

**ADMINISTRATIVE APPEAL DECISION FOR
ARMY CORPS OF ENGINEERS PERMIT DENIAL REGARDING
SILVER SPRINGS EAST (LOT P), SACRAMENTO COUNTY, CALIFORNIA
SACRAMENTO DISTRICT FILE NUMBER 199900712**

May 4, 2004

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

District Representatives: Michael Jewell and Mike Finan, U.S. Army Corps of Engineers, Sacramento District Regulatory Office, California

Appellant Representative: Tina Thomas of Remy, Thomas, Moose, and Manley as counsel for Angelo K. Tsakopoulos of AKT Development Inc. (AKT), Sacramento, California

Authority: Clean Water Act (CWA), Section 404 (33 U.S.C. 1344)

Receipt of Request For Appeal (RFA): October 24, 2003

Appeal Conference Date: February 12, 2004 **Site Visit Date:** February 12, 2004

Background Information: The Appellant (AKT Development) proposed to fill 10.78 acres of waters within CWA jurisdiction including 9.26 acres of vernal pools and 1.52 acres of seasonal wetlands to construct the Silver Springs East project consisting of 80 single-family homes on one-acre lots on an 85-acre property, known as Lot P, located northwest of the intersection of Calvine and Excelsior Roads, adjacent to the northern boundary of the City of Elk Grove, in Sacramento County, California. The Sacramento District denied the Appellant's permit request because the District determined the permit action the Appellant requested did not comply with the CWA Section 404 (b) (1) Guidelines, and was contrary to the public interest. The Appellant claims these determinations are arbitrary and capricious and that a permit should have been issued.

Summary of Decision: I found the administrative record supported the District's conclusion to deny the Appellant's CWA permit request because the project requested in the Appellant's permit application did not comply with the CWA Section 404 (b) (1) Guidelines.

Appeal Evaluation, Findings and Instructions to the Sacramento District Engineer (DE):

Reason 1: The Appellant asserts that the District's CWA Section 404 (b) (1) Guidelines determination of the least environmentally damaging practicable alternative was arbitrary and capricious.

FINDING: The appeal did not have merit.

ACTION: None required.

DISCUSSION: The Sacramento District's action being reviewed in this administrative appeal decision is its denial of an individual permit to the Appellant to fill 10.78 acres of waters within CWA jurisdiction in order to construct a residential housing development on the 85-acre Lot P (Sacramento District File No. 199900712).

Prior Corps permitting actions regarding the Lot P property

The District and the Appellant disagree as to the scope and effect of prior Corps CWA permit authorizations and related actions regarding Lot P, particularly their effect in relation to whether the Appellant's project proposed in its December 9, 1999 permit request (Sacramento District File No. 199900712) complied with the CWA Section 404 (b) (1) Guidelines (40 CFR 230).

On May 9, 1994, the District issued a Nationwide Permit (NWP) authorization to the Appellant (Sacramento District File No. 1993300372) for the Calvine 1100 Acre II Partnership's construction of Country Creek Estates. The area evaluated in the Calvine 1100 Acre II Partnership 1994 NWP evaluation included several parcels to be developed at that time, as well as Lot P, which was not then proposed for development. Regarding the project evaluated under that NWP, the District NWP authorization stated:

“...the Corps has evaluated this request in a cumulative fashion along with H.C. Elliot's Silver Springs subdivision which has already impacted .98 acres of waters and Southgate Recreation and Park District's proposed golf course which will impact 1.31 acres of waters. You have agreed to mitigation for the impacts associated with the Calvine 1100 Acres II Partnership project and the past impacts associated with the H.C. Elliot's project by creating 6.05 acres of seasonal wetland and seasonal marsh within the Laguna Creek Corridor.”

The District's 1994 NWP authorized the filling of waters of the United States on the Country Creek Estates parcel, which was subsequently sold by the Appellant AKT to J & L Property in May 1997. J & L Property constructed the Silver Spring residential development on that parcel. The J & L Property parcel is immediately west of Lot P. AKT owns Lot P as it has since before the 1994 NWP authorization.

Special condition 2 of the 1994 NWP authorization states with regard to the Lot P area under consideration in this appeal that:

“The project area is redefined to include the vernal pool complex immediately east of the PDN (Project Discharge Notice) Plan development boundary. The vernal pool complex shall be included as a preserve area and maintained as a wetland preserve and wildlife habitat in perpetuity.”

Special condition 5 of the 1994 NWP authorization identified the following actions that shall be taken prior to any impacts to waters of the United States:

“5 (b) Recordation of deed restrictions maintaining the preservation and mitigation areas as wetland preserve and wildlife habitat in perpetuity. Copies of the proposed deed restriction language shall be provided to the Corps of Engineers prior to recordation.”

The Appellant stated at the appeal meeting that they objected to these special conditions at the time of the 1994 NWP authorization. The administrative record is clear and the Appellant acknowledged at the appeal meeting that it and its successors proceeded under the 1994 NWP authorization and modifications to that NWP authorization required by subsequent Endangered Species Act (ESA), Section 7, consultations. Therefore, the District reasonably concluded that the Appellant and his successors, having received the benefits of proceeding under the 1994 NWP authorization, must abide by the special conditions of that authorization.

The District’s December 17, 1997 letter approved the deed restriction wording for Lot P submitted by the Appellant as meeting the requirement of Special Condition 5 (b) of the 1994 NWP. Paragraph 3 of the deed restriction provided that the Appellant could terminate the deed restrictions on Lot P and develop Lot P if the Appellant received all necessary and required permits, permissions, and approvals under the CWA, ESA, and/or any other applicable federal, state or local laws. Thus the District’s special conditions of the 1994 NWP, which originally included wording that required protection of Lot P in perpetuity, now allowed for the development of Lot P if certain conditions were met. The wording of the deed restriction did not guarantee that such approvals would be granted, nor that the Appellant could disregard any requirement of federal law.

In 1998, additional, previously unknown habitat for threatened and endangered species was discovered on the J & L Property, requiring additional ESA Section 7, consultations between the U.S. Fish and Wildlife Service and the District. As a result of this and other issues, there were additional discussions between the Appellant and the U.S. Fish and Wildlife Service (USFWS) resulting in an August 27, 1999 U.S. Fish and Wildlife Service letter to the Appellant and a subsequent October 13, 1999 ESA, Section 7, Biological Opinion issued by the USFWS to the District regarding modifications of the special conditions of the 1994 NWP. The District’s letter of November 3, 1999 made the terms and conditions of the USFWS October 13, 1999 Biological Opinion special conditions of the District’s 1994 NWP authorization. The Appellant asserts that that these documents represented a “global settlement” with the USFWS and the District showing that the agencies accepted an alternative location, the Excelsior 184 property, in

place of preservation and avoidance of Lot P, and that preservation of the Excelsior 184 property was to be considered in place of any on-site avoidance measures associated with future development related to aquatic resources, including vernal pools, on Lot P. The District disagrees with the Appellant's conclusion.

The administrative record supports the District's conclusion there was no "global settlement" that required the District to issue a CWA authorization for the development of Lot P as residential housing or approve the Excelsior 184 property as an appropriate alternative avoidance area in place of Lot P. The USFWS stated in its August 27, 1999 letter to AKT that:

"When you approach the Service with development plans for Lot P, we will evaluate the development plans in the context of a section 7 consultation"

This indicates that the District had not started an ESA, Section 7, Consultation with the USFWS regarding the potential adverse effects of the development of Lot P on threatened and endangered species, but rather was addressing the J & L Property development activities, a portion of which affected Lot P. The USFWS's October 13, 1999 ESA, Section 7, Biological Opinion finalizing the approach discussed in the Service's August 27, 1999 letter also states that:

" This biological opinion only addresses the current phase (J & L Properties portion) of the Silver Springs residential development and the impacts [of the J & L Properties development] on the adjoining Lot P."

Note: words in brackets [] added for clarity.

The Appellant did not submit a permit application to the District proposing to fill all waters within CWA jurisdiction on Lot P until December 9, 1999. The District could not reasonably have evaluated, much less granted final approval for, a specific alternative to preserving the vernal pools on Lot P, such as the Excelsior 184 property, before such a permit application was submitted. Also, the District could not take those actions until it had the opportunity to conduct a CWA Section 404 (b) (1) Guidelines analysis on the Appellant's project proposal.

The administrative record shows no evidence that the District made any pre-decision to approve any "global settlement" to fill all waters of the United States on Lot P, develop residential housing on Lot P, or allow the Excelsior 184 property to be used as mitigation for those activities. The District correctly evaluated the Appellant's permit application by considering it in accordance with the Corps regulations and the CWA Section 404 (b) (1) Guidelines, and not any "global settlement" that the Appellant claimed existed.

Project Definition and Purpose Regarding the Silver Springs East Project

The Appellant submitted an application as allowed by the Corps-approved deed restriction for Lot P to seek authorization to fill all waters on Lot P to build a residential development. The Appellant proposed to mitigate for these environmental effects in part by receiving credit for preserving portions of the Excelsior 184 property, approximately

four miles northeast of Lot P. The District stated in its decision document that the proposed project was:

“The proposed project (“Silver Springs East”) involves the discharge (of) dredged or fill material into 10.78 acres of waters of the United States (U.S.), including wetlands, to construct 80 single-family houses (on one-acre lots) on an 85-acre site.”

The Appellant asserts that the District should have included the Appellant’s proposed “avoidance area” or preservation area at the Excelsior 184 property, as part of the proposed project. The Appellant claims that the permit decision in this matter would have been different had the District done so.

The CWA Section 404 (b) (1) guidelines require that the District identify the basic and overall project purpose in order to evaluate the project in relation to the Guidelines. The Appellant’s December 9, 1999 permit application to fill waters within CWA jurisdiction on Lot P stated that the project purpose was to:

“To provide housing in a rapidly urbanizing area of Sacramento County and to take advantage of existing infrastructure (water, sewer, etc.) on adjacent properties.”

The District defined the basic project purpose as:

“The basic project purpose is to develop a residential subdivision and associated facilities, a non-water dependent activity.”

The District defined the overall project purpose as:

“The overall purpose of the project is to construct a small residential subdivision within the County of Sacramento’s Urban Services Boundary (USB) in south Sacramento County.”

Both the District and the Appellant identified the proposed project as a residential housing development, a non-water dependant activity. The District reasonably concluded that the Appellant’s project purpose did not include or require the use of the off-site Excelsior 184 property. The District correctly considered that the proposal to use the Excelsior 184 property as an alternative “avoided area” in place of permanent protection of Lot P must be evaluated within the context of the Corps regulations, guidance, and a CWA Section 404 (b) (1) Guidelines analysis as part of the Corps individual permit application to fill waters within CWA jurisdiction.

Alternatives Analysis

The Appellant asserted in his administrative appeal that because the effects of his proposed project on Lot P would be minor, only a limited evaluation of alternatives was required. To support this position the Appellant quoted the Corps Regulatory Guidance

Letter 93-02 (RGL 93-02) *Guidance on Flexibility of the 404 (b) (1) Guidelines and Mitigation Banking* as follows:

“Although sufficient information must be developed to determine whether the proposed activity is in fact the least damaging practicable alternative, the Guidelines do not require an elaborate search for practicable alternatives if it is reasonably anticipated that there are only minor differences between the environmental impacts of the proposed activity and potentially practicable alternatives”

To further support his position that only a limited alternatives analysis was required the Appellant further stated that:

“The impacts to Lot P would certainly be considered “minor” especially when the benefits of preserving the Excelsior 184 site are considered.”

The administrative record and Corps guidance do not support the Appellant’s conclusions that the environmental effects of the Appellant’s proposed project would be minor and that therefore only a limited alternatives analysis was required. Lot P contains 10.78 acres of wetlands, including 9.26 acres of vernal pools. The CWA Section 404 (b) (1) Guidelines identify wetlands as special aquatic sites, and vernal pools such as those on Lot P area are commonly habitat for federally threatened and endangered species. In addition, it would be contrary to the Corps’ guidance for the District to consider the potential benefits of preserving the Excelsior 184 property in order to justify that a lesser alternatives analysis is sufficient. RGL 93-02 specifically considered and rejected this approach stating:

“It is not appropriate to consider compensatory mitigation in determining whether a proposed discharge will cause only minor impacts for purposes of the alternatives analysis required by Section 230.10 (a).”

The Appellant asserted that his proposal to preserve the Excelsior 184 property in place of preservation of Lot P was not a compensatory mitigation measure, but an avoidance measure that should be considered in the same manner as if the Excelsior 184 property was contiguous with the Lot P property. However, RGL 02-02, *Guidance on Compensatory Mitigation Projects for Aquatic Resources Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 20 of the Rivers and Harbors Act of 1899*, issued December 24, 2002, defines preservation actions such as proposed by the Appellant in this instance as a form of compensatory mitigation.

The CWA Section 404 (b) (1) Guidelines generally follow a sequential approach to mitigation that is also considered in the development of project alternatives. This approach is described in the *Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of*

Mitigation Under the Clean Water Act Section 404 (b) (1) Guidelines dated February 6, 1990, as follows:

“The Corps, except as indicated below, first makes a determination that potential impacts 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. This sequence is considered satisfied where the proposed mitigation is in accordance with specific provisions of a Corps and EPA approved comprehensive plan that ensures compliance with the compensation requirements of the 404(b)(1) Guidelines (examples of such comprehensive plans may include Special Area Management Plans, Advance Identification areas (Section 230.80), and State Coastal Zone Management Plans). It may be appropriate to deviate from the sequence when EPA and the Corps agree the proposed discharge is necessary to avoid environmental harm (e.g., to protect a natural aquatic community from saltwater intrusion, chemical contamination, or other deleterious physical or chemical impacts), or EPA and the Corps agree that the proposed discharge can reasonably be expected to result in environmental gain or insignificant losses.”

The Appellant has asserted preservation of the Excelsior 184 property, plus other associated measures to create additional wetland to address environmental impacts on Lot P, were substantially environmentally superior to retaining all or part of the environmental resources on Lot P. The Appellant asserts that the District should have accepted the Appellant’s residential development project as proposed including preservation and compensatory mitigation measures, with no other substantive alternatives analysis.

While such an approach is within the range of possibilities addressed in the 1990 Memorandum of Agreement discussed above, the District reasonably concluded that it should consider project alternatives to avoid and minimize the environmental effects of the Appellant’s project. As the administrative record shows there was a diversity of opinion regarding the overall negative or positive environmental effects of the proposed discharge, it was reasonable for the District to follow the typical sequential approach provided in the CWA Section 404 (b) (1) Guidelines to first consider measures to avoid impacts to aquatic resources, then minimize impacts to aquatic resources, and finally provide compensatory mitigation for impacts to aquatic resources. The District reasonably concluded a detailed evaluation of alternatives was necessary and undertook such an analysis.

The District considered a number of alternatives to the Appellant’s proposed project. The Appellant provided information on several alternatives in his March 29, 2002 *404(b)(1) Alternatives Analysis, Silver Springs East, (Lot P) (Public Notice #199900712), Sacramento County, California* (Alternatives Analysis). The Appellant’s project proposed the discharge of fill for a non-water dependant activity (residential housing) into a special aquatic site (wetlands). Under the CWA Section 404 (b) (1) Guidelines (40 CFR 230.10 (a) (3)), actions that are not water-dependant are presumed to have

practicable project alternatives to the use of special aquatic sites unless clearly demonstrated otherwise. It was the Appellant's burden to clearly demonstrate that no practicable alternatives were available.

The Appellant concluded in his Alternatives Analysis that there were no practicable off-site or on-site alternatives that would meet the project objectives other than the project as proposed. The District identified several alternatives to the Appellant's proposed project that the District considered to be less environmentally damaging practicable alternatives. The District discussed its consideration of alternatives in its Decision Document for this action.

First, the District considered "no action" alternatives that did not require the District to issue a permit. These included several "build on uplands only" alternatives, which would not require Corps permit authorization and a "no build, no project" alternative, in which the Appellant would forgo development of this project at any location. The Appellant's Alternatives Analysis evaluated several "build on uplands only" alternatives.

The Appellant's Alternatives Analysis concluded that on-site alternatives involving 50 ft. 100 ft. or 250 ft. upland buffer areas around all wetland areas would reduce the developable area of the property by 65% (32 acres still developable), 85 % (13 acres still developable), and 99% (0.94 acre still developable) respectively. The Appellant concluded all these alternatives were impracticable because of the small amount of land remaining for development, the logistical and technical impracticality of routing utilities and roads to avoid all wetland and wetland buffer areas, and the increased cost of doing so. The District's Decision Document concurred with the Appellant's conclusion that the 100 ft. and 250 ft. upland buffer alternatives provided insufficient developable acreage to meet the project purpose. However, the District concluded that the 50 ft. buffer alternative:

“...allows for some areas within the proposed project site to be used for other purposes, including, but not limited to, parks and small residential or commercial development.”

Figure 6 in the Appellant's Alternatives Analysis shows that providing buffers, whether they be 50 feet, 100 feet, or 250 feet in width, around all the small, dispersed wetlands on the property, would result in a very irregularly shaped developable area. While the Appellant did not clearly establish that routing utilities to avoid all these wetland buffer areas would be logistically and technically impractical, it is clear that substantially longer utility lines would be required, and that this would increase project costs. The Appellant did not provide specific details regarding these increased costs. The District did not address these factors in determining that the 50 foot upland buffer alternative was a practicable alternative. While the District's administrative record did not clearly establish whether or not the 50 foot upland buffer alternative was practicable, the CWA Section 404 (b) (1) Guidelines (40 CFR 230.10 (a) (3)) require that the District presume a practicable alternative not involving a special aquatic site is available unless clearly demonstrated otherwise.

The District also stated in its Decision Document that:

“In its permit application and 1994 NWP verification for the original Silver Springs development, which involved setting aside Lot P as a wetland preserve in perpetuity, AKT demonstrated the site could be practicably avoided.”

It is unclear from this statement whether the District considered a “no build, no project” alternative to meet the requirements of the Appellant’s overall project purpose because Lot P had been avoided during prior development associated with the Calvine 1100 Arce II Partnership’s development area. However, as the District considered the 100 ft. and 250 ft. upland buffer alternatives to provide insufficient usable area for the project to be practicable, so it would follow that providing no acreage for the project at any location would also be an impracticable alternative.

The District’s actions subsequent to issuance of the 1994 NWP suggest that total avoidance of Lot P in the initial 1994 NWP ultimately was not practicable. On December 17, 1997 the District approved deed restrictions in accordance with the special conditions of the 1994 NWP that modified the requirement that Lot P be set aside in perpetuity as a wetland preserve. Also, on November 3, 1999, the District approved of elimination of Special Condition 6 of the 1994 NWP that required a buffer of no less than 50 feet around preservation and mitigation areas on Lot P as the Appellant was providing alternative mitigation for those areas. I determine that the District’s administrative record does not contain sufficient information to conclude that the “no action, no project” alternative was a practicable alternative to the Appellant’s construction of a residential development project at some location.

The Appellant’s Alternatives Analysis also considered setting aside a Northern, Central, or Southern preserve area on portion of the property as a wetland/endangered species preserve. Each of these preserve options would involve preservation of a different amount of on-site wetlands, and a different reduction of developable acreage. The District concluded that other residential project designs could be considered as part of a Northern, Central, or Southern preserve option as well. These included reducing lot size to less than one acre, building more houses per acre, and/or building connected dwellings such as duplexes that would result in more residences per acre. In his Alternatives Analysis, the Appellant identified three reasons for rejecting a Northern, Central, or Southern preserve alternative. The District disagreed with the Appellant’s reasons and conclusions.

First, the Appellant’s Alternatives Analysis concluded that a Northern, Central, or Southern preserve alternative was impractical because the loss of residential lots to accommodate an on-site wetlands preserve would reduce project revenues relative to costs so severely that the project cost would become excessive and impracticable. The District concluded that the Appellant had not clearly demonstrated that a smaller project was not practicable. The Appellant did not provide cost information that clearly demonstrated projects with fewer houses on one-acre lots, projects with a similar number

of houses on less than one-acre lots, or projects with some connected dwellings instead of all single-family houses, were not practicable.

Second, the Appellant's Alternatives Analysis concluded that a Northern, Central, and Southern preserve alternative was impractical because significant portions of the wetlands, and listed species, located within the preserves were considered to be experiencing environmental impacts. The Appellant asserted that those environmental impacts would remain under a Northern, Central, or Southern preserve alternative.

Previous environmental impacts associated with development of the J & L Property include placement of fill on Lot P in excess of authorized amounts, changes in buffer zone widths between wetlands on Lot P and the J & L Property, and increased levels of incidental take of threatened and endangered species. The District previously addressed mitigation for those environmental effects by modifying the special conditions of the 1994 NWP, including completing additional ESA, Section 7, Endangered Species consultations that required the establishment and retention of a conservation easement on the Excelsior 184 property. There may be other environmental impacts on Lot P that are not associated with prior CWA permit actions and for which no mitigation measures have been required as part of the 1994 NWP authorization.

The mitigation measures currently required by the 1994 NWP authorization would be unaffected by the District's denial of a permit to develop Lot P. Although some adverse environmental effects may be affecting the aquatic resources in the area of a future Northern, Central, or Southern preserve on Lot P, that conclusion does not establish that the only practicable alternative to such environmental impacts is to eliminate all aquatic environmental resources on Lot P to accommodate development, and mitigate for those impacts at an off-site location(s). The administrative record does not support the Appellant's assertion that ongoing environmental impacts on Lot P aquatic resources are so severe that it is impracticable for such resources to be supported on-site in the future.

Third, the Appellant's Alternatives Analysis concluded that a residential development with a Northern, Central, or Southern on-site preserve would not make economic viable use of the site consistent with the County of Sacramento land use designations when mitigation for the loss of the on-site vernal pool complex was available at an alternative location. The Appellant's conclusion does not clearly demonstrate that an on-site residential development including a Northern, Central, or Southern preserve is not a practicable alternative. Such a preserve would allow for economic use of the property consistent with County of Sacramento land use designations for residential use. In any case, while the District must consider local land use designations as part of its permit evaluation process, the District it is not bound to follow such local land use designations to the exclusion of all other considerations. The administrative record supports the District's conclusion that the Appellant did not clearly demonstrate that a modified residential project on Lot P incorporating a Northern, Central, or Southern wetland preserve and compensatory mitigation area was not practicable.

The Appellant's alternatives analysis included several off-site project alternatives. The Appellant's position was that no off-site project alternatives were practicable, while the District considered that several of the off-site alternatives were practicable.

The Appellant evaluated the nearby approximately 160 acre Waterman/Sheldon property as a potential off-site practicable alternative to the proposed Lot P location. The Appellant claimed this site was impractical because of:

- a) economic infeasibility because of the costs and time of extending utility infrastructure to the property, including five years to complete the appropriate local government agency planning requirements.
- b) greater losses of aquatic functions and habitat quality associated with development as compared to Lot P.
- c) potential adverse effects on federally threatened and endangered species.

The District disagreed with all three of the Appellant's reasons for rejecting Waterman/Sheldon property. In the evaluation of the Waterman/Sheldon site the District's Decision Document stated that:

“Costs such as infrastructure improvements, time and planning are normal expenses associated with any development and are not delimiting factors in this evaluation.”

While some costs for infrastructure improvements, time and local government planning efforts are certainly part of typical residential development projects, the District's assertion that these factors cannot at some point be “delimiting” factors, that is, factors that can make an alternative impracticable, is not consistent with the CWA Section 404 (b) (1) Guidelines. The Guidelines (40 CFR 230.10 (a) (2) state that:

“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.”

While some level of cost for infrastructure improvements, time, and planning, is normal, there is some point beyond which such costs become excessive. Therefore, the District incorrectly stated that costs such as infrastructure improvements, time and planning could not be considered delimiting factors. However, in this case this error represents an ultimately harmless procedural error.

The District has reasonably concluded that other less damaging practicable alternatives, such as a Northern, Central, or Southern preserve alternative, are available. Also, the Appellant did not provide details to clearly demonstrate his claim that the Waterman/Sheldon property had sufficiently higher infrastructure costs or local government agency planning requirements relative to Lot P to render it impractical. The District reasonably concluded that the Waterman/Sheldon property was a practicable

alternative in terms of cost and time and the Appellant did not clearly demonstrate otherwise.

The Appellant asserted that aquatic areas on the Waterman/Sheldon property, although approximately one-half the acreage of the aquatic areas on Lot P, had more than twice the aquatic habitat values of the areas on Lot P. This conclusion was not clearly established by the Appellant's alternative analysis. The District reasonably concluded that there was not a sufficient basis to reject the Waterman/Sheldon property as a practicable alternative based on differences in environmental impacts to aquatic resources. Both the Waterman Sheldon property and Lot P are thought to contain federally listed threatened and/or endangered species. The District reasonably concluded that the Appellant's reasons for rejecting the Waterman/Sheldon property were not sufficiently documented in the administrative record to clearly demonstrate that this property was not practicable alternative.

The Appellant also evaluated the 230 acre County of Sacramento Sanitation property as alternative project location to Lot P. The Appellant concluded that approximately half of this property, about 115 acres, could be developed. Approximately 26 acres of wetlands are present on this property. The Appellant rejected this site due to:

- a) Lack of available utility infrastructure
- b) Lack of appropriate zoning
- c) Greater environmental impacts to aquatic resources as compared to Lot P

The District concluded that the County of Sacramento Sanitation property appeared to be practicable because the District considered the costs of providing utility infrastructure and rezoning the property to be normal costs associated with any project. As stated above, at some point such costs can become prohibitively expensive, but the Appellant did not provide sufficient documentation to clearly demonstrate that was the case here.

The District concluded that since only 85 acres of the 115 acre County of Sacramento Sanitation property would be needed for a project of equivalent size to the Silver Springs East project on Lot P, that it was likely that the project could be designed with less impact to aquatic resources as compared to Lot P. The Appellant disagrees and stated that since the aquatic areas on the County of Sacramento Sanitation property are distributed relatively uniformly, and that 9.78 acres of aquatic impacts could be expected in an 85-acre project. The Appellant states that the 9.78 acres of impacts to waters of the United States including wetlands would represent a greater impact on aquatic resources than the loss of 10.78 acres anticipated with the development of Lot P. The administrative record does not clearly establish whether or not the County of Sacramento Sanitation property is a practicable alternative, but the burden was on the Appellant to clearly demonstrate it was not a practicable alternative. As the Appellant did not do so it was reasonable for the District to conclude that it was a practicable alternative.

The District and the Appellant agreed that the 138 acre Churchill Downs property was not a practicable alternative because deed restrictions on the property establish it as a wetland preserve in perpetuity.

The District considered the 184 acre Excelsior 184 property to be a practicable alternative to the proposed project because there would be fewer direct impact to aquatic resources than if the proposed project was built on Lot P. However, the Appellant considered the use of the Excelsior 184 property to be impracticable because a permanent conservation easement had been placed on the entire property and the U.S. Fish and Wildlife Service's October 13, 1999 ESA, Section 7, Biological Opinion addressing development of the J & L Property required this easement remain in place.

The District had rejected the Churchill Downs property as a practicable alternative because it had deed restrictions that restricted development. However the conservation easement on the Excelsior 184 property had similar restrictions on development and the District still considered that property a practicable alternative. I conclude that the administrative record does not support the District's conclusion that the Excelsior 184 property is a practicable alternative. However, I conclude this is a harmless error. The District's administrative record identified several other less environmentally damaging practicable alternatives to the filling and elimination of all aquatic resources on Lot P. The District reasonably concluded that the Appellant's permit request must be denied because it was not the least damaging practicable alternate for the Appellant's proposed project, and therefore did not comply with the CWA Section 404 (b) (1) Guidelines.

The Appellant asserted that the District must consider the CWA Section 404 (b) (1) Guidelines requirements regarding threatened and endangered species when making a determination whether a proposed fill complies with Guidelines. The CWA Section 404 (b) (1) Guidelines at 40 CFR 230.30 (c) state that:

“Where consultation with the Secretary of the Interior occurs under Section 7 of the Endangered Species Act, the conclusions of the Secretary concerning the impact(s) of the discharge on threatened and endangered species and their habitat shall be considered final”

The Secretary of the Interiors's conclusion regarding the impacts of the proposed discharge of material into waters within CWA jurisdiction on Lot P is given in the USFWS's November 19, 2002, ESA, Section 7, Biological Opinion regarding the Appellant's Corps permit application to fill Lot P. Page 24 of the Biological Opinion states that:

“**Conclusion** After reviewing the current status of the endangered vernal pool tadpole shrimp and threatened vernal pool fairy shrimp, the environmental baseline, the effects of the proposed Silver Springs East (Lot P) residential development project together with the cumulative effects, it is the Service's biological opinion that the proposed Silver Springs East project is not likely to jeopardize the continued existence of the endangered vernal pool tadpole shrimp

and the threatened vernal pool fairy shrimp, nor is it likely to adversely modify proposed critical habitat of the vernal pool tadpole shrimp, vernal pool fairy shrimp, Sacramento Orcutt grass, and slender Orcutt grass.”

The District’s conclusion is not contrary to the conclusion of the U.S. Fish and Wildlife Service Biological Opinion, and page 7 of the District’s Decision Document specifically states that the Appellant’s proposed project is not likely to jeopardize the continued existence of any threatened or endangered species.

The District denied the Appellant’s permit request because it concluded that the request did not comply with the CWA Section 404 (b) (1) Guidelines. The ESA, Section 7, Interagency Consultation, Biological Opinion, constitutes an analysis of whether or not an action will jeopardize the continued existence of any threatened or endangered species. The District’s Decision Document is consistent with the conclusion in the USFWS Biological Opinion that issuing a permit to the Appellant to fill wetlands on Lot P would not jeopardize the continued existence of any threatened or endangered species. However, the District is responsible for the CWA Section 404 (b) (1) Guidelines analysis, and conclusions of a USFWS Biological Opinion do not substitute for that analysis.

The District’s CWA Section 404 (b) (1) Guidelines analysis had minor flaws, but even if the District resolved all those minor flaws in the Appellant’s favor, it would not provide any basis to alter the District’s conclusion to deny the Appellant’s permit request. The administrative record supports the District’s conclusion to deny the Appellant’s permit request in accordance with the CWA Section 404 (b) (1) Guidelines because several less damaging practicable alternatives meeting the Appellant’s overall project purpose were available.

Reason 2: The Appellant asserts the District’s public interest review was arbitrary and capricious, and contrary to the Corps’ regulations.

FINDING: The appeal did not have merit.

ACTION: None required.

DISCUSSION: The Corps’ regulations at 33 CFR 320.4 (a) describe the general policies regarding the public interest review of Corps permit applications as follows:

“(a) Public Interest Review. (1) 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 Secs. 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest.”
(italics added for emphasis).

The District's August 25, 2003 permit denial letter to the Appellant stated that:

“...your project is contrary to the public interest since it would result in unacceptable impacts to important vernal pools that are to be preserved.”

As discussed under Reason 1, on December 17, 1997 the District approved a deed restriction in accordance with the special conditions of the 1994 NWP that modified the requirement that Lot P be set aside in perpetuity as a wetland preserve. The deed restriction allows the Appellant to apply for any permits, permissions or approvals under the CWA and any other federal, state, and local laws, to develop Lot P. If all such required authorizations are granted, the deed restriction allows for development of Lot P inconsistent with the requirement for perpetual protection. The District's action established that protection of Lot P in perpetuity was not required under all circumstances.

As the District approved a deed restriction in December 1997 allowing for the elimination of vernal pools on Lot P under some circumstances, the District erred in reconsidering perpetual protection of the vernal pools on Lot P as a public interest review factor during the review of the Appellant's permit request to develop Lot P. The District made a decision in December 1997 not to require perpetual protection of Lot P under all circumstances. The District should have taken public interest considerations regarding the perpetual protection of Lot P into account in December 1997, prior to making that decision. The District erred in reconsidering that decision as a public interest review factor since the District had already modified the requirement for protection in perpetuity of the vernal pools on Lot P.

The District also discussed as a public interest review factor whether it would be setting a significant national precedent by issuing a permit to fill wetlands that had been

previously been set aside in perpetuity. In response to a question from the Review Officer at the appeal meeting, the District acknowledged that no permit decision made within a District could establish a precedent that other Corps regulatory entities would be required to follow. In this specific instance, the District's December 17, 1997 letter established that the District was willing to consider alternatives to perpetual protection of Lot P. The administrative record does not support the District's conclusion that authorizing a permit to fill wetlands on Lot P would potentially set a significant national precedent or that such a consideration should be considered a public interest review factor supporting the District's denial of the Appellant's permit.

The District incorrectly considered the perpetual protection of vernal pools on Lot P, and the District's potential to set a national precedent for the Corps Regulatory Program, as public interest review factors. The administrative record does not support the District's conclusion that the Appellant's proposal is contrary to the public interest because it does not provide for the perpetual protection of vernal pools on Lot P. However, the Corps regulations regarding the public interest review include a restatement of the requirement that a permit request must be denied if it does not comply with the CWA Section 404 (b) (1) Guidelines.

The District's Decision Document and administrative record established that the Appellant's proposal does not comply with the CWA Section 404 (b) (1) Guidelines. The minor flaws in the District's public interest review process do not change that overall conclusion. Even if those minor flaws were resolved in the Appellant's favor, the permit denial decision would still be justified based on the CWA Section 404 (b) (1) analysis.

The administrative record shows that the Appellant has not applied for, nor received CWA Section 401 Water Quality certification. The District's Decision Document and August 25, 2003, permit denial letter noted that this requirement had not been met, but simply state that such certification must be received or waived prior to the District issuing a permit. The administrative record does not identify the lack of CWA Section as a major factor in denying the Appellant's permit request.

Information Received and its Disposition During the Appeal Review: In addition to the District's administrative record and the Appellant's request for appeal, the following materials were provided during the administrative appeal and were considered clarifying information.

- 1) The District provided the administrative record for its May 9, 1994 Nationwide Permit (NWP) authorization to the Appellant (Sacramento District File No. 1993300372) for the Calvine 1100 Arce II Partnership's construction of Country Creek Estates.
- 2) On April 1, 2004, the Appellant submitted clarifications regarding his understanding of certain discussions at the February 12, 2004 appeal conference.

Conclusion: Although there were minor flaws in the District’s CWA Section 404 (b) (1) Guidelines analysis, and public interest review analysis, these did not result in District decision that was arbitrary, capricious, or inconsistent with the laws, regulations, or guidance regarding the CWA or the Corps regulatory program. If all these errors had been resolved in the Appellant’s favor, there was still sufficient information in the administrative record to appropriately deny the Appellant’s permit request.

The Appellant’s proposed project did not comply with the CWA Section 404 (b) (1) Guidelines because the District identified several less environmentally damaging practicable alternatives to the Appellant’s proposal to completely fill and eliminate all aquatic resources on Lot P to build a residential development, and provide off-site mitigation for those aquatic impacts. The District was required to deny the Appellant’s permit request because it did not comply with the CWA Section 404 (b) (1) Guidelines. The administrative record and the District’s Decision Document for this action support that conclusion as described in detail in this administrative appeal decision.

/original signed by/

Leonardo V. Flor
COL, EN
Commanding