficient size to configure a parking lot for the proposed development, and that the site was outside the primary trade area. Both the Cambridge site and the appellant's proposed site would require major off-site roadway improvement, so this district concluded it was not appropriate to reject one site on this basis, but not the other. The District acknowledged that the Cambridge site might be too small for a larger department store, but that some of the commercial activities from the proposed site could be relocated there. As a result, there would be more room available on the proposed site to avoid on-site wetlands. The appellant did not clearly demonstrate, as required by the Guidelines, that the site could not be configured to provide a practicable alternative.

In the decision document, the District also identified the Sam's Town site on U.S. Highway 50 near Alternative Site 4 at Cameron Park Drive, as a possible alternative site. The applicant did not consider the Sam's Town site in his Revised Alternatives analysis. In the Request for Appeal, the appellant stated that the Sam's Town site at U.S. Highway 50 was only 8.5 acres, while at the appeal conference the District stated that an additional 10 acres adjacent to the Sam's Town site were available. The District stated some of the commercial activities at the proposed site might have been moved to the Sam's Town site to reduce the impacts to aquatic resources. The District agreed with the appellant that the site was too small to support the entire development as proposed by the appellant.

The appellant stated in his Revised Alternatives analysis that to be practicable any off-site alternative must be located near the center of the population of the demographic zone, which he stated was the general vicinity of the City of Placerville. However, the appellant did not clearly demonstrate how far from the center of the demographic zone would be considered outside of the primary trade area, or supplement this information with data as to why that would make the off-site alternatives impracticable. The appellant did not clearly demonstrate that the Cambridge site and/or the Sam's Town site were not practicable off-site alternatives.

The appellant also asserted that no on-site mitigation measures to minimize or avoid impacts to aquatic resources were practicable. The appellant claimed he had appropriately followed the required sequence of mitigation in the Guidelines and the Corps/EPA MOA by proposing off-site mitigation for this project. The District found

that the appellant had not clearly demonstrated that less damaging on-site alternatives were impracticable.

The District suggested providing buffer areas around the existing wetland areas, bridging the wetland areas, and/or developing multistory parking garages to serve the retail facilities, and reducing or eliminating the Headington Road extension during review of this permit application. These mitigation measures used known technologies, and appeared to be technically and logistically feasible.

The appellant objected to these measures primarily on the basis of cost. The appellant's Revised Alternatives analysis, and clarifying information provided during the appeal process stated that the proposed project was actually substantially more expensive to construct than a smaller project with a 100-foot buffer area avoiding on-site wetlands. The appellant's Revised Alternatives analysis projected that his proposed project would cost approximately 9 ½ million dollars more than a smaller project. However, the appellant concluded that the smaller project provided insufficient net operating income and financial rate-of-return to be practicable. That is, the profit margin of the project would be so low that it did not justify the level of risk in investing in the project.

The appellant claimed that a minimum return on investment of approximately 12% was required to make the project sufficiently profitable to be a practicable alternative. However the appellant did not clearly demonstrate that a modified project that reduced impacts to the on-site aquatic resources was impracticable. The District considered whether the proposed project, and on-site alternatives would generate a profit or incur a loss as part of its determination of practicable alternatives, but did not consider a specific rate-of-return as a threshold for establishing a practicable alternative. I found no specific Corps guidance relevant to that topic which the District could have used in establishing such a threshold. Given the lack of specific guidance on this topic, and that reasonable changes in the assumptions or methodology could have affected the appellant's estimated rate-of-return, the District's choice not to evaluate the practicability of project alternatives in relation to a specific financial rate-of-return was reasonable.

If the appellant had provided sufficient information that all measures to avoid or minimize on-site and off-site impacts to aquatic resources had been considered and shown to be impracticable, he may have clearly demonstrated the proposed project was in fact the least damaging practicable alternative. However, that is not the case here. This appeal decision document reviews the District's evaluation of why the appellant did not clearly demonstrate that less damaging on-site practicable alternatives were available.

First, the District's decision document notes that the appellant owns and would grade 77 acres for the project, but considers only 53 acres as part of the developable area for his project. The District considers this an understatement of the available land for the development that flaws the appellant's subsequent analysis of the costs of avoiding the waters of the United States.

The appellant explained that most of the additional acreage would be used for roads and detention basins, and several other public purposes, and therefore would not be available for use as additional retail development. However, the appellant acknowledged in his alternatives analysis that there would be 17.5 acres available for future development north of the proposed Headington Road extension.

The appellant stated that any additional space north of Headington Road would not function as part of the “critical mass” of 500,000 square feet of retail space needed to be part of a practicable development. The appellant asserted this 17.5 acre area was too far away from the rest of the development to be part of the “critical mass” because it was separated from the primary development by a major street. However, the District’s contention, that some costs of that future development were being considered, but the potential future income (although probably small in the context of the overall development) was being excluded, was reasonable.

The decision document identified that the appellant did not differentiate between the area required for an internal roadway and the area needed for parking. Therefore, it was not clearly demonstrated whether sufficient parking could be retained for the appellant’s proposed development by reducing or eliminating the development’s internal roadways. The decision document stated that no evaluation was made for increasing the pad elevation of the parking lots as a way to meet the parking lot grading standards without filling wetlands. Also, the appellant asserted at the appeal conference that people in this semi-rural area would avoid developments with parking garages. This assertion was not clearly supported by the administrative record and the District noted that there is a parking garage in use in nearby downtown Placerville. The District was reasonable in concluding that the appellant did not clearly demonstrate that the parking areas and internal roadways could not be modified to avoid or reduce on-site impacts to aquatic resources including wetlands.

The appellant asserted that avoiding on-site aquatic resources would fragment the project, resulting in poor access between stores, higher than normal business failures and abnormally high tenant turnover. The District considered the appellant’s position, but concluded that even with reduced access a local shopping center was likely to still be attract customers when compared to an approximately 20-mile drive to the nearest similar complex. The appellant did not clearly demonstrate otherwise. The District’s conclusion that local residents would use a local shopping center with limited access in preference to a development approximately 20 miles away was reasonable.

The appellant asserted that regional access would be impaired by providing a buffer for the wetland area and terminating the Headington Road extension at Mound Springs Creek. However, the District concluded that the appellant’s alternatives analysis should have included an evaluation of a bridge or culverted crossing of Mound Springs Creek at Headington Road that would have allowed this regional access. The appellant might also have provided a larger contiguous area for retail development if he moved the Headington Road extension further north. The appellant stated that the alignment of the Headington Road extension had been determined by the El Dorado County Department

of Transportation and a modification to allow a larger contiguous area for retail development would require an exception to county road standards and extensive fill on a sloped upland area.

At the appeal conference, the appellant stated it was his understanding that the District did not support a proposal to build a bridge over Mound Springs Creek at Headington Road. Although District staff may have favored complete avoidance of Mound Springs Creek they proposed bridging the creek as a possible alternative. The appellant opted at the August 18, 2000 meeting with the District to terminate further consideration of alternatives and requested the District issue a permit decision. The appellant did not clearly demonstrate that modifications to Headington Road to avoid or minimize impacts to waters of the United States were impracticable. Therefore, the District's position is reasonable that further evaluation of bridging Headington Road might have avoided or reduced on-site impacts of the project.

The appellant stated in his Revised Alternatives analysis that the project cannot proceed unless designed as proposed, because it would not provide sufficient sales tax funding to provide for the necessary Missouri Flat Road roadway improvements. The appellant reached that conclusion based on the county-approved Missouri Flat Master Circulation and Funding Plan.

The decision document identified that the county had other options available for funding the infrastructure improvements such as direct assessment on developers who will benefit from the improvements, bond measures, or a temporary sales tax increase. The District stated that other nearby local municipalities had used such measures successfully to fund infrastructure improvements. In addition, depending on the ultimate interpretation of El Dorado County measure Proposition Y, passed in 1998, a different method of funding the Missouri Flat Road roadway improvements may now be required. Therefore, the District concluded that the appellant could not rely on the lack of sufficient funding from the project to support roadway improvements as a logistical reason why project alternatives are impracticable. The District's conclusion was reasonable.

The decision document recognized that the proposed major retail tenants for the project would likely oppose any alternative that impaired marketability or access as a possible factor that would reduce the number of customers, and therefore the potential financial return on their investment. However, such opposition does not make such proposed modifications impracticable. The District and the Environmental Protection Agency both stated that the District is not obligated to permit the alternative that provided the greatest financial return to the developer. The Guidelines require the District permit only the least damaging practicable alternative. The District was correct to consider alternatives to avoid or minimize on-site impacts, even though proposed major tenants of the project opposed such alternatives.

On October 28, 1999 the District advised the appellant that although the appellant had not provided all the information the District requested in its July 7, 1999 letter, there was sufficient information in the District's administrative record to make a permit decision.

Overall, the District made several attempts to get conclusive information from the appellant to clearly demonstrate the practicability of on-site and off-site alternatives to avoid and minimize impacts to aquatic resources. In addition, the District met with the appellant on August 18, 2000 to discuss a project alternative that the District thought it could likely approve. At the August 18, 2000 meeting, the appellant declined to consider additional project alternatives, and requested the District issue a permit decision on the proposed project.

The District ultimately concluded that the appellant had not provided sufficient information to clearly demonstrate that no less damaging practicable on-site and off-site alternatives were available. The District then denied the appellant's permit request as required by the Guidelines. Based on my review of the administrative record, this decision was reasonable.

Reason 2: The District's permit denial is based largely on anticipated water quality impacts for which the appellant had proposed sufficient mitigation measures. Therefore, to deny a permit on this basis is arbitrary and capricious.

FINDING: The appeal does not have merit

ACTION: None required

DISCUSSION: The decision document identified water quality impacts that would result from the loss of 2,500 to 3,000 lineal feet of Mound Springs Creek, including adjacent wetlands. These impacts included introduction of parking lot runoff water contaminated with toxins in the watershed, an increase in volume and velocity of runoff water, and a loss of the water filtration functions of the creek, and changes in erosion and accretion patterns. The decision document stated that the loss of the filtration function of the stream could not be mitigated at an off-site location. These impacts to aquatic resources would also contribute to cumulative degradation of the Mound Springs Creek watershed.

The appellant proposed a detention basin as mitigation for the on-site water quality impacts, and claimed it could provide mitigation for the on-site water quality impacts. The District stated it did not receive any specific details regarding the design of the proposed detention basin, and so could not verify the appellant's assertion that the detention basin would provide sufficient on-site water quality mitigation. The appellant provided a preliminary grading and drainage plan as clarifying information during the appeal process, however this plan had been previously submitted to the District which considered it as part of the administrative record during the permit evaluation process. This plan shows the location and size of a detention pond, but provides no details as to its design, or potential filtration functions. The appellant clarified and reiterated in its January 9, 2000 e-mail that the detention pond would prevent an increase in storm water flow, and could be enlarged if needed.

The Central Valley Region, California Regional Water Quality Control Board (Board), informed the District on March 19, 1999 that they had reviewed information on the

Sundance Plaza project and concluded that the appellant's proposed mitigation would not provide an equivalent water quality function to the existing wetlands and recommended that other project alternatives be considered. On August 24, 2000 the District confirmed with the Board that the CWA Section 401 water quality certification had not been issued or waived for the appellant's project. The review officer requested the appellant provide any pertinent clarifying correspondence with the Board relating to this issue. The appellant reviewed his files and found no record of coordination with the Board to either obtain or waive CWA Section 401 water quality certification. It states at 33 CFR 325.2 (b) (1) (ii) that:

“No permit will be granted until required (water quality) certification has been obtained or has been waived.”

The District was required to deny this permit based on the lack of Clean Water Act Section 401 water quality certification.

The decision document also identified these impacts as representing a significant degradation of the aquatic ecosystem under the Guidelines (40 CFR 230.10 (b) and (c)). It states at 40 CFR 230.10 (b) (1) that:

“No discharge of dredged or fill material shall be permitted if it causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard.”

Also at 40 CFR 230.10 (c) it states:

“Except 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 of the waters of the United States.”

(Note Section 404 (b) (2) does not apply to this appeal).

The District had substantial evidence in the administrative record to support its conclusion that the appellant's project would adversely affect water quality. The appellant provided only general information regarding his proposed mitigation measures, which the District considered insufficient. The District's conclusion that the project as proposed would result in the degradation of water quality was reasonable. The water quality analysis reasonably supported the District's conclusion that water quality impacts of the proposed project were inconsistent with the Guidelines and the permit should be denied.

Reason 3: The endangered species impact analysis for this project was incorrect.

FINDING: The appeal does not have merit

ACTION: None required

DISCUSSION: The District and the appellant agree that project surveys found no endangered California red-legged frogs on-site. The District and the appellant also agree that the bullfrog, a significant predator of California red-legged frogs, does occur on-site. Based on these facts, the appellant asserted that his project location was not California red-legged frog habitat.

The District conducted an Endangered Species Act, Section 7, consultation with the U.S. Fish and Wildlife Service regarding the potential impacts of this project on the endangered California red-legged frog. The U.S. Fish and Wildlife Service biological opinion for this project concluded that:

“...there is a high likelihood that California red-legged frog breeding has occurred on the project site in the past and its (sic) is likely that California red-legged frogs occupy or disperse through the site to carry out the nonbreeding portions of their life cycle.”

The U.S. Fish and Wildlife Service concluded that the project site was California red-legged frog habitat. The District reviewed this determination and concluded that it should consider the project site California red-legged frog habitat. The District’s conclusion, based in large part on consultation with the U.S. Fish and Wildlife Service, the federal government’s expert on endangered species, was reasonable.

The appellant’s Request for Appeal stated the U.S. Fish and Wildlife Service biological opinion’s conclusions were internally contradictory. The biological opinion stated:

“After reviewing the current status of the California red-legged frog and cumulative effects within the project vicinity, it is the Service’s biological opinion that the project is not likely to jeopardize the continued existence of this species. No critical habitat has been designated for this species, therefore, no critical habitat will be affected.”

In discussions with the appellant before and at the appeal review conference, it became clear that the appellant did not understand the specific formal procedures that must be completed to establish “critical habitat” for purposes of the Endangered Species Act. “Critical habitat” as defined by the Endangered Species Act is established only after publication of proposed critical habitat in the Federal Register, acceptance of public comment, and issuance of a final rule in the Federal Register. Until formally established no “critical habitat” could be affected by the appellant’s proposal. The review officer explained that the U.S. Fish and Wildlife Service could identify California red-legged frog habitat affected by the project without a “critical habitat” designation, as was done for this permit action. As a courtesy, the review officer provided the appellant a copy of the U.S. Fish and Wildlife Service proposed designation of California red-legged frog critical habitat currently available for public review and comment.

The U.S. Fish and Wildlife Service biological opinion found that the project did not jeopardize the continued existence of endangered species provided that the

nondiscretionary Terms and Conditions implementing the Reasonable and Prudent Measures of the Incidental Take Statement were implemented. These terms and conditions included a provision that:

“No land conversion or construction activities, including but not limited to, grading, paving, removal of vegetation, or storage of equipment, shall be permitted within 300 feet from the top of the bank of Mound Springs Creek including the approximate 0.25 acre pond that occurs along its length.”

The District, the U.S. Fish and Wildlife Service, and the appellant met on August 18, 2000 to discuss an on-site alternative the District thought could be permitted. At that meeting, the appellant indicated he did not want to consider further alternatives or modifications to his project, and requested a decision on the project as proposed. The District’s analysis of impacts on the endangered California red-legged frog, based in part on the U.S. Fish and Wildlife Service biological opinion, was reasonable.

Reason 4: Corps staff was personally biased against the project and unduly influenced by advocates of no-growth in El Dorado County.

FINDING: The appeal does not have merit.

ACTION: None required

DISCUSSION: The appellant provided no information beyond his assertion in the Request for Appeal, that the District staff was biased in their evaluation of his proposed project. There is no evidence of bias by District staff in the administrative record. The administrative record supports the conclusion that the District undertook a detailed analysis of the appellant’s proposed project based on the information in the administrative record. The District’s denial of the appellant’s permit request was required because the District concluded the appellant’s project as proposed did not meet the substantive requirements of the Guidelines and CWA Section 401 State water quality certification had not been obtained or waived. Also, the District identified in its the cover letter transmitting the permit denial to the appellant, and in its the August 18, 2000 meeting with the appellant prior to denying the permit, that a modified project alternative avoiding the wetlands and waters of the United States might be permitted.

Information Received and its Disposition During the Appeal Review:

- 1) On December 15, 2000 the appellant submitted clarifying analysis regarding the fiscal analysis of the project. This information was considered during the appeal process.

- 2) On January 2, 2001 the appellant submitted the preliminary grading and drainage plan for the project. However, this information was already part of the administrative record and was considered during the appeal process.
- 3) On January 10, 2001 the appellant submitted an e-mail that reiterated that the size of their 0.5 acre detention pond had been established by their civil engineer to retain anticipated storm flows from the size, but could be substantially increase in size if necessary. Also, the appellant stated that the local environmental and building permit requirements required the appellant to maintain peak flows into Mound Springs Creek that area no greater than pre-construction levels. The appellant concluded that the increased storm flow from the proposed development should not be a reason to deny the permit request. This information was considered clarifying information and considered during the appeal process.
- 4) During the appeal process the U.S. Supreme Court issued its decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (SWANCC decision) (January 9, 2001). The SWANCC decision was related to Corps jurisdiction over nonnavigable, isolated, intrastate waters based solely on the use of such waters by migratory birds. On January 25, 2001, the District clarified jurisdiction in this case was established on the basis of Mound Springs Creek being connected to the navigable American River by a series of tributaries, and that the on-site wetlands were immediately adjacent to Mound Springs Creek. The SWANCC decision did not relate to basis for jurisdiction in this permit action.

Conclusion: My analysis of this permit decision found that the District undertook a detailed analysis of the administrative record. The District found that the appellant proposed to fill wetlands, a special aquatic site, and therefore the appellant had the obligation to clearly demonstrate that less damaging practicable alternatives were available. The appellant did not meet this obligation. The District identified both off-site and on-site alternatives in its decision document and the appellant did not clearly demonstrate that these alternatives were impracticable. The District also had substantial evidence that the proposed project would contribute to significant degradation of water quality. Therefore, the District was required under the Clean Water Act, Section 404 (b) (1) Guidelines to deny the appellant's permit. In addition, the District denied the appellant's permit to comply with 33 CFR 325. 2 (b) (1) (ii) because of the lack of a Clean Water Act Section 401 State water quality certification or waiver. Either reason alone would have been a sufficient basis to deny this permit. The District's decision was reasonable and supported by substantial evidence in the administrative record. The appeal does not have merit.

original signed by
Peter T. Madsen
Brigadier General, Corps of Army
Division Engineer