

ADMINISTRATIVE APPEAL DECISION
FILE POA-2005-1576 (ConocoPhillips Alaska, Inc. CD-5)
ALASKA ENGINEER DISTRICT (POA)
SECTION 404 AUTHORITY
DATE: December 2, 2010

Review Officer (RO): David W. Gesl, U.S. Army Corps of Engineers, Northwestern Division, Portland, Oregon, on behalf of the Pacific Ocean Division (POD).

Appellant: ConocoPhillips Alaska, Inc. (CPAI).

Receipt of Request For Appeal (RFA): The RO received Appellant's RFA on April 2, 2010. The Appellant requested an appeal of a permit denial by the Alaska Engineer District (District).

Site Visit and Appeal Conference: Site Visit - August 10, 2010; Appeal Conference - August 13, 2010. The RO provided a Memorandum for Record of the appeal conference to the Appellant and the District Engineer on November 16, 2010.

Summary of Appeal Decision: CPAI is appealing the Alaska District's permit denial for the CD-5 Alpine Satellite Development, Colville River Unit, Alaska. The proposed project is one of several existing and planned satellite drill sites located in the National Petroleum Reserve - Alaska (NPR-A) and involves a drill site pad, pipeline, access road, and bridge crossing. A permit is required to discharge fill into wetlands subject to Section 404 of Clean Water Act (CWA) jurisdiction and to place structures in waters subject to Section 10 of the Rivers and Harbors Act of 1899. The RFA challenges the permit denial based upon several reasons addressed individually herein. CPAI is appealing the District's determination that CPAI's preferred alternative for CD-5 development is not the least environmentally damaging practicable alternative (LEDPA), and therefore, fails to comply with the 404(b)(1) Guidelines. CPAI does not agree with the District's determination that a "roadless" alternative that employs Horizontal Direct Drilling (HDD) under the Nigliq Channel would be less environmentally damaging, and that HDD is practicable. CPAI also asserts that the District did not correctly factor state and local community support into its decision.

Many of the stated reasons in CPAI's RFA are without merit, however as detailed below, several aspects of the RFA have merit and the decision is being remanded to the District Engineer for further consideration and final action. The RFA also seeks elevation of the permit decision to the Division Engineer, but that request is without merit and is being denied. The appropriate course of action is remand to the District Engineer for further action.

Reason(s) for Appeal: The Appellant provided six (6) Reasons for Appeal, one of which (Reason 3) was subdivided by the Appellant into 14 sub-reasons. The Reasons for Appeal are discussed in the Evaluation Findings and Instructions Section below.

Background Information:

The CD-5 project is one of five satellite drill site projects identified by CPAI following the announcement in May 2001 that economically developable oil resources had been found in the Northeast NPR-A. In 2004, the U.S. Bureau of Land Management, as the lead Federal agency, published a 2000-page Alpine Satellites Development Project (ASDP) Final Environmental Impact Statement (FEIS). CPAI's intent is to use the existing Alpine facilities as a logistics, operations and production center for the five satellites. The Corps directly participated in this National Environmental Policy Act (NEPA) process as a "cooperating agency," and has since adopted the ASDP FEIS for the three CWA § 404 permitting decisions the Corps has made regarding ASDP drill sites, including the Corps' denial determination regarding CPAI's CD-5 permit application. CPAI first applied to the Corps for a permit for the CD-5 project in 2005. That application was voluntarily withdrawn by CPAI due to issues with local authorization and in meeting District information requests. In May 2009, the Corps issued a public notice for CPAI's revised proposal having a change in the location of the Nigliq Channel Bridge. That application was denied on February 5, 2010.

The District Engineer denied CPAI's CD-5 permit application on the basis that two LEDPAs exist. The two LEDPAs identified in the Alaska District's Department of the Army Record of Decision and Permit Evaluation for CD-5 (ROD) are: Alternative 3 - a "roadless" drill site design with a three-phase pipeline connecting to the existing Alpine production facilities located within the Colville River Delta ("CRD") using horizontal directional drilling ("HDD") to cross under the Nigliq Channel, and including a gravel airstrip at CD-5 for fixed-wing aircraft access; and Alternative 5 - a "roaded" drill site design using an HDD three-phase pipeline as in Alternative 3, and also including an eight-mile gravel road connecting the CD-5 drill site to the otherwise roadless village of Nuiqsut. The key features of both Alternatives 3 and 5 are (i) use of a three-phase HDD pipeline design crossing under the Nigliq Channel, and (ii) elimination of direct road access across the CRD between the CD-5 drill site and existing production, operations, logistics and transportation infrastructure at CPAI's Alpine facilities. The distinguishing feature of CPAI's permit application is that CPAI seeks to construct a road, including a bridge across the Nigliq Channel of the Colville River, for the purpose of establishing direct access across CRD between CD-5 and the existing Alpine infrastructure.

APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE ALASKA DISTRICT ENGINEER (DE):

Reason 1: CPAI contends that "the District Engineer unlawfully denied the CD-5 permit in violation of 33 C.F.R. § 328.8(b)(2), because he did not have delegated authority from the Secretary of the Army to make the CD-5 permit decision."

The Appellant contends that the District Engineer did not have authority to make the CD-5 permit decision because 33 C.F.R. § 325.8(b)(2) requires the District Engineer to elevate permit decisions to the Division Engineer for resolution "[w]hen the recommended decision is contrary to the written position of the Governor of the state in which the work would be performed." The Appellant's argument fails because the Governor of Alaska did not provide the District Engineer with a written position in support of CPAI's permit application prior to the District Engineer's permit denial.

The District Engineer's decision of February 5, 2010, was preceded by correspondence from the Commissioner, Department of Natural Resources, a personal meeting between the Governor and the District Engineer, and media quotations from the Governor indicating that the Corps should not deny CPAI's permit application. These actions did not constitute a "written position of the Governor," and there is no basis to apply 33 C.F.R. 325.8(b)(2) other than by its plain meaning (requiring a "written position"). Thus, the authority to decide the permit was not elevated to the Division Engineer prior to issuance of the permit denial. Similarly, when the Governor did issue a written position, in the form of a letter dated March 5, 2010, the District Engineer's decision had already been made. Thus the appropriate recourse for CPAI was an administrative appeal to the Division Engineer.

CPAI's argument to the effect that the District Engineer did not inform the Governor or the applicant of the need for a written statement is unavailing inasmuch as 33 C.F.R. 325.8(b)(2) clearly "informs" all parties of that requirement.

Therefore, I find that the District Engineer acted in accordance with Corps' regulations and this reason for appeal does not have merit.

Reason 2: CPAI contends that "the Division Engineer should disapprove the denial determination, and should elevate the permit application to himself pursuant to 33 C.F.R. § 331.8(c) or remand the permit application to the Alaska District, because the Corps' decision is premised upon an arbitrarily inaccurate and narrow statement of the project purpose."

The Appellant objects to the District's use of the term "commercial oil products" where the District described the project purpose as "to access hydrocarbons at the CD-5 reservoir and transport commercial oil products to the Alpine Central Processing Facility." (ROD at page 9.) The Appellant asserts that "commercial oil product" is inappropriately narrow and that the purpose of the pipeline is, in fact, to transport three-phase fluids (oil, gas, and water). This distinction is important because three-phase fluid pipelines present physical and chemical challenges that differ from commercial oil product pipelines that transport processed or refined petroleum product. The Appellant's argument is form over substance because the District's terminology does not appear to have had any substantive meaning in its analysis of CPAI's permit application. Review of the decision document reveals no instance that indicates District mistakenly believed that processed or refined product and not three phase fluids would be pumped from CD-5 to the Alpine processing facility.

To clarify any confusion, the RO asked at the appeal conference whether the District's decision considered three phase liquid(s) to be the "commercial oil product" that would be transported from CD-5. The District indicated "the pipeline was to transport CD-5 produced fluids (crude oil, gas and water) to CD-1 for processing" and "that is what the District referred to as commercial oil product." Therefore, the Appellant's appeal point highlights, at worst, an underly specific term in the decision, but otherwise the Appellant's argument lacks merit and is denied.¹

The Appellant also argues that the project purpose should include "to mitigate impacts to CRD from the proposed project, and to more broadly mitigate cumulative subsistence, cultural and economic impacts to the local Native community resulting from adjacent oil and gas development in this remote region." The Appellant points out that the location of the Nigliq Channel crossing for its CD-5 plan was, essentially, negotiated with Kuukpik Corporation and the community of Nuiqsut whose concerns were addressed with modifications to the plan.² Further, they argue that socioeconomic and socio-cultural measures contained in an MOA between CPAI and Kuukpik (acting on behalf of the residents of Nuiqsut) which they term mitigation should also be considered part of the project purpose. This, according to the Appellant, justifies an expanded definition of project purpose.

Because the District Engineer's decision did not reflect an expanded project purpose, and consequently credit CPAI's non-oil-related efforts, CPAI argues that it was unfairly penalized for the increased gravel footprint of its plan without giving due consideration and credit to the "essential mitigation benefits" of their agreement with Kuukpik.

The definition of the project purpose is a critical aspect of Section 404(b)(1) Guidelines, NEPA, and the Corps' public interest review regulations (see 40 C.F.R. § 230.10(a), Appendix B at 33 C.F.R. § 325 Section 9(b)(4), and 40 C.F.R. 1502.13. The definition must not be so narrow that it unduly restricts the range of alternatives nor so broad that the universe of options could never be fully evaluated. *Citizens Against Burlington Inc. v. Busey*, 938 F.2d 190 (D.C.Cir 1991), *Simmons v. Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997), and CEQ's May 12, 2003 response to Secretary of Transportation Mineta). As a result, the Corps takes into consideration the needs, goals/objectives, and views of the applicant, but is required to independently determine the appropriate "project purpose" itself. *Louisiana Wildlife Federation inc., v. York* [5th Circuit Court of Appeals] and the Corps' Office of the Chief Counsel guidance contained in the Plantation Landing 404q decision [page 4], and Appendix B Section 9(b)4).

¹ I do, however, recommend that the District amend the definition of project purpose to substitute the term "three-phase fluids" for "commercial oil product" when referring to the liquid that will move from CD-5 to Alpine.

² For example, CPAI agreed to changes in the proposed bridge crossing, road placement that does not directly support CPAI's work, but was desired by Kuukpik/Nuiqsut, a long term mitigation fund, efforts to increase local employment, reimbursement for connecting access roads, and use of Kuukpik construction laydown areas, etc.

Here, CPAI itself did not include mitigation in its definition of project purpose when the Environmental Impact Statement was being developed. Additionally, CPAI's permit application and subsequent communications with the District did not indicate any desire to include mitigation in the project purpose. It appears instead that this point is being raised for the first time as an appeal point. I cannot fault the District for failing to include a project purpose definition that CPAI itself did not request prior to the District's decision. This argument (information) is considered new and is beyond the scope of the current appeal per 33 C.F.R. § 331.7(f).

I do note, however, that even if this argument were properly before me on appeal, it would fail. In plain words, the overall purpose of the CD-5 project (and CPAI's entire presence on the North Slope) is to access hydrocarbons at the CD-5 reservoir and transport those hydrocarbons to the Alpine Central Processing Facility. Concessions that CPAI is required, or chooses, to make in order to meet regulatory requirements or obtain local support for its operations are, indeed "mitigation", but that does not transform the project purpose to include that mitigation. (33 CFR 320.4(r), 33 CFR 332, 40 CFR 1502.14(f), 1502.16(h), and 1505.3, and 40 CFR 230.70). Instead, mitigation is a requirement of the permit process. Here, the fact that CPAI and Kuukpik agreed upon CPAI's mitigation (most or all of which do not mitigate aquatic or other ecosystem impacts at all, but are simply to benefit Kuukpik/Nuiqsut), does not elevate the mitigation to a project purpose. In sum, the District did not commit an error by failing to (spontaneously) include CPAI's proposed mitigations in the definition of CPAI's overall project purpose.

CPAI's MOA with Kuukpik

Several of CPAI's appeal Reasons, in addition to Reason #2, rely upon its Memorandum of Agreement (MOA) with Kuukpik Corporation, whereby CPAI offered socioeconomic and socio-cultural compensation (which it calls "mitigation") as part of its continuing construction/operations in the vicinity of Nuiqsut. The District requested CPAI provide specific information regarding the mitigation on several occasions, including late in the evaluation process (Administrative Record (AR) 8831). CPAI responded by providing a limited description of the compensation measures in MOA, but not the MOA itself nor details of its terms and conditions. (AR 8741). In general, CPAI has agreed to several "commercial items" with Kuukpik, including:

1. Use of a lay down area west of the Colville River Delta for potential development projects in the NPR-A should Kuukpik Corporation or one of its affiliates construct a lay down area;
2. Reimburse Kuukpik Corporation or one of its affiliates for up to \$8M for a spur road if a spur road is constructed to connect Nuiqsut with CPAI's proposed CD5 access road;
3. Create a mitigation fund for projected Alpine Satellites in the NPR-A;

4. Improve local hire program;
5. Update the socioeconomic/socio-cultural study described in the COE's ROD for the Alpine development;
6. Support certain changes to the existing Good Neighbor Program; and
7. Enhanced consultation between CPAI and Kuukpik Corporation.

CPAI indicated that four out of these seven items are currently underway, that “CPAI’s voluntary agreement with Kuukpik Corporation does not pertain to an HDD alternative”, and “[t]he MOA reflects terms agreed to in light of the potential for impacts from the CD-4 bridge location. For a different project, a different set of terms likely would have to be negotiated.” (See CPAI’s response to advance conference questions).

Consequently, CPAI’s reliance upon the MOA in this appeal (i.e. as a reason why its preferred alternative is superior to HDD) appears misplaced. There is no evidence that the MOA is directly tied to, or dependent upon, CPAI’s preferred CD-5 alternative. Instead, the MOA offers mitigation for the broader impacts of oil development on the Native Alaskan Community. The MOA being a voluntary agreement between Kuukpik and CPAI, there is no evidence that alternative CD-5 projects, including HDD, would not warrant the same or similar compensation.

Reason 3: CPAI contends that “the Division Engineer should disapprove the denial determination and elevate the permit application to himself or remand the permit application to the Alaska District because the District Engineer's determination that ConocoPhillips' proposal is not the Least Environmentally Damaging Practicable Alternative ("LEDPA") is "arbitrary, capricious, . . . [and] not supported by substantial evidence in the administrative record." 33 C.F.R. § 331.9(b).”

Reason 3.1: CPAI contends that “the Administrative Record does not support a finding that a three-phase HDD project design is a practicable alternative to ConocoPhillips' CD-5 proposal.” and challenges the District’s practicability determination regarding three-phase HDD design alternatives for seven reasons:

Reason 3.1.1: CPAI contends that “the three-phase HDD alternative designs relied upon by the District Engineer are arbitrary, materially incomplete and materially inaccurate because the District Engineer has identified a single 0.4 acre "valve pad" as the only feature located within, and thereby affecting, the CRD.”

CPAI suggests that the District must have assumed that the HDD pipeline would be an “ultra extended reach HDD” under the entire CRD.

CPAI also argues that it informed the District that HDD would require two transition zone gravel pads that are over 0.4 acres in size, a larger CD-5 pad, and expansion of the footprint within the CRD at CD-2 and adjacent to the existing Alpine Central Processing Facility.

In fact, the District provided an opportunity for CPAI to submit information on the HDD alternative in a September 4, 2009 letter³ that requested “a project description, drawings, fill quantities and dimensions, etc.” to assist the District in evaluating HDD alternatives. CPAI responded that it had not prepared an HDD alternative project description, or detailed design documents, dimensions, or quantities. CPAI stated that the existing record already provided sufficient analysis of roadless alternatives. Instead, CPAI offered what it termed the “principal elements of a hypothetical HDD alternative design concept.”⁴ Those elements included pads to support borings in the CRD, pads for thermosyphons, and a larger footprint at the Alpine Central Facilities and at CD-2. CPAI did not identify the size of these pads.

Without complete design information from CPAI, the ROD acknowledged the conceptual nature of the HDD information and estimated pad acreage using the best available information.⁵ This is a reasonable and widely accepted standard practice nationwide, and is not arbitrary or capricious.

The District’s response to Appeal Conference advance questions clarified this issue as follows:

- a. The HDD alternative(s) are not an ultra extended reach and involve HDD under the Nigliq Channel only,
- b. The size of the pad was not a major reason for CPAI’s alternative not being the LEDPA, and
- c. The District’s greater concern was the proposed bridge and road system connecting CD-5 to the Alpine Facility (which would impact the hydrology and geomorphology of the CRD beyond that of two HDD gravel pads).

Further, the District’s decision relied heavily on its assessment that several miles of road within the CRD, perpendicular to the natural flow path of the delta, would impact water levels, overland sheet flow, and circulation/fluctuation patterns within the CRD. (ROD at page 31 and others.) The ROD clearly distinguishes impacts within the CRD would be of greater concern and consequence than impacts outside the CRD.

³ AR 8829-8831

⁴ See AR 8727-8729

⁵ ROD at page 11

In light of the identified concern for water level and flow patterns, it was reasonable for the District to conclude that a limited number of relatively small pads would have less overall effect than a road extending across the CRD. According to Table 3 of the ROD,⁶ CPAI's proposal was estimated to have 21.3 acres of impact within the CRD. Further, it is unlikely that, even with more detailed and/or accurate estimates of fill requirements for the pads and other fills required by HDD, total acreage impacts for the HDD alternatives would approach 21.3 acres as in CPAI's preferred alternative.

Consequently, this Reason for Appeal does not have merit.

Reason 3.1.2: CPAI contends that "the three-phase HDD alternative design relied upon by the District Engineer is arbitrary, materially incomplete and materially inaccurate because it includes a new and unexplained CD-5 airstrip location outside the sensitive Fish Creek buffer zone."

CPAI concedes that the HDD alternative (analyzed in the ASDP FEIS) would reduce the gravel footprint within the CRD, but submits that it would also involve an airstrip in another high-value subsistence area, the Fish Creek buffer. However, the District Engineer's ROD identifies that the District identified another possible airstrip location that avoided the Fish Creek buffer; HDD alternatives identified as LEDPAs by the District involved that location. (ROD at page 11.)

Still, CPAI argues that the District's suggested airstrip location, 1) was never identified or discussed with CPAI, landowners, the local community, and other stakeholders, nor was it discussed and approved by involved resource agencies, 2) is no more than a possible location, and 3) CPAI did not have an opportunity to address the environmental suitability or practicability of that airstrip location.

The District's September 4, 2009, letter offered CPAI the opportunity to demonstrate that its preferred alternative complies with the 404(b)(1) Guidelines, and that letter identified HDD as being the potential LEDPA.⁷ Thus, CPAI was on notice that a roadless HDD alternative, which included an airstrip, should be addressed. The District's letter, however, did not identify the alternate airstrip location (outside the Fish Creek buffer). Consequently, it is not clear why the alternative airstrip location was not identified to CPAI, and CPAI should be given an opportunity to address that alternative.

For the above reason, Reason 3.1.2 has merit, and a remand of the decision to the District Engineer to address and consider the issue(s) above is warranted.

⁶ ROD at page 15

⁷ AR 8829-8831

Reason 3.1.3: CPAI contends that “the record does not support the District Engineer's determination that the cost of a three-phase HDD design alternative is practicable.”

CPAI argues that the three-phase HDD design is not practicable on the basis of cost, and asserted that the Corps had rejected a CPAI cost analysis (and demanded a third-party cost analysis). CPAI also argues that one of the District's LEDPAs is similar to an alternative that was found to be not economically viable in the ASDP FEIS.

Practicable alternatives are available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. 40 CFR 230.10(a)(2). It is incumbent upon the applicant to demonstrate compliance with the 404(b)(1) Guidelines, which includes demonstrating that less environmentally damaging alternatives are not practicable because of cost.

Here, the District's September 4, 2009, letter to CPAI identified concerns regarding CPAI's proposed alternative, including whether it was the LEDPA and whether it complied with the 404(b)(1) Guidelines.⁸ The letter also identified HDD, which placed upon CPAI the burden to demonstrate that HDD is not practicable because of cost. CPAI's September 25, 2009 response did not squarely address the cost issue, and certainly did not clearly demonstrate that HDD is cost prohibitive. Thus, CPAI failed to meet its burden under the 404(b)(1) Guidelines – that its proposal was the LEDPA.

At the same time, the AR contains extensive information regarding project costs.⁹ Even though CPAI did not affirmatively demonstrate that HDD is too costly when given the opportunity, the District must still sufficiently document its consideration of the cost information available at the time of its decision.

Additionally, the District must document the relationship, between the LEDPAs identified in the ROD and the alternatives considered in the FEIS. There should also be documentation clarifying if and why conclusions in the FEIS and the ROD differ.

The District Engineer's decision is remanded for reconsideration.

Reason 3.1.4: CPAI contends that “the record does not support the District Engineer's determination that a three-phase HDD design alternative is technologically practicable.”

The District's September 4, 2009, letter offered CPAI an opportunity to address concerns regarding the proposed project, including whether it complied

⁸ AR at 8830

⁹ Including AR 9219-9955

with the 404(b)(1) Guidelines and to challenge all facets of proposed alternatives.¹⁰ CPAI's response stated "the technology to physically construct an HDD pipeline crossing of the Nigliq Channel does exist."¹¹ In addition, according to a Corps Memorandum for Record¹² CPAI indicated on May 2, 2008, that it could build an HDD alternative if that was an alternative that the Corps would permit. Finally, CPAI provided a November 22, 2005, technical description titled *Nigliq Channel HDD Crossing White Paper*, by Michael Baker, Jr., Inc. (HDD White Paper)¹³ that concluded "an HDD pipeline crossing of the Nigliq Channel is technically feasible" but has "disadvantages"¹⁴ and "HDD installation at the Nigliq Channel is technically feasible and would require considerations very similar to the crossing of the Colville River by the Alpine pipeline project."¹⁵

Relying on the information cited above, the District Engineer acted well within reason in rejecting CPAI's argument an HDD alternative was not practicable on the basis of technology. This reason for appeal does not have merit.

Reason 3.1.5: CPAI contends that "the record does not support the District Engineer's determination that a three-phase HDD design alternative is logistically practicable."

There is considerable information contained within the AR, and discussed at the Site Visit and Appeal Conference, regarding logistic concerns and challenges -- particularly in the Appellant's responses to Corps and other Federal Agency letters.¹⁶ Thus, it is clear that logistic issues are a major, and perhaps the most important, factor regarding practicability of the District's LEDPA, yet logistics for HDD are not extensively discussed and the District's reasoning is not documented by the District in the ROD and AR.

Although it is CPAI's burden to demonstrate that alternatives are not logistically practicable, the District Engineer's determination whether the project is logistically practicable is insufficiently supported and must be better documented. This point is remanded.

Reason 3.1.6: CPAI contends that "the District Engineer's practicability determination is arbitrary and unsupported by the record because he did not

¹⁰ AR at 8830

¹¹ AR at 8735

¹² AR 7167-7168

¹³ AR 8726-8796

¹⁴ . The HDD White Paper discusses those disadvantages, and identifies potential means to overcome or minimize them.

¹⁵ The Colville River crossing involves a pipeline for processed crude oil, not three-phase fluids.

¹⁶ Some of those communications may be considered new information rather than clarifying information, and thus cannot be considered under this appeal.

consider, let alone determine, that the three-phase HDD design alternatives are permissible.”

CPAI asserts that an alternative is not practicable unless all required regulatory approvals for that alternative are obtainable. CPAI contends that the District Engineer must perform “a reasonable investigation of . . . the permissibility of . . . alternatives.” This issue, however, is raised for the first time on appeal – CPAI did not dispute the permissibility of HDD to the District¹⁷ -- so this issue cannot be considered and is denied.

Reason 3.1.7: CPAI contends that “the District Engineer's practicability determination is arbitrary and unsupported by the record because the three-phase HDD design alternatives do not achieve one of the two purposes of the CD-5 project that ConocoPhillips has proposed.”

CPAI again argues that mitigation of local concerns and cumulative impacts should have been considered as part of the overall project purpose. As discussed above under Reason for Appeal 2, the District Engineer was correct in not including mitigation in the definition of project purpose, so this reason for appeal does not have merit and is denied.

Reason 3.2: CPAI contends that “the Administrative Record does not support a finding that a three-phase HDD project design is a less environmentally damaging alternative to ConocoPhillips' CD-5 proposal”.

CPAI suggest that “the central principle relied upon by the District Engineer to deny ConocoPhillips’ permit application is that practicable alternatives with less gravel footprint in the CRD are *per se* less environmentally damaging”.

Instead, according to CPAI:

1. No CD-5 project alternative (except the no action alternative) avoids all impacts to aquatic resources.
2. The differences in the impacts of the gravel footprints to aquatic resources from various CD-5 project design alternatives are insignificant.
3. The probable environmental impacts from CPAI’s proposal are limited and mitigated.

¹⁷ It would have been unduly speculative, and beyond the District Engineer’s responsibility, to base practicability decision(s) on a prediction of regulatory approval by other agencies. The District Engineer is not required to make a formal 404(b)(1) Guideline compliance finding for each LEDPA in order to support his determination that the applicant's preferred alternative does not comply.

4. CPAI's proposal is environmentally preferable to the HDD alternatives because the probable environmental impacts of the HDD alternatives are greater than for CPAI's proposal.

Reason 3.2.1: CPAI contends that “table 3 (ROD at page 15) is erroneous”.

They argue the gravel footprints (specifically with respect to the 0.4 acre valve pads) are not accurate. This issue was discussed under reason 3.1.1 above, which was denied.

CPAI also argues that the total acreage impact for the HDD alternative in Table 3 was unexplained and contrary to the record. CPAI argues that it provided a range estimate of 55.7 acres to 68.7 acres, depending on where the airstrip was located, and questioned the 54 total acreage impact reported in Table 3. At the Appeal Conference, the District clarified that the primary reason for the difference between the District's and CPAI's estimate is the location of the airstrip and resulting airstrip access road. CPAI identified two alternative airstrip locations, 1.1 and 2.9 miles away. The District identified another location approximately 1.0 miles from the CD-5 Pad.¹⁸ Considering the difference in the distances and the conceptual nature of the estimate, the District Engineer's 54 acre total impact estimate (which requires a slightly-shorter connecting road) is not unreasonable.

CPAI further argues that the District's comparison of gravel footprint acreages was selectively biased, referring again to Table 3. As discussed above in Reason 3.1.1, the ROD clearly distinguished that impacts within the CRD would be of greater concern and consequence than impacts outside the CRD, and that a road traversing the CRD would have unacceptable impact(s). Contrary to CPAI's suggestion, the comparison of total acreage impact was not the District's deciding factor. There would be little value in refining the total acreage impacts to eliminate these so-called “errors” when the District's compelling factor clearly was impacts in the CRD, most notably a structure crossing the reach of the CRD.

This reason for appeal does not have merit and is denied.

Reason 3.2.2: CPAI contends that “the District Engineer's reliance upon gravel footprint size alone, whether within the CRD, or in total, is arbitrary and unsupported by the record”.

CPAI asserts it is a “broadly-held consensus” that the gravel footprint is insignificant in comparison to the “aquatic environment” on the North Slope of Alaska and within the CRD.

CPAI's argument is misdirected. As previously discussed, the District Engineer's denial was based largely upon CPAI's proposal to construct several

¹⁸ ROD at page 11

miles of road within the delta, perpendicular to the natural flow path of the delta, that would impact water levels, overland sheet flow, and circulation/fluctuation patterns within the CRD. (ROD at pg 31 and others) Thus, the District Engineer did not rely “upon gravel footprint size alone” much less upon a simple comparison of gravel footprint size to the entire CRD or North Slope.

This reason for appeal does not have merit and is denied.

Reason 3.2.3: CPAI contends that “the District Engineer's permit denial determination is arbitrary and unsupported by the record because it is predicated upon the assumption of possible adverse impacts to the CRD that are contrary to the un rebutted evidence and data in the record”.

CPAI argues that the District Engineer should not have relied upon the mere sensitivity of the CRD’s resources without concluding that adverse and unacceptable impacts would result from CPAI’s proposal. CPAI relies upon a September 2009 two dimensional surface water model: “There is a large body of specific data and modeling work provided by ConocoPhillips demonstrating that the impacts to hydrology and geomorphology will be very limited in magnitude and local in occurrence” and “[t]here is no contrary data or modeling presented in the record.” But the District’s research indicated that the model’s ability to accurately predict real-world scenarios in the CRD had limitations and is disputable, and the District’s discussion of the unpredictability and influence of ice jams on hydrology and geomorphology in the CRD is persuasive.

CPAI argues that it has been engaged in oil production within the CRD since 2000 and those operations have shown no detectable adverse impacts nor have they altered the abundance and function of aquatic resources. The United States Environmental Protection Agency (EPA) disagrees,¹⁹ because development in the CRD is relatively recent (10 yrs), and relatively small in comparison to other fields. Thus, a lack of detectable adverse impacts is neither surprising, nor meaningful. EPA points out that CPAI’s “no adverse population level impacts” argument does not address the selection of LEDPA, as required by the 404(b)(1) Guidelines. EPA notes instead that impacts of oil and gas development are “well documented” in the 2003 National Research Council Report *Cumulative Environmental Effects of Oil and Gas Activities on Alaska’s North Slope*, and discussed that report’s findings with respect to permanent spine roads.

CPAI argues further that the District Engineer adopted the ASDP FEIS “as his own for the CD-5 permit decision,” and that FEIS “confirms that there are no probable significant and adverse impacts to fish populations and passage, bird populations, caribou and other terrestrial mammal populations, marine mammal populations, or threatened and endangered species”.

¹⁹ AR 8813-8823. It is reasonable for the District Engineer rely upon the judgment of recognized experts from other Federal agencies.

The relationship between the 404(b)(1) Guidelines and NEPA documents, which includes Environmental Impact Statements is explained in 40 C.F.R. 230.10(a)(4):

For actions subject to NEPA, where the Corps of Engineers is the permitting agency, the analysis of alternatives required for NEPA environmental documents, including supplemental Corps NEPA documents, *will in most cases* provide the information for the evaluation of alternatives under these Guidelines. On occasion, these NEPA documents may address a broader range of alternatives than required to be considered under this paragraph *or may not have considered the alternatives in sufficient detail* to respond to the requirements of these Guidelines. In the latter case, it may be necessary to supplement these NEPA documents with this additional information. (emphasis added)

In short, NEPA documents may not have considered the alternatives in sufficient detail to satisfy the requirements of the 404(b)(1) Guidelines, and adequate NEPA documents do not guarantee permit issuance. The District Engineer's decision was reasonable and within the zone of discretion delegated to him by Corps regulations.

This reason for appeal does not have merit and is denied.

Reason 3.2.4: CPAI contends that “the District Engineer's permit denial determination is arbitrary and unsupported by the record because he did not provide a rational explanation for why the environmental impacts of the three-phase HDD alternatives are less than for ConocoPhillips' proposal”.

CPAI again argues that the District Engineer's decision was a mathematical comparison of gravel acreage within the CRD, rather than a comparison of probable environmental impacts. At several points in the District's 404(b)(1) evaluation, including under its determinations regarding water quality, circulation, fluctuation and salinity²⁰ and cumulative effects on the aquatic ecosystem²¹, the District discussed hydrologic effects of the construction of the road across the CRD as a major concern.

CPAI repeats the arguments regarding gravel impacts (area requirements) that were rejected above in Reasons 3.1.1., 3.1.2., and 3.2.2, and those rejections are incorporated herein.

CPAI argues that the ROD did not explain the analyses and findings regarding road, ice road and air traffic, impacts associated with additional infrastructure requirements at CD-5, risks of a potential oil spill, and the issue of

²⁰ ROD pages 28-31

²¹ ROD pages 37-39

abandoning pipelines under the river for purposes of replacement or decommissioning. This argument notwithstanding, road, ice road, and air traffic impacts *were* acknowledged and discussed at several points in the AR, and throughout 404(b)(1) Guideline Evaluation (Section 5.0), comparing CPAI's preferred alternative with the two HDD alternatives.

CPAI is correct regarding minimal documentation of impacts associated with additional infrastructure at CD-5 and abandoning pipelines under the river during replacement or decommissioning and that aspect of the ROD is remanded for elaboration and reconsideration.

The risk of oil spills is discussed in the ROD (Sections 4.2; 5.1.8).²² There is general agreement between the District and CPAI that the risk of a significant spill is small for both CPAI's preferred and the HDD alternatives. Although the District put greater weight on the consequences of a large spill, whereas CPAI is more concerned with the ability to detect and address small leaks, the District's conclusion is not arbitrary. Further, the HDD White Paper contains discussion and recommendations for leak detection²³ and also discusses a pipe-in-pipe system (which is currently used at the Coleville crossing). According to the HDD White Paper, pipe-in-pipe would increase monitoring capability and offer an alternative for replacement of the pipe.²⁴

Finally, the position of State Agencies regarding leaks and spills is a consideration that requires some attention and is not sufficiently explained in the ROD.

This Reason for Appeal has some merit and the aspects of the ROD discussed above are remanded for further consideration.

Reason 3.3: CPAI contends that “the District Engineer arbitrarily refused to discuss and consider mitigation [that would have minimized and offset adverse impacts] in assessing ConocoPhillips' CD-5 proposal”.

The District Engineer's decision found that CPAI's proposal did not comply with the 404(b)(1) Guidelines on the basis it was not the LEDPA, and compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of LEDPA under Section 230.10(a).²⁵ Furthermore, the mitigation agreement

²² ROD 39-42

²³ AR 8759

²⁴ ID 8761

²⁵ *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, February 6, 1990*

between CPAI and Kuukpik addresses socioeconomic and socio-cultural issues, neither of which constitute ecosystem mitigation.

This reason for appeal does not have merit and is denied.

Reason 3.4: CPAI contends that “the District Engineer's decision is biased and arbitrary in its consideration of the cumulative impacts mitigation agreed upon by ConocoPhillips and Kuukpik”.

This reason is similar to Reason 3.3 and is denied as well.

CPAI notes that the District Engineer concluded that the Nuiqsut Road project is reasonably foreseeable in order to consider its adverse impacts, but speculative in order to ignore its ameliorative impacts. Although this is not a sufficient inconsistency to find merit, I invite the District to clarify.

Reason 3.5: CPAI contends that “the District Engineer's decision contains material errors in the description of the applicant's proposed project”.

CPAI points to the statements in the ROD,” because it states “ice roads will be required every winter for rig transport” and “[t]here is potential that additional drilling sites within the NPR-A would be developed using ACPF [Alpine Central Processing Facility] as a hub thereby increasing the ACPF footprint to accommodate additional facilities, and thereby increasing air and road traffic”.

At the Appeal Conference, the District acknowledged that the statement regarding ice road requirements is incorrect, but noted that ice road(s) were not germane to the permit denial. This error was harmless in effect. The most important factor in the permit denial was the impact of the permanent road and the channel crossing on the CRD.

Likewise, footprint of the ACPF was not the material concern in the District’s evaluation either.

This reason for appeal does not have merit and is denied.

Reason 4: CPAI contends that “the District Engineer's determination that significant national issues of overriding importance trump state and local support for the CD-5 project is arbitrary and unsupported by the administrative record”.

Corps Regulations establish that “a permit will generally be issued following receipt of a favorable state determination provided the concerns, policies, goals, and requirements as expressed in 33 CFR parts 320-324, and the applicable statutes have been considered and followed.” 33 CFR 320.4(j)(4). [Emphasis added] The Clean Water Act is listed as one of the applicable statutes. In this case, while recognizing that state and local governments supported CPAI’s proposed alternative, the District Engineer

nevertheless found that CPAI's proposed alternative did not comply with the 404(b)(1) Guidelines of the Clean Water Act.

The Appellant challenges the District Engineer's finding, arguing that "it is incumbent on the District Engineer to rationally explain why he has assessed the potential for and severity of impacts from proposed CD-5 project differently from the State, the North Slope Borough (NSB), the three affected landowners, the local Native community and the applicant". According to the Appellant, the District Engineer should give "great weight to the environmental balance and public interest favored by the Native community" and is obligated to provide a rational explanation for why he balanced the "probable environmental consequences of the CD-5 project in a manner directly contrary to the considered views of the Governor of Alaska, numerous State agencies, the North Slope Borough, Nuiqsut, Kuukpik, ASRC [Arctic Slope Regional Corporation] and CPAI" and contrary to the conclusions of the FEIS.

An adequate or favorable FEIS does not ensure that the Corps permit evaluation will result in a finding of compliance with the 404(b)(1) Guidelines or that an alternative will be found not contrary to the public interest; adopting another agencies' EIS can satisfy NEPA requirements but does not guarantee permit issuance. It is within the District Engineer's zone of discretion to exercise his judgment that the NEPA documents did not consider alternatives in sufficient detail to satisfy the 404(b)(1) Guidelines.

33 C.F.R. § 325.2(a)(6) states, "If a district engineer makes a decision on a permit application which is contrary to state or local decisions (33 CFR 320.4(j)(2) & (4)), the district engineer will include in the decision document the significant national issues and explain how they are overriding in importance." Further, the preamble to Corps final rules (published on October 5, 1984 at 49 FR 39476) contains the following, regarding 33 C.F.R. § 320.4(j)(2):

"...[T]he district engineer will normally consider the decisions of state, local, and tribal governments on land use matters to be conclusive as to this factor in the public interest review. [Emphasis added] Many commenters interpreted this change to mean that the Corps would automatically base its permit decisions on existing or planned zoning or land use designations, or on the permit decisions of a state, local or tribal government rather than its current objective public interest review. [Emphasis added] This interpretation is not correct. Land use is one of several factors considered by the Corps in the public interest review (33 CFR 320.4(a)). The intent of this paragraph is to recognize that the primary responsibility for addressing this factor (i.e., local zoning and/or land use matters) rests with state, local and tribal governments. When a state, local and tribal government gives its zoning or other land use approval for a particular project, this will be considered conclusive for this factor. However, the Corps will continue to perform a thorough, objective evaluation of each application in full compliance with applicable regulations and laws."

There are 21 public interest factors identified in 33 C.F.R 320.4(a)(1) that must be evaluated and weighed in the District's public interest review. The decision whether to authorize a proposal, and under what conditions, is determined by the outcome of this general balancing process. Land use is identified as one of those public interest factors.

Consequently, the state and local support for the CD-5 project is conclusive for the land use factor but there is nothing in regulation, policy, or guidance that requires state and local support be given special weight in the overall balancing of the 21 public interest factors. Furthermore, it is not incumbent upon the District Engineer to address why his overall balancing of public interest factors and application of Federal statutes resulted in a decision that differs from the conclusions and/or opinions of state and local authorities.

Here, the District Engineer found that CPAI's proposed alternative did not comply with the 404(b)(1) Guidelines. That District's decision did not deny a land use, which in this case is oil reserve development. Rather it denied the proposal because CPAI failed to demonstrate that the oil development land use could not be accomplished via a less environmentally damaging alternative. Thus, the District Engineer did not make a finding with respect to land use that was counter to State and/or local findings.

The positions of state and local authorities are considerations in Corps permit evaluations, however, those positions are a part of the overall public interest review and do not have overriding significance. The Appellant's argument that the District Engineer's decision is arbitrary and capricious on the basis of how state and local support was considered does not have merit and is denied.

Regarding the articulation of overriding national issues, which justify a permit decision contrary to state and local interests, Section 7.17 of the ROD identifies impacts to aquatic resources in the CRD as an "overriding national issue," discusses the functions and values of the CRD, summarizes anticipated impacts, and identifies that there are less environmentally damaging practicable alternatives. That Section of the ROD does not, however, identify that the District Engineer determined the proposed project does not comply with the Section 404(b)(1) Guidelines for the Clean Water Act²⁶ and it does not explain how the land use public interest factor was weighed in the decision.²⁷

The issue of deference to state and local positions aside, the public benefits and detriments of all the public interest factors relevant to each case must be carefully evaluated and balanced. 33 C.F.R. § 320.4(a)(1). The ROD does not document the reasoning and decision making process with respect to the public interest determination. The decision is remanded to document the balancing process.

²⁶ The Clean Water Act is one of the applicable statutes identified in 33 CFR 320.4(j)(4)

²⁷ I recommend the District Engineer amend Section 1.17 of the ROD to clarify his findings with respect to these two points.

Reason 5: CPAI contends that “the District Engineer's reliance upon Special Condition 10 is incorrect, arbitrary and unsupported by the record because Special Condition 10 does not apply to ConocoPhillips' CD-5 proposal”.

Special Condition 10 of the Alpine § 404 permit²⁸ states as follows:

If additional oil and gas development occurs between the East and Nechelik channels of the Colville River Delta with pipeline connections to the Alpine facility, it shall be accomplished with a minimum of additional fill. Within this area, the design of fields with pipeline connections to the Alpine facility shall incorporate the concept of roadless satellite production facilities. Exceptions may be granted in cases where alternative designs are environmentally preferable, or if a roadless design is infeasible.

Although the plain wording of Special Condition 10 appears to weigh against CPAI's CD-5 proposal, which is distinctly not “roadless,” the District recognized at the Appeal Conference (and in response to advance questions) that Special Condition 10 was geographically limited and that “[CPAI's] project did not necessarily need to be consistent” with Special Condition 10. Consequently, the District confirmed that Special Condition 10 was not operative, nor did it affect, the decision to deny CPAI's CD-5 permit.²⁹ Although I recommend that the District amend the ROD to clarify the relevance/non-applicability of Special Condition 10, a remand is not justified and the Appellant's Reason 5 is denied.

Reason 6: CPAI contends that “the Division Engineer should exercise his discretion pursuant to 33 C.F.R. § 325.8(c) and § 331.3(a)(2) to elevate ConocoPhillips' permit application because of the Alaska District's pervasive failure to adequately communicate with the applicant, the State of Alaska and with the affected landowners”.

CPAI asserts that the District Engineer “cut off communication with the applicant, with the State and the North Slope Borough, with the affected landowners and with the local community” and did not communicate to CPAI that the District intended to deny the permit. Rather than deny the permit without prior notification, CPAI suggests that a Corps “practice” of communicating concerns to applicants and working with them to develop acceptable proposals, or allowing applicants to withdraw and modify permits in lieu of denial, was practiced earlier in the CD-5 application process and is the Corps' approach in other Districts.

Although the Corps Regulatory Program is decentralized and Districts are encouraged to develop efficient and effective methods of evaluating permit applications, there is no requirement in the Clean Water Act, in the U.S. Army Corps of Engineers Regulatory Program Regulations (33 C.F.R § 320-332), or in any Corps policy guidance

²⁸ See AR 5888-5889.

²⁹ Special Condition 10 is only mentioned twice, on pages 17 and 19, of the ROD.

that a District notify a permit applicant of an intent to deny a permit prior to the final decision. Consequently, this appeal cannot consider whether the District either correctly applied, or had any obligation to apply, a non-mandatory practice of providing advance notification of its permit decision. In other words, the failure to supply advance notification, even if that kind of communication has occurred in the past in the Alaska District, is not a basis to elevate the permit decision to the Division Engineer pursuant to 33 C.F.R. § 325.8(c) and § 331.3(a)(2). Thus, Reason for Appeal 6 is denied to the extent it is based upon the District's purported failure to communicate its decision to deny CPAI's permit prior to doing so.

CPAI also complains that the District received and accepted public comments from environmental advocacy groups and from federal resource agencies, but did not provide CPAI an opportunity to respond. These comments include a letter from Audubon Alaska dated November 16, 2009³⁰ and two technical papers, discussing pipelines, provided to the District by the U.S. Fish and Wildlife Service.³¹

33 C.F.R. § 325.2(a)(3) requires the District Engineer consider all public comments, make them part of the administrative record, and, if he determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant will be given the opportunity to furnish its views. In practice, it is common for Districts to continue to receive comments and information well after the public notice comment period in high profile cases, or when controversy or public and agency involvement is high. In the interest of delivering a timely decision, District Engineers routinely evaluate comments to determine if they provide substantive new information that could have a bearing on the decision and whether a delay caused by coordination with the applicant is warranted. There is no obligation to, and no benefit in delaying a decision to coordinate comments that are similar in content to those already provided to an applicant. This practice is reasonable.

Here, although the Alaska District indicated at the appeal conference that it did not consider the technical papers in its decision, the record is not clear why the identified submissions were not provided to CPAI for response. For that reason, remand is required for the District Engineer for clarification. Alternatively, the District Engineer can invite CPAI to respond in full to all comments, then the District can reevaluate the overall decision in light of all comments and responses.

Although this aspect of the appeal has merit, I note that the District Engineer's failure to provide CPAI with all comments, and seek a response for each, does not constitute a "pervasive failure to adequately communicate," and certainly does not warrant elevation of the decision. Thus, Reason for Appeal 6 has merit regarding the District's need to document why all comments were not provided to CPAI prior to the final decision or to coordinate those comments with CPAI, but is denied as to the relief sought by CPAI.

³⁰ See AR 9047-9050

³¹ See AR 8832-8864

INFORMATION RECEIVED AND ITS DISPOSITION DURING THE APPEAL REVIEW:

The Division Engineer has the authority to consider appeal of this permit denial.³² However, the Division Engineer does not have authority under the appeal process to make a final permit decision, as that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his delegate conducts an independent review of the AR to address the reasons for appeal cited by the Appellant. The AR is limited to information contained in the record by the date of the Notification of Administrative Appeal Options and Process (NAP) form. Pursuant to 33 C.F.R. § 331.7(f), no new information may be submitted on appeal. Neither the Appellant nor the District may present new information. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the District's AR, because the District Engineer did not consider it in making the decision on the permit denial. However, in accordance with 33 C.F.R. § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision.

The District provided a copy of the AR to the RO and the Appellant. The RO and Division staff, with the Appellant and District representatives present, conducted a site visit and appeal conference. This information was used in the appeal decision process.

The Appellant provided several items during the course of the site visit and subsequent appeal conference. As discussed in the Memorandum for Record documenting those actions, that information is considered interpretation, clarification, and/or explanation and it was considered in the appeal decision.

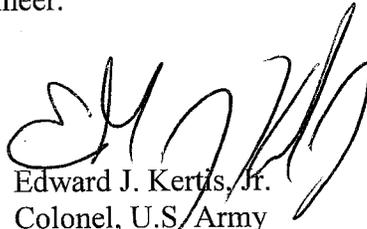
The District provided a copy of the paper *Hydrologic and Geomorphic Processes in the Colville River Delta*, by H.J. Walker and P.F. Hudson, 2003, *Geomorphology* 56 (291-303) in response to a request for photos and or documentation of conditions in the CRD during spring break-up by the RO during appeal conference. That paper is cited in the ROD and is a readily available reference, therefore, it was considered in the appeal decision.

The Appellant provided a monitoring report associated with a previous permit action in response to the RO's request. That report was not considered in the decision because it was not mentioned in the AR for the CD-5 permit action and is too distantly related to the action at hand.

OVERALL CONCLUSION: After reviewing and evaluating the RFA, the District's AR, and the site visit, I find that some of the Appellants Reasons for Appeal and Reason for Appeal subparts have merit. I am remanding the appeal to the District for further

³² 33 C.F.R. § 331.3(a)(2).

clarification and evaluation. I do not find merit in the Appellant's arguments to elevate the decision; the appropriate course of action is remand and for the final decision to remain with the Alaska District Engineer.

A handwritten signature in black ink, appearing to read 'E. J. Kertis, Jr.', written in a cursive style.

Edward J. Kertis, Jr.
Colonel, U.S. Army
Commanding