



DEPARTMENT OF THE ARMY
PACIFIC OCEAN DIVISION, CORPS OF ENGINEERS
FORT SHAFTER, HAWAII 96858-5440

October 5, 2004

REPLY TO
ATTENTION OF
OFFICE OF COUNSEL

Thomas W. Mortensen
Tom Mortensen Associates
P.O. Box 113192
Anchorage, Alaska 99511

SUBJECT: Appeal of Swan Bay Holdings, Inc., from the denial of a Department of the Army permit modification under Application No. Z-1984-0184, Ship Creek 7, originally submitted to the Alaska Engineer District by Douglas Management Company—FINAL APPEAL DECISION

Dear Mr. Mortensen:

I have reviewed the appeal of the Alaska Engineer District's denial of the subject permit modification, which you submitted to the Corps of Engineers' Pacific Ocean Division on behalf of your client, Swan Bay Holdings, Inc., with your letter dated November 18, 2003. I have determined that the permit denial should be remanded to the District for reconsideration. My Final Appeal Decision is enclosed.

In accordance with the Corps' administrative appeal process (33 CFR part 331), I am forwarding a copy of this letter and its enclosure to the District Engineer. Based on my Final Appeal Decision, I expect the District to review the administrative record, supplement it as needed, and analyze and evaluate specific issues addressed in my Final Appeal Decision. I trust you and your client will be cooperative in that effort. The District Engineer will keep you informed of the District's reevaluation of the permit application.

If you have any questions regarding this appeal, please feel free to contact Mr. Mike Lee at (808) 438-3063.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert L. Davis".

Robert L. Davis
Brigadier General, U.S. Army
Division Engineer

Enclosure, as stated
Copy furnished with Enclosure:

Colonel Timothy J. Gallagher
Commander
U.S. Army Engineer District, Alaska
P.O. Box 898
Anchorage, Alaska 99506-0898

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

FINAL APPEAL DECISION

**Concerning Permit Modification Denial
Swan Bay Holdings, Inc.
File No. Z-1984-0184, Ship Creek 7
U.S. Army Corps of Engineers
Alaska Engineer District
Denied October 3, 2003**

Review Officer: Ms. Martha S. Chieply, U.S. Army Corps of Engineers, Mississippi Valley Division

Appellant/Applicant: Swan Bay Holdings, Inc., Anchorage, Alaska / Douglas Management Company, Seattle, Washington

Appellant's Representative: Mr. Thomas W. Mortensen, Tom Mortensen Associates, Anchorage, Alaska

Authority: Section 404 of the Clean Water Act (33 U.S.C. § 1344) and 33 CFR Part 331

Receipt of Request for Appeal: November 20, 2003

Site inspection date: January 29, 2004

Permit denial appeal conference date: January 29, 2004

SUMMARY OF THIS FINAL APPEAL DECISION

1. Appellant's Request for Appeal ("RFA") lists over 150 specific "reasons for appeal," asserting essentially that the decision document prepared by the Alaska Engineer District (the "District") to support denial of Appellant's permit application under Section 404 of the Clean Water Act contains incorrect and misrepresented information, omissions of material fact, contradictions and procedural errors. The RFA alleges that these flaws led to unsupported and incorrect conclusions by the District Engineer in denying the permit. My review of the administrative record and information obtained during and since the appeal conference indicates that there remain unresolved disagreements regarding exactly what information was exchanged and discussed during the District's permit evaluation process. Overall, I have found that some of Appellant's reasons for appeal have merit, because material information may not have been considered or clarified sufficiently by the District to serve as substantial evidence to support the District Engineer's decision. This lack of sufficient information could have affected the District Engineer's conclusions regarding the overall project purposes, the availability of practicable alternatives, the economic effects of permit denial, the adequacy of proposed compensatory mitigation, and effects on public safety, among other things. I am therefore remanding the

District's permit denial decision to the District Engineer for his reconsideration, with certain instructions and recommendations.

BACKGROUND INFORMATION

2. Swan Bay Holdings, Inc. ("Swan Bay" or "Appellant"), of Anchorage, Alaska, through its authorized representative, Thomas W. Mortensen ("Mr. Mortensen") of Tom Mortensen Associates, in an RFA dated November 18, 2003, has appealed the District's decision to deny a permit application to modify the Department of the Army ("DA") permit referred to as Z-1984-0184, Ship Creek 7 (the "permit application" herein); however, the permit application was originally submitted to the District on March 14, 2001, on behalf of Douglas Management Company ("Douglas Management") of Seattle, Washington. Both Swan Bay and Douglas Management apparently are (or were) subsidiaries of Lynden Incorporated ("Lynden") and part of the "Lynden Family of Companies." Regardless of the fact that the permit application was filed on behalf of Douglas Management and the appeal was filed on behalf of another Lynden company, Swan Bay, the latter will generally be considered both the "applicant" and "Appellant" for purposes of this Final Appeal Decision. According to the District, if issued, this permit would be the 12th modification to the "original permit issued to the applicant" since October 3, 1984.

3. A permit is required for the applicant's proposed project under Section 404 of the Clean Water Act because the proposed project requires the filling of a portion of the "waters of the United States," specifically, a small pond (the "pond") and associated wetlands and mudflats (sometimes referred to collectively as the "pond/wetland/mudflat complex") located immediately adjacent to Lynden's existing business center near downtown Anchorage. The proposed project site is situated along the right bank of Ship Creek (commonly referred to as the "north bank" of Ship Creek) near where it empties into Cook Inlet. However, at the precise location of the proposed project the bank of Ship Creek actually forms the westerly boundary of the pond/wetland/mudflat complex, which is further generally bounded on the north by a fill pad Lynden uses for cargo storage and handling, on the east by a railroad track and an adjacent paved public road (New Western Drive), on the south by a gravel surfaced private road leading to the Municipality of Anchorage boat launch facility (Ship Creek Point Access Road) across which is a fill pad Lynden also uses for cargo storage and handling, and on the west by a gravel surfaced parking area, which also appears to be on a fill pad.

4. The pond by all accounts is relatively small, capable of holding only about .25 to .4 acre feet of water, or about 80,000 to 130,000 gallons, according to the applicant. Filling the proposed project site to an elevation of between 36 and 38 feet above the mean lower low water mark (i.e., between "+36 ft. and +38 ft. MLLW"), as the applicant proposes to do, would purportedly require about 4,000 cubic yards of gravel fill on the pond/wetland/mudflat complex which, purportedly, is slightly less than ½ acre in total area.

5. The proposed project site is owned by the Alaska Railroad Corporation (the "Railroad"); however, at the time the District denied the permit to Swan Bay, a lease from the Railroad to Swan Bay for the proposed project site was purportedly "pending." Lynden affiliates apparently have also received previous DA permit authorization to fill 13.9 acres near the proposed project

site, including approximately three acres of open water authorized to be filled pursuant to Ship Creek 7 “Modification O” in 1998, which open water area has not yet been filled. In addition, in 1998 part of the pond along its north side was excavated and partially replanted with aquatic vegetation, as compensatory mitigation for the filling of 1060 square feet on the east side of the pond, under the conditions of a DA nationwide permit verification issued by the District to the Alaska Department of Transportation (“ADOT”), when ADOT moved “Old Western Drive” to its “New Western Drive” location that year.

6. According to the Decision Document, the “general project area,” including the pond/wetland/mudflat complex, consists of “extensive industrial and infrastructure developed fill areas where salt marsh estuary once occurred,” all adjacent to Ship Creek in the tidal estuary that connects to Cook Inlet. The Decision Document also describes the pond/wetland/mudflat complex area as a “pond (with brackish water) and associated emergent wetlands and mudflats” that is “affected by tidal and freshwater influences at differing times and durations,” creating “variable and irregular salinity gradients” and “salinity gradients [that will] depend upon the recent tidal flooding and the amount of recent rainfall and runoff (or the season),” thereby creating a “salt marsh pond” with “a unique ecological system.” There seems to be no dispute about these facts.

7. The pond is separated from the right bank of Ship Creek by a low profile, gravel fill berm, and the water level of the pond is controlled by a short intermittent “drainage way” or “outfall” that passes over and through the berm and connects the pond to the very top of the bank of Ship Creek, which is tidal at that location. The elevation of the outfall through the berm (and therefore the surface level of the pond) are at approximately +32 ft. MLLW, about 3.4 feet above the mean high water line of +28.3 ft. MLLW, and only about 2.4 feet below the high tide line of +34.4 ft. MLLW. Seawater briefly flows across the berm into the pond only during the highest tides (i.e., when the tide is about 3.4 feet above the mean high water line) obviously flowing initially through the outfall until the berm itself is overtopped (i.e., when the tide is about 2.4 feet below the high tide line). As the Decision Document states, “[o]nly the higher flood tides overtop the low profile berm,” and, following such “higher flood tide” events, when the tide flows through the outfall and/or over the berm, the berm retains sea water in the pond/wetland/mudflat area (obviously at the level of the outfall) as the tide ebbs. The pond also receives fresh water drainage from the surrounding area through a culvert passing under New Western Drive and the adjacent railroad track.

8. The pond itself is not a natural feature. According to unrebutted statements in the record, the area where the pond is located used to be a storage area, and the pond originally resulted from the placement of the gravel berm under an emergency permit issued to the Railroad for erosion protection after local flooding that occurred along Ship Creek in 1989. The berm subsequently acted as a low dam between the uplands and the Ship Creek channel, trapping local runoff and creating the shallow pond area, purportedly “by accident.” It is not clear from the record whether or not the pond itself sits entirely on previously placed fill, i.e., fill placed either before or after the U.S. Army Corps of Engineers (the “Corps”) assumed regulatory jurisdiction over the discharge of fill material in the proposed project area. However, photographs in the record indicate that the entire area to the north of Ship Creek has been extensively filled since the early 1900s, and it seems likely that some old photograph of the proposed project site may exist

that might verify its pre-filled condition. Statements by the applicant (apparently un rebutted) indicate that “[b]efore the gravel was placed in 1989 the current pond area was a combination of unvegetated fill and mud and was used periodically for boat and other marine storage.”

9. The proposed project site is zoned as Industrial I-1 property by the Municipality of Anchorage, and the applicant also apparently holds a total of approximately 18 acres of developed property in the immediate area, under lease from the Railroad, including the two large cargo storage and handling areas immediately to the north and south of the pond/wetland/mudflat complex. Lynden affiliates are currently using these adjacent areas for “multimodal operations,” which apparently generally includes marine cargo containers arriving by barge at the Knik Arm dock, the cargo being temporarily stored on-site and later distributed to the general Anchorage area or loaded on rail cars to Fairbanks; empty containers being backhauled and temporarily stored on-site prior to being loaded and shipped from Anchorage via barge; and related cargo handling operations. Lynden also plans to conduct backhaul operations via rail and rail barge between this existing facility and Whittier.

10. The pond is located between the two main cargo storage and handling areas at the existing cargo facility and, in the applicant’s words, the pond “is creating a critical bottleneck to the expanded movement and handling of marine and rail cargo and the interfacing and coordination of the applicant’s freight infrastructure within Alaska.” The applicant essentially asserts that, “[a]lthough additional space is needed due to the current overcrowding of the facility, the use of the proposed fill area is necessary because it is at the key location needed for the existing and planned operations at the cargo facility.” The applicant further asserts that filling the pond/wetland/mudflat complex “is necessary to be able to integrate the existing marine cargo yard area for interfacing and coordination with the entire freight infrastructure of the Alaska Railbelt Marine and rail cargo system to, from, and within Alaska”; that “[t]his need includes the movement of cargo by rail barge and rail to and from Lynden’s new Alaska Railbelt Marine rail barge dock located at Whittier”; and that the “purpose of the proposed project” is “for storage, handling, and improved access to increase the operational efficiency at the existing cargo facility.”

11. According to the Mayor of Anchorage, “large container vans, lifted by heavy equipment” at the applicant’s facility currently are “driven out onto Western Drive [i.e., New Western Drive], effectively impeding through traffic and raising the danger of collision with other commercial and non-commercial traffic in the area.” It appears from the record that the “heavy equipment” referred to in this statement by the Mayor are 14.5-foot-wide forklifts weighing about 50 tons each which purportedly “gross” around 180,000 pounds each when loaded, and/or lift trucks weighing 190,000 to 200,000 pounds each and “rated” at 282,000 to 330,000 pounds capacity each. In short, the applicant’s current cargo handling operations involve extremely heavy transfer equipment that affects public traffic on New Western Drive.

12. On April 23, 2001, the District issued a “Public Notice of Application for Permit” (the “Public Notice”) announcing the proposed permit for the filling of the pond/wetland/mudflat complex purportedly “to increase the storage and handling space for marine cargo,” and, in response to the Public Notice, the District received comments from Federal, State and local agencies, as well as from a few non-governmental organizations and individuals.

13. In an initial response dated May 23, 2001, the U.S. Fish and Wildlife Service objected to the issuance of a Corps permit, based largely on Ship Creek's status as an anadromous fish stream, stating:

Ship Creek is considered an anadromous stream, with 1954 surveys showing coho, chum, chinook, and pink salmon present throughout and upstream of the project area....

* * *

The applicant now proposes to fill the last remaining segment of wetlands between his current storage facility and the existing access road [i.e., Ship Creek Point Access Road]. The further constriction of the Ship Creek channel and resulting increase in water velocities would be detrimental to juvenile salmon as they linger in the intertidal area for some time during the smoltification process as they physiologically adjust from fresh to saltwater....Adverse effects upon the juvenile salmon would result in greater mortality and fewer returning adults. This would, in turn, result in impacts upon the predators such as bald eagles, beluga whales, and harbor seals dependent upon returning adult salmon as their food source. It would also mean fewer adult salmon for sport fishers who fish lower Ship Creek....We recommend that a permit not be issued for the activity as described in the public notice.

Similarly, in an initial response to the State's Division of Governmental Coordination (the "DGC") dated May 30, 2001 (with a copy furnished to the District), the Alaska Department of Fish and Game commented:

The tideland area that this project proposes to fill is the last remaining unfilled parcel on the north side of the Ship Creek estuary. Estuarine tidelands are extremely productive habitats for fish and wildlife. Juvenile pink, chum, chinook and coho salmon will utilize these tideland habitats when they are inundated at high tide

These comments were particularly significant, because anadromous fish, such as salmon, are federally managed species under the Magnusson-Stevens Fishery Conservation and Management Act. However, in May of 2001 the U.S. Fish and Wildlife Service conducted a fish trapping survey in the pond using minnow traps, presumably searching for juvenile salmon among other species, and, while they did catch 100 small stickleback fish, they did not find any salmon or any other anadromous fish in the pond.

14. In a letter dated August 7, 2001, the applicant asked the District to "withdraw the permit from active status," and it appears from the record that the applicant requested this withdrawal so that the applicant could pursue a final Alaska Coastal Management Program ("ACMP") consistency determination from the State, to comply with requirements of the Coastal Zone Management ("CZM") Act. Consequently, by letter dated August 8, 2001, the District informed the applicant that the District had "closed" the permit application file.

15. Because the State's resource agencies—specifically, the Alaska Department of Environmental Conservation, the Alaska Department of Fish and Game, and the Alaska Department of Natural Resources—initially objected to the proposed project, the State twice issued a "proposed consistency determination" finding the proposed project to be "inconsistent" with the ACMP at both the "Regional" and the "Director" levels, and the applicant twice

“elevated” the State’s proposed consistency determination (or, more accurately, its proposed negative consistency determination) to the next higher level in the State government. In an e-mail dated April 2, 2002 (after the State’s proposed negative consistency determination at the “Regional” level but before the CZM process had actually been completed), the applicant requested that the District “re-open” the permit application file. However, according to the District, the District did not actually resume its evaluation of the permit application until September 11, 2002, which was after the State’s CZM process had been completed.

16. In a letter dated August 14, 2002, the DGC, an office in the State’s Office of Management and Budget organized within the Office of the Governor, issued the State’s final “Commissioner-Level Consistency Determination,” finding the applicant’s proposed project to be *consistent* with the ACMP—in effect overruling the various objections that the State’s resource agencies had raised to filling in the pond/wetland/mudflat complex—on the condition that the applicant construct a new “settling pond,” as the applicant and the State had agreed, to deal with sedimentation problems that would be created by filling the existing pond. The DGC’s letter, a copy of which was furnished to the District, indicated that the State’s final Commissioner-Level Consistency Determination was based in large part on the recommendations of the Mayor of Anchorage, and particularly the Mayor’s assertion that “the project is consistent with the Anchorage Comprehensive Plan 2020, which specifically identifies...the area north of Ship Creek...as reserved for industrial development.” In what appears to have been a significant shift in understanding of the nature of the proposed project, the State, in issuing its final Commissioner-Level Consistency Determination, modified its description of the project’s purpose. The State’s “Director-Level” negative proposed consistency determination had implied that the project’s purpose was merely to increase “storage areas” and had concluded that “[a]lternative storage areas at upland locations, or at locations that were created from previous tideland fills do exist in the immediate vicinity.” However, the State’s final Commissioner-Level Consistency Determination described the project’s “purpose” much more broadly, as follows: “The purpose of the project is to increase the useable storage and handling area for an existing marine cargo operation, and to improve access, which will increase the operational efficiency of the facility.”

17. There is no indication in the administrative record that the District ever asked the Governor to express his views on the proposed project, or that the Governor ever expressed views contrary to the position stated in the DGC’s August 14, 2002, Commissioner-Level Consistency Determination letter, or that the District ever considered that letter not to represent the State’s official position regarding the permit application, for the purpose of resolving conflicting comments from State agencies in accordance with the Corps’ regulations.

18. By letter dated September 6, 2002, the applicant advised the District that the State had found the proposed project to be “consistent [with the ACMP] as proposed with the addition of a created settling pond which will maintain the sediment settling functions of the existing pond located within the fill area.” With that letter the applicant also sent the District plans for the new settling pond, which was to be “entirely located on an existing filled area.”

19. In an e-mail message dated January 22, 2003, responding apparently to oral questions from the District regarding the “need for access through the proposed fill area,” the applicant explained to the District exactly where (in information previously submitted to the District) the applicant had previously addressed the need for “access” as a “specific project purpose.”

20. On May 8, 2003, apparently following much verbal give-and-take between the applicant and the District regarding the “purpose” of the proposed project, a meeting was held between the appellant’s representatives, including Mr. Mortensen and Mr. James Jansen (Lynden’s President and Chief Executive Officer) and the District Engineer and his staff, at the request of the District Engineer. According to the District’s memorandum of that meeting, the meeting began with a disagreement over what the “real project purpose” was. According to Mr. Mortensen, “the real project purpose was access,” and Mr. Jansen was quite emphatic that the project purpose was “not for storage.” However, according to the District’s personnel, although they acknowledged “there was an access issue that was not clearly understood,” they then believed that “the permit application” that they were evaluating “did not mention access.” The parties went on to discuss how Lynden envisioned using the proposed fill area and possible alternatives. The May 8, 2003, meeting ended with the District Engineer requesting additional information from the applicant regarding the project’s purpose and need, alternatives, cumulative impacts, business operations, and mitigation.

21. In an 8-page letter to the District dated June 4, 2003, Mr. Mortenson provided information responding to the District Engineer’s May 8, 2003, request for additional information, and also answered questions raised in subsequent phone conversations with District personnel. Regarding the “project purpose,” he said:

The stated project purpose [on the permit application] was for cargo storage and handling. By definition, necessity and customary use[,] the handling of cargo and freight requires access. The need for improved access between the two existing cargo areas was specifically identified in the permit application letter dated March 12, 2001. The need for access, and not simply additional temporary cargo storage area, has always been a key purpose of the proposed work. This fact was pointed out several times during our meeting with [the District Engineer] on May 8, 2003.

Regarding alternative “sites,” Mr. Mortenson continued:

The facility is currently in operation at this location and it would not be possible to move it to another location because there simply are none available. There are no adjacent and available upland sites that would serve as a practicable alternative for the needed use and access at the proposed location.

It is not clear from the record when the District received this June 4, 2003, letter from the applicant; however, an e-mail dated June 4, 2003, indicates that Mr. Mortenson told the District that the letter would be mailed on the following day (June 5, 2003). It is also worth noting here that the permit application letter dated March 12, 2001 (referred to in the quotation above), had indeed said that the proposed project would “improve access” at the existing facility, although the permit application form itself had not mentioned “access.”

22. Approximately one week later, on June 11, 2003, the District sent the applicant a certified letter referring to the District Engineer's May 8, 2003, request for additional information, stating: "This letter serves as formal request for you to submit the additional information at this time." In essence, the remainder of the District's certified letter cited regulations regarding practicable alternatives and requested that the applicant clearly demonstrate why less damaging practicable alternatives to the proposed project did not exist; however, the District did not explain why the applicant's June 4, 2003, letter had not adequately done that.

23. On June 17, 2003, Mr. Mortensen telephoned the District to inquire about the status of the information he had sent, and the parties apparently reached a deadlock on the phone over the issue of practicable alternatives, as captured in the District's version of that conversation:

I repeated that it was the applicant's responsibility to clearly demonstrate there was no practicable alternatives [sic]. He replied that there were no alternatives (without explanation).

24. On June 26, 2003, Mr. Mortensen wrote another letter to the District, in which he said:

Your certified letter to me dated June 11th stressed the need for more information on alternatives, cumulative impacts, and mitigation, as did your phone conversation with me on June 16th [sic, June 17th ?]. It was my understanding that the lack of a practicable alternative was adequately demonstrated during our May 8th meeting and with my June 4th letter. But since this is apparently is not the case, I thank you for this opportunity to provide you with additional clarification on this and other issues.

Mr. Mortensen then continued for an additional five pages, describing the proposed project again, explaining again why the applicant's marine cargo facility could not be moved to another location, and why filling the proposed project site would be the only practicable way (in the applicant's opinion) to alleviate a critical bottleneck at the existing facility.

25. On August 5, 2003, the District contacted the ADOT and the Anchorage Municipal Right-of-Way Office to receive oral assurances that the Ship Creek Point Access Road (adjacent to the pond area on the south) was a private road and was the responsibility of the Railroad, and that ADOT could issue a road use permit for the applicant to use the adjacent public road (New Western Drive, adjacent to the pond area on the east) for forklift traffic—i.e., for access to its two main cargo storage and handling areas, in lieu of the filling the pond area to create another roadway—if certain load restrictions were met.

26. On September 4, 2003, another meeting was held, this time at the request of the new District Engineer. This meeting included the new District Engineer and his staff, and Mr. Mortensen and Mr. Jansen again representing the applicant along with Mr. David Haugen (Lynden's Vice President), as well as representatives from the Railroad who attended on the applicant's behalf. At this meeting, the applicant's and the Railroad's representatives explained the current and proposed operation of the applicant's existing cargo facility. The District pointed out that ADOT had told the District that New Western Drive could be used by forklifts, provided the road was protected from damage; however, the applicant explained that New Western Drive, as presently constructed, would not be sufficient to carry forklifts grossing 180,000 pounds. The

parties also discussed other potential alternatives suggested by the District, including filling a previously authorized 3-acre deepwater area (i.e., the “Modification O” deepwater area) to create more storage and handling area, constructing double and triple rail lines to improve access within the existing cargo facility; however, according to the District’s account of the meeting, “[t]he only new issue was whether the applicant could obtain a special use permit from [ADOT] for the use of New Western Drive for loaded/unloaded forklifts.” According to the District’s account of the September 4, 2003, meeting, the District’s personnel told the applicant’s representatives at that time that “they could meet the law if they would replace the pond/wetlands in the Ship Creek Estuary.”

27. By letter dated September 8, 2003, ADOT definitively told the applicant that ADOT would not issue an oversize/overweight permit for routine crossings of New Western Drive, because, even when empty, the applicant’s lift trucks would far exceed the legal weight for vehicles on ADOT highways. Mr. Mortensen communicated this information to the District in an e-mail on that same date. There is nothing in the administrative record following this September 8, 2003, e-mail from Mr. Mortensen indicating any further communication between the parties, until the District Engineer made his decision in October.

28. In a letter dated October 3, 2003, the District Engineer informed the applicant that he was denying the applicant’s permit modification request, stating that he had “determined that issuance of this particular permit would not be in the public interest.” Enclosed with his letter were the Decision Document, a partially-completed combined “Notification of Administrative Appeal Options and Process and Request for Appeal” (“NAP/RFA”) form, and a questionnaire. By letter dated November 18, 2003, Mr. Mortensen, on behalf of Swan Bay, submitted a completed RFA to the Corps’ Pacific Ocean Division (“POD”), and POD received the completed RFA on November 20, 2003. POD’s Acting Commander appointed Ms. Martha Chieply to serve as Administrative Appeal Review Officer (the “RO”) to assist POD’s Division Engineer in reaching and documenting the Division Engineer’s decision on the merits of the appeal, and by letter dated January 7, 2004, the RO formally accepted the RFA and scheduled a site investigation and an appeal conference. The RO conducted both the site investigation and the appeal conference on January 29, 2004.

INFORMATION CONSIDERED DURING THE APPEAL PROCESS

29. In accordance with 33 CFR § 331.7(f), the appeal of a permit denial is limited to the information contained in the administrative record by the date of the Notification of Appeal Process (“NAP”), the proceedings of the appeal conference, and relevant information gathered by the RO. Neither appellant nor the District may present new information not already contained in the administrative record. However, both parties may interpret, clarify, or explain issues and information contained in the record. Furthermore, in accordance with 33 CFR § 331.9(a), while reviewing and reaching a decision on the merits of an appeal, the Division Engineer can consult with or seek information from any person.

30. Clarifying information submitted with Appellant’s RFA, specifically including a letter from the Railroad’s President and Chief Executive Officer, Mr. Patrick Gamble, to the District Engineer dated November 17, 2003 (the “Railroad’s letter”), as well as other explanatory

information, have been considered in reaching this Final Appeal Decision, even though they were not considered during the District's permit evaluation process. In answer to one of the formal questions propounded to the District by the RO, the District confirmed that the Railroad's letter, which arrived after the District Engineer's permit denial decision, had not been considered. And, in answer to another of the RO's questions, the District said that the "significance" of certain "supplemental information" received in the RFA "to clarify information in the administrative record" (and whether or not that supplementary information "may have affected the evaluation") were at the time of the appeal conference "undetermined." Thus, the District Engineer did not have the benefit of all the information contained in the Railroad's letter and other clarifying information contained in the RFA when he made his decision on the permit application, as I do now. However, because both the Railroad's letter and that additional information in the RFA seem substantially to clarify and explain issues and information already contained in the administrative record by the NAP date, they have been considered in making this Final Appeal Decision.

31. During the appeal conference, the RO provided two Administrative Appeal Process Flowcharts. Those flowcharts are Exhibit 1 in the Memorandum for the Record of the appeal conference (the "appeal conference MFR").

32. Prior to the appeal conference, the District provided to the RO a copy of the administrative record that the District had compiled for this permit action. That administrative record has been considered in reaching this Final Appeal Decision.

33. By e-mail and by telefax on January 26, 2004, the RO provided the District and Appellant separate lists of written questions, directed to the District and to Appellant, for discussion at the appeal conference.

34. At the appeal conference, the District provided the following documents to the RO:

- The District's written response to the RO's questions (Exhibit 4 to the appeal conference MFR). The District's written response, further discussion of those questions at the appeal conference, as well as general discussions at the appeal conference documented in the appeal conference MFR, comprise interpretive, clarifying and explanatory information that has been considered in reaching this Final Appeal Decision.
- A copy of DA Permit No. O-840184, Ship Creek 7, issued to Douglas Management on May 18, 1993 (i.e., the "Modification O" permit), with an attached "Certification of Reasonable Assurance" dated March 16, 1992, from the Alaska Department of Environmental Conservation, and an attached "Conclusive Consistency Finding" dated March 9, 1992, from the Alaska DGC (Exhibit 5 to the appeal conference MFR). "Modification O" is referred to numerous times in the administrative record; therefore, this documentation is clarifying information and has been considered in reaching this Final Appeal Decision.

- A copy of an undated document entitled “Section 404 and Anchorage Wetlands Policy” (Exhibit 7 to the appeal conference MFR). This document, which is referred to in the administrative record, is clarifying information and has been considered in reaching this Final Appeal Decision.
- A copy of the District’s June 22, 1998, Nationwide Permit verification letter to ADOT (Exhibit 8 to the appeal conference MFR). A copy of this document was already included in the administrative record; therefore, it has been considered in reaching this Final Appeal Decision.
- A copy of a January 1998 document entitled “A Vision for Ship Creek Enhancement, Recommendations to the Mayor of Anchorage and the Alaska Railroad Corporation” (Exhibit 9 to the appeal conference MFR). This document, which is referred to in the administrative record, is clarifying information and has been considered in reaching this Final Appeal Decision.
- Copies of pages 472, 478, and 486 of the administrative record, which had been inadvertently left out of the copy of the administrative record provided to the RO.

35. During and following the appeal conference, Appellant provided the following documents to the RO:

- Appellant’s written response to the RO’s questions (Exhibit 2 to the appeal conference MFR). Appellant’s written response, and further discussion of those questions at the appeal conference, as well as general discussions at the appeal conference documented in the appeal conference MFR, comprise interpretive, clarifying and explanatory information that has been considered in reaching this Final Appeal Decision.
- A pamphlet copyrighted by Alaska Railbelt Marine, one of the “Lynden Family of Companies” (Exhibit 3 to the appeal conference MFR). This pamphlet was already included in the administrative record; therefore, it has been considered in reaching this Final Appeal Decision.
- A hand drawn sketch of New Western Drive and adjacent rail lines (Exhibit 6 to the appeal conference MFR). This sketch is considered clarifying information and has been considered in reaching this Final Appeal Decision.
- On May 10, 2004, after the appeal conference MFR had been finalized, the RO contacted Appellant’s representative by telephone and left a voicemail message requesting the date the applicant’s first mitigation proposal was sent to the District. By e-mail dated May 10, 2004, Appellant’s representative provided a response. That e-mail is considered clarifying information and has been considered in reaching this Final Appeal Decision.

36. The RO provided both Appellant and the District copies of all information received by the RO up to and including the publication of the appeal conference MFR.

37. Following the appeal conference a number of materials were provided to POD by the District, at the Division Counsel's request. Those materials, which have also been considered in reaching this Final Appeal Decision, include the following: pages 299, 360, 362, 472, 474, 478, 536, 538, 546 and 550 of the administrative record, all of which were inadvertently left out of the copy of the administrative record provided to the Division Counsel; a copy of DA Permit No. 4-890163 (Ship Creek 13) issued to the Railroad on June 12, 1989 (for the bank stabilization berm that created the pond in 1989); and a letter dated March 3, 2004, from the District to the Railroad referring to that permit.

DISCUSSION OF APPELLANT'S REASONS FOR APPEAL

38. Appellant's completed NAP/RFA form, at the beginning of its RFA, lists seven discrete "reasons for appeal" (referred to herein as Appellant's "Reason No. 1" through "Reason No. 7"); however, the ensuing 23 unnumbered sections and innumerable unnumbered subsections in the RFA contain no less than 152 separate additional "reasons for appeal," all seemingly related, but not necessarily directly related, to the original seven. Many are duplicative of one another, and most seem to be subsets of the original seven. The cumbersome way in which the RFA is organized, its lack of sequential pagination or section numbering, and its inordinant length are among the reasons this Final Appeal Decision has taken so much longer to finalize than is contemplated by the regulations. On the other hand, the administrative record submitted by the District, compiled and submitted in alternating forward and reverse chronological order and with no discernible separation between documents, attachments to documents, and attachments to attachments, is also very difficult to sort through. On remand Appellant is advised to present additional information needed by the District in as concise and organized a manner as possible, to avoid frustration on the part of both parties, who must deal with one another amicably to resolve this matter, and the District is advised to submit future administrative records to POD in a more organized manner.

39. Since it does not seem particularly productive to address all 159+ of Appellant's "reasons for appeal" in any sequence, and since it is doubtful that many readers would make it through all 159+ reasons for appeal in any event, this Final Appeal Decision will address only the original seven, in the order in which they are presented in the RFA, and only in a very general way. Some of these seven are also combined for purposes of discussion. That is not to say that none of appellant's other 152+ reasons for appeal have any merit—but simply to say that the reader will have to infer the merit (or non-merit) of each one of them from the general statements in this Final Appeal Decision regarding the original seven.

40. **Appellant's Reason No. 1: "The incorrect conclusion that there are essentially no economic benefits that will result from the proposed project."**

Finding: Partial merit. The administrative record contains insufficient facts and analyses to support the Decision Document's conclusions regarding economics.

Action: The District should supplement the administrative record with additional economic information to support its contentions, among others, that the proposed project would

comprise only a minor addition to regional growth and a very small increase in business activity within the Ship Creek waterfront business area.

Discussion:

41. Regarding the economics of regional growth and business activities, the Decision Document concludes that the proposed project would be a “minor addition to the regional growth within the Ship Creek waterfront business area” that would “add very little to the overall Anchorage regional growth because it will be a very small increase in area to an existing business.” The Decision Document further concludes that there would be “a very small increase in business activity at the applicant’s level of the operations with the additional space for storage and handling of cargo created by the pond/wetland/mudflats fill” and that there would be “no discernible increase in regional business activity” if the proposed project were built. However, the Mayor of Anchorage has gone on record stating that “the applicant has demonstrated a compelling need to fill this pond and the fill proposal is justified,” urging the State of Alaska to give favorable consideration to proposed project during the State’s CZM process. Apparently, largely as a result of such comments by the Mayor, the State subsequently found the proposed project to be consistent with the ACMP, conditioned on the applicant’s agreement to put in a settling pond as mitigation. According to the State, under the Anchorage Coastal Management Plan, it is the Mayor who decides “controversial issues regarding coastal management.” The Mayor also told the State that the proposed project “is consistent with the Anchorage Comprehensive Plan 2020, which specifically identifies, on the Land Use Policy Map, the area north of Ship Creek along the tidelands of Knik Arm as reserved for industrial development.”

42. Although several such comments by the Mayor to the State are quoted in the Decision Document, the letter (or letters) in which the Mayor made such comments to the State do not appear to be included anywhere in the administrative record, nor, apparently, is any part of the Anchorage Comprehensive Plan 2020, which is also referred to in the Decision Document. In fact, the District has confirmed that the Anchorage Comprehensive Plan 2020 was not reviewed during the permit evaluation process. Therefore, conclusions about the entire context of the Mayor’s comments on the proposed project (and, accordingly, the City’s economic arguments as they pertain to industrial development) cannot be informed conclusions without some additions to the administrative record.

43. On the related matter of industrial safety, the Mayor on February 14, 2003, wrote directly to the District Engineer, expressing his strong support of issuing this permit as an industrial safety measure. The Mayor stated that “the Municipality of Anchorage wholeheartedly supports issuance of this permit as a public safety measure to reduce heavy equipment/vehicular interaction on Western Drive,” that, without the proposed project, “large container vans, lifted by heavy equipment, are driven out onto Western Drive, effectively impeding through traffic and raising the danger of collision,” and that issuance of the permit “will ameliorate those conditions.” The Mayor in his letter to the District went on to say: “This administration is fully cognizant of the importance of this watershed to our community and we would not support the permit’s issuance if we had any concerns about adversely impacting that resource.” Although the Mayor’s February 14, 2003, letter is included in the

administrative record, the safety concerns expressed in it on behalf of the City are not mentioned in the “Safety” section of the Decision Document.

44. Regarding the economics of employment, the Decision Document concludes simply that there would be “a possible slight temporary increase [in employment] with the construction activities,” without addressing the regional impact of more efficient port activities on local employment other than temporary construction employment. And, on the related matter of “community cohesion” as it relates to business activities, the Decision Document states that the “business community is generally understood to be supportive of the project” and that the Railroad has “indicated that they are in agreement with the project,” and it mentions the Mayor’s February 14, 2003, letter in favor of the project. However, the Decision Document concludes, based apparently on comments received from a few non-governmental individuals and organizations, that “[o]verall, authorization of this proposal would have negative impacts to community cohesion.” These conclusions in the Decision Document seem to understate economic benefits to the local business community that might result from the proposed project, based on information in the administrative record.

45. On the other hand, the Decision Document seems to *overstate* the practical value of other types of other potential economic impacts if the proposed project were built, such as the loss of commercial bird watching and commercial fishing opportunities. The Decision Document refers, for example, to a birding tour company that visits the proposed project area during the tourist season, and says that, if the permit is granted, “[t]his type of recreation, at this site, will be eliminated.” The Decision Document also refers, without explanation, to a commercial fisher who said she would be unable to offload her skiff at the proposed project site if the permit were granted. However, responding to these particular examples of purported commercial use that would be lost if the permit were granted, the Railroad (which owns the land) has told the District Engineer that the Railroad has not issued permits for such types of commercial purposes on its land, and that “persons using the project area for commercial purposes are trespassing on private property.” To the extent that the Decision Document relies upon economic impacts that are premised on existing use of the proposed project site by trespassing commercial entrepreneurs, its economic conclusions seem to be somewhat distorted, and the administrative record should be supplemented to clarify the facts in that regard.

46. Overall, the District in the Decision Document seems to have given more credence to the initial views of the individual State and Federal resource agencies opposing the proposed project than to the official State and local government views in favor of it. In this regard, it is important that the Mayor, as the Chief Executive of the Municipality of Anchorage, has expressed his strong support of the proposed project, in spite of its recognized environmental consequences, and that the DGC within the Office of the Governor, has, in effect, overridden the initial objections of the State resource agencies by finding the proposed project (with mitigation) to be consistent with the ACMP, at the third level of elevation within the State. It is also significant that the State’s CZM consistency determination was an appealable “final administrative decision” under State law, and that it evidently has never been appealed.

47. Since the District apparently has chosen to follow the recommendations of the Federal resource agencies and the overruled positions of the State and local government’s resource

agencies, instead of the official decisions of the State and local governments, the District's action falls squarely within the ambit of the Corps' regulatory guidance at 33 CFR § 320.4, which states essentially that the primary responsibility for determining land use matters rests with the State and local governments and that the District Engineer will normally accept decisions by the State and local governments on those matters unless there are significant issues of "overriding national importance." Issues of overriding national importance could include preservation of special aquatic areas, such as wetlands or mudflats, if they have "significant interstate importance"; however, whether a factor has overriding national importance will depend on the degree of impact in an individual case, and the official State position (conveyed by a single responsible coordinating State agency, if there is one) is to be given particularly great weight in the District Engineer's evaluation. Specifically, 33 CFR § 320.4(j)(4) states: "In the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, 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 [i.e., the Corps' general regulatory policies and specific permit requirements], and the applicable statutes have been considered and followed."

48. In this instance, the State of Alaska has designated a single responsible coordinating agency to express the official State position on permit applications—i.e., the DGC in the Office of the Governor—and the DGC has expressed the State's official position that the applicant's proposed project, with mitigation, is consistent with the ACMP. Furthermore, there appears to be no determination in the Decision Document that the pond/wetlands/mudflats in this case have "significant interstate importance" or anything approaching that description that would be of sufficient "overriding national importance" to overcome the regulatory guidance that "a permit will generally be issued following receipt of a favorable state determination." For example, the potential adverse effects on federally-managed anadromous fish, which at first seemed likely to materialize into an issue of overriding national importance, turned out not to be. The District has found that the early concern of the U.S. Fish and Wildlife Service (and the similar concern of the State's Department of Fish and Game) that the proposed project would have an adverse impact on salmon habitat, and consequent impacts on bald eagles, beluga whales and harbor seals, is essentially unsupported by the facts. The Decision Document reports that the U.S. Fish and Wildlife Service's fish trapping survey in the pond found no salmon, juvenile or adult, and explicitly states that it "has not been documented that adult salmon use the area when flooded," concluding that, "[s]ince the project area will not directly impact [Essential Fish Habitat], an unacceptable adverse impact to Federally Managed Fish Species [e.g., salmon] will not occur." And finally, other than concerns about possible noncompliance with the "Section 404(b)(1) Guidelines" (the "Guidelines" herein)—which essentially involves the parties' disagreement about the "real project purpose" (as discussed at length under Appellant's Reason Nos. 3 and 4 below)—the administrative record does not document any other "concerns, policies, goals, or requirements" mandated by regulation or statute that have not been "considered and followed" that would seem to overcome the regulatory preference in favor of granting the permit in light of the State and local governments' political decisions to support the proposed project.

49. If the District does not consider the DGC's August 14, 2002, final Commissioner-Level Consistency Determination to be a "favorable state determination" or the "official state position"

on this permit matter, the District should document the administrative record with facts supporting that position. If the District does consider the State's final consistency determination to be both of those things, it should follow all applicable regulatory guidance in that regard, and fully explain any significant issues of overriding national importance it may identify.

50. **Appellant's Reason No. 2: "The incorrect conclusion that there would not be significant adverse consequences to the applicant / affected party resulting from the denial of the permit."**

Finding: Partial merit. The administrative record contains insufficient facts and analyses to support the Decision Document's implied conclusion that denial of the permit will not have significant consequences for the business activities of the applicant or other affected parties.

Action: The District should supplement the administrative record with additional information to support its implied conclusion that denial of the permit will not have significant consequences for the business activities of the applicant or other affected parties.

Discussion:

51. While this reason for appeal is not explained in great detail in the RFA, cumulative statements in the Decision Document do imply that denial of the permit will not have significant consequences for the applicant's business activities. Obviously, however, *the applicant* believes that not being able to fill the proposed project site will be of significant consequence to its business activities; otherwise, the applicant would not have spent substantial resources attempting to obtain a permit for the proposed project and would not be planning to spend substantial resources to construct it. Businesses do not do expensive things for no reason, and the record provides no reason to question the applicant's business judgment. On the other hand, the administrative record seems sparse in facts supporting the District's conclusory statements regarding potential impacts on the applicant's business activities. In this regard, the Corps' regulations provide that, when private enterprise makes application for a permit, it will generally be assumed that all appropriate economic evaluations have been completed, that the proposal is economically viable, and that it is needed in the marketplace.

52. According to literature in the administrative record, Lynden has the most extensive terminal system of any transportation company in Alaska, and is serving a global market with a focus on Alaska. Purportedly, Lynden provides transportation for the oil and gas, mining, construction, retail and manufacturing industries by land, sea and air, with offices in more than 40 cities across the lower 48 states and a domestic agent network blanketing North America and serving more than 6,000 U.S. cities. According to Appellant, Lynden has invested millions of dollars in its rail barge cargo system linking the lower 48 states to Alaska, and that investment is being "put at risk" because of this permit denial. Clearly, Appellant believes it has a great deal at stake in this Alaska permit matter, that its proposed project is economically viable and needed in the marketplace, and that the District's denial of the permit will adversely affect Lynden's actual or planned business activities. On remand, both parties should provide for the administrative record additional facts and analyses regarding the impacts of the District's decision on the business activities of the applicant, its affiliates, and any other affected parties.

53. **Appellant’s Reason No. 3: “The incorrect application of the Section 404(b)(1) Guidelines regarding practicable alternatives”**—combined with **Appellant’s Reason No. 4: “The incorrect conclusion that there are practicable alternatives to the proposed filling to improve cargo access and handling.”**

Finding: Partial merit. The administrative record contains insufficient facts and analyses to support the Decision Document’s conclusions regarding practicable alternatives and the District’s application of the Guidelines.

Action: The parties should attempt to reach agreement on the threshold questions of what comprise the “overall project purposes” and the “basic purpose of the proposed activity,” and the District should provide additional documentation in the administrative record as to whether any alternatives already identified by the District, such as use of the “Modification O” fill site or other lease areas, the construction of double/triple rail lines, the upgrading or modified use of New Western Drive—or other alternatives that may yet be identified—are practicable alternatives to the proposed activity.

Discussion:

54. The Decision Document says that “the applicant did not provide any information on alternative sites” and that the applicant stated there were no “alternative sites” available “without providing any justification.” However, the applicant’s letter dated June 26, 2003, did, in fact, discuss alternatives to the proposed activity (although not limited only to alternative “sites”), and the applicant provided explanations as to why it considered those alternatives impracticable. Additional documentation is needed in the administrative record to clarify why the applicant’s explanations do not constitute adequate justification as to why the alternatives identified thus far (or others that may remain to be identified) are not practicable.

55. The Guidelines compel the Corps to examine all practicable alternatives to (not only alternative “sites” for) a proposed discharge of fill material in waters of the United States. Practicable alternatives that do not involve “special aquatic sites” (a term which specifically includes wetlands and mudflats) are presumed to be available, unless clearly demonstrated otherwise. However, the question of whether a practicable alternative is available is inextricably bound up with two basic questions that remain at issue in this appeal—i.e., what are the applicant’s “overall project purposes,” and what is the “basic purpose of the proposed activity”?

56. In this regard, the Guidelines specifically state:

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

(3) Where the activity associated with a discharge which is proposed for a special aquatic site [which includes wetlands and mudflats, according to the definitions in Subpart E of the Guidelines] does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e., is not “water dependent”), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

57. The Guidelines also prohibit the Corps from permitting the discharge of fill material “if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.” However, subject to the requirement that the proposed project must comply with the Guidelines and with applicable laws, under the Corps’ regulations a permit “will be granted” unless the District Engineer determines that it would be “contrary to the public interest.” We are therefore left in this appeal with the question of whether the discharge proposed by the applicant complies with the Guidelines, which in this context seems to boil down to the question of whether there is a “practicable alternative” to filling the wetlands and mudflats at the project site, taking into account the “overall project purposes” and the “basic purpose of the proposed activity.” If there is not such a “practicable alternative,” and if the other requirements of the Guidelines can be satisfied by the applicant (i.e., if the proposed project can pass the Corps’ public interest review), then the permit *will* be granted if the District Engineer cannot determine it would be “contrary to the public interest.”

58. The parties have been arguing back and forth about the “real project purpose” in this case for over three years now. In fact, they seem to have gotten off to a bad start when the District in its Public Notice on April 23, 2001, summarized and paraphrased (rather than quoting directly) the purposes the applicant had stated on its application on March 12, 2001. The paraphrased “Work” and “Purpose” statements in the District’s Public Notice clearly implied that the fill area itself (i.e., a mere .45-acre area) would comprise the increased storage and handling space for marine cargo. Those two statements in the Public Notice were as follows:

WORK: Placement of 4,000 yd³ of gravel, from upland sources, within a pond/wetland area to raise the elevation to approximately +37 ft. MLLW. The total proposed area of fill is approximately 0.45 acres.

PURPOSE: To increase the storage and handling space for marine cargo.

However, that is not what the applicant had actually said. What the applicant had actually said a month earlier on its permit application form was the following:

19. Project Purpose: ...The project purpose is to increase the operational efficiency and increase the available cargo storage and handling space available at an existing marine cargo facility.

Moreover, in the letter transmitting its application form, the applicant had further explained:

The proposed project is the placement of fill to increase the usable storage and handling area for marine cargo at the Alaska West facility located along the right (north) bank of Ship Creek in Anchorage. Due to the location of the proposed fill between two existing cargo areas, the proposed project will also improve access and increase the efficiency of the cargo handling at the existing facility....The proposed filling is necessary because there is a critical need for additional storage and handling space for marine cargo at this facility, and there are no practicable alternative sites for the existing uses.

Thus, it appears that the applicant was talking about connecting two existing cargo areas “at” its existing facility, already located on the Anchorage waterfront—a site already fixed, presumably, by decisions not involving the Corps, and a site which could not be relocated to an alternative site—to improve access and increase operational efficiency at that existing facility. The applicant was not merely talking about increasing storage and handling space “for” its facility by the .45-acre size of the proposed fill area.

59. The District’s paraphrasing of the applicant’s stated purposes is carried over into the Decision Document itself. In at least two places, the Decision Document purports to repeat what the applicant stated on its permit application, at one place saying the stated purpose on the application was to “increase the available cargo storage and handling space for an existing marine cargo facility,” and in another place saying the stated purpose on the application was “to provide an additional area for cargo storage and handling and increase efficiency.” However, neither of these two statements in the Decision Document contains an exact quotation of what the applicant actually said anywhere on its permit application or in the letter transmitting it. Both these statements are still different from what the applicant actually said, and perhaps that difference is a distillation of the conflict between what the applicant has been saying all along and what the District has *perceived* the applicant has been saying.

60. Whereas Appellant seems to be saying it needs more “available” or “useable” space “at” its existing facility—perhaps meaning it already has much of the space it needs in its two main cargo areas “at” the existing facility, but it needs to make that existing space more “available” and more “useable,” plus add some additional space—the District seems to be saying what Appellant really needs is more cargo storage and handling space “for” the facility—seeming to mean the applicant needs to acquire more space somewhere in the general vicinity of the two existing main cargo areas, “for” the applicant’s facility to use.

61. The key difference remaining now between the District’s perception of what the applicant’s purpose is, and what the application and transmittal letter and the applicant’s subsequent statements have said its purpose is, seems to be that the District is still focusing on finding increased space “for” the existing cargo facility, whereas the applicant seems to be more focused on making existing space “at” the existing cargo facility more “available” and “useable.” However, that clearly has not been the limit of the parties’ disagreements about the “real project purpose” over the past three years. As the Decision Document puts it, the “applicant’s stated purpose and need was an issue of discussion and analysis throughout the State and Federal review processes,” and the Decision Document seems in several places to accuse the applicant of changing what the applicant considers the purpose of the proposed action to be. However, nothing in the administrative record indicates that the applicant has ever said anything about

changing the project purpose, and it seems implausible to suppose that the applicant has ever changed what it considers the purpose of the proposed action to be. Perhaps the applicant has changed the exact words it has used to express its purpose, and perhaps the District's perception of the applicant's "real project purpose" has changed over time; however, we must assume that the "overall project purposes" and the "basic purpose of the proposed activity" have remained the same—at least for the applicant—throughout the permit review process.

62. The fact that the District's Public Notice did not fully and accurately recite the purpose stated by the applicant is more than merely a semantic problem and may have been more than a harmless procedural error. The statement in the Public Notice that the purpose was merely "to increase the storage and handling space for marine cargo"—ignoring the applicant's references to such aspects of its purpose as "operational efficiency," "access," "efficiency of...cargo handling" and its "location...between two existing cargo areas"—not to mention the applicant's explicit statement that it needed such improvements "at" the existing marine cargo facility—may have contributed significantly to subsequent adverse news reports and public comments contained in the administrative record. Such adverse reports and comments could also have been influenced by the paraphrased statement of the proposed project's purpose contained in the DGC's public notice, in which the State said that gravel would be placed "within a pond/wetland area to increase the storage and handling space for marine cargo."

63. The parties' ongoing disagreement about the "real project purpose"—e.g., "access" and "useable" area "at" versus "storage and handling space for" the existing facility—culminated in the parties' seemingly disconnected arguments at the appeal conference held on January 29, 2004, at which the District continued to argue that the appellant had "failed to demonstrate that upland storage sites were not available," to which the applicant responded that the applicant's "key point is access between parcels [i.e., the two existing cargo areas referred to in its application], not storage," and the District countered that "[o]ther sites in the vicinity and general area should be considered"—with the District ultimately saying that it considered "the vicinity" to include the entire "downtown port industrial area." On remand, the parties are urged to make greater efforts to agree on the "overall project purposes" and the "basic purpose of the proposed activity" (which, in turn, will dictate whether any "practicable alternatives" are available). The hope is that on remand the applicant will provide more detail as to why "access between parcels" is so critical to its project objectives, and the District, in turn, will be very careful to avoid even the appearance that it might be substituting its own perceived purpose for the one the applicant has articulated.

64. On remand, once the parties have been able to reach agreement on what constitute the purpose and objectives of the applicant's proposed project, they should be able to reach a closer accord on the practicability of the various alternatives discussed in the Decision Document, such as use of the "Modification O" site, construction of double/triple rail lines, the upgrading or modified use of New Western Drive, or other alternatives that may yet be proposed by either of the parties or others.

65. **Appellant's Reason No. 5: "Contradictions between statements and conclusions in the Decision Document regarding mitigation"**—combined with **Appellant's Reason No. 6: "The incorrect conclusion that the compensatory mitigation proposed was not adequate."**

Finding: Partial merit. The administrative record contains insufficient facts and analyses to support the Decision Document’s conclusions that the compensatory mitigation the applicant has proposed (or would propose if allowed to do so) is inadequate.

Action: The District should provide additional documentation in the administrative record regarding any mitigation plan proposed by the applicant, communicate to the applicant any specific reasons why such a proposed mitigation plan is inadequate, and provide the applicant an opportunity to rebut such reasons or revise its mitigation proposals as appropriate.

Discussion:

66. These two related reasons for appeal cannot be discussed without first discussing exactly what resource values any mitigation plan would cover and asking the questions: exactly what is the nature of the resource being lost and how and why was it created?

67. In many ways it is understandable why District personnel seem to have favored hearing the “environmental” voices of the Federal, State and local governments over the “political” voices of the State and local governments. Clearly, District personnel in their role as good stewards of the natural environment are very concerned about losing valuable aquatic resources, in particular, the “wetlands” and “mudflats” associated with the pond, which are defined as “special aquatic sites” in the Guidelines and are afforded special regulatory protection. Regarding such “special aquatic sites,” the Guidelines quite emphatically say that the degradation or destruction of special aquatic sites, such as wetlands, is considered to be among the most severe environmental impacts covered by the Guidelines, and that the “guiding principle” of the Guidelines should be that “degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.”

68. Capturing the depth of the District’s (and the resource agencies’) concerns with saving such valuable special aquatic sites are numerous allegations in correspondence included in the administrative record to the effect that the proposed project site is the last vestige of a certain type of intertidal marsh and estuary habitat remaining on the north bank of Ship Creek. The Decision Document itself says that the proposed project area is “the last salt marsh pond left on the north side of the Ship Creek” and that the “proposed fill site is the last remaining, fully functioning, intertidal/ freshwater pond and emergent wetland and mudflat complex area on the north side of Ship Creek in the estuary.” What is clear from such statements in the administrative record and in the Decision Document itself is that the District—and more particularly its senior decision makers—were laboring under the assumption that filling the proposed project site would indeed eliminate the last salt marsh pond left on the north side of the Ship Creek. What such statements seem to have ignored or at least understated, however, is the fact that the entire south bank of Ship Creek below the Ship Creek Point Access Road remains largely an unfilled coastal salt marsh in the Ship Creek estuary as well as an extensive estuary habitat. That remaining estuary habitat on the south bank appears to be every bit as original as the proposed project site on the north bank—and possibly even more so in light of the fact that

the project site is quite literally surrounded by man-made fill, and, according to some indications in the Decision Document itself, may even be located on top of previously placed fill material

69. Even if one were to accept that an artificial intertidal pond and associated wetlands on the *north* bank of Ship Creek is more valuable or important than similar features on the *south* bank, which is not fully explained in the administrative record, it appears from the record and visual observations of the site that there is in fact at least one other intertidal pond and associated wetlands also located on the north bank. That is the small intertidal, salt marsh pond, with associated wetlands, located at the “Y” formed where the railroad spur line and the Ship Creek Point Access Road converge heading west to cross Ship Creek on two separate bridges—a pond that apparently lies outside the proposed project area. It appears that the pond between the railroad spur line and Ship Creek Point Access Road bridges may also be “a unique special aquatic site due to flooding by salt water tides, freshwater runoff, and a mixture of salinity gradients” which is “unique in the manner that the hydrology from salt and fresh water combine at varying time periods to produce an environment that can be predominantly marine, fresh, or brackish water in character,” creating a “salt marsh pond” with a “unique ecological system”—which is exactly how the Decision Document describes the pond at the proposed project site. In addition, the record indicates that other significant areas of “tidal mud” still exist on the north bank of Ship Creek (with adjacent wetlands of undetermined salinity) that would apparently not be disturbed by the proposed fill.

70. On remand, the District should determine whether the proposed project area indeed contains “the last salt marsh pond left on the north side” of Ship Creek, if that conclusion is any part of the rationale used to override the will of the State and local governments to fill the proposed project area. If the answer is “yes,” then the District should support that conclusion with more substantial evidence in the administrative record.

71. Separate from the issues of fact pertaining to the “last salt marsh pond left on the north side”—but related to the question of what mitigation would be appropriate for the proposed fill—is the point made many times in the administrative record by the District, by the State resource agencies, and by others, that part of the proposed fill area is already a “mitigation site” that was required for an earlier permitted project. Specifically, this refers to the mitigation site created by the Alaska Department of Transportation (“ADOT”) when it replaced Old Western Drive with New Western Drive in 1998.

72. The Decision Document contains numerous and repeated references to the very valuable “wetland creation area” or “mitigation site” created by ADOT in 1998 that would be destroyed by the applicant’s proposed project. The Decision Document concludes that the ADOT mitigation site would not be adequately replaced by the “relatively deep” (i.e., 2-foot-deep) “mitigation pond” agreed upon by the State and the applicant during the CZM process to replace the existing pond, which the District characterizes as “wide and shallow.” The ADOT mitigation site resulted from mitigation measures required in the District’s 1998 Nationwide Permit (“NWP”) verification letter to ADOT which informed ADOT that it was authorized to “construct an access road” (i.e., New Western Drive) “along the edge of an unmapped tidal pond” (i.e., the then 9-year-old artificial pond now at issue in this appeal) “under the authority” of NWP No. 23,

subject to certain “project-specific conditions.” The wetland “creation” requirement in that 1998 NWP verification letter was contained in “project-specific” Condition Nos. 1, 4 and 5. Those project-specific conditions essentially required the excavation of 1590 square feet along the north side of the pond to compensate for the loss of 1060 square feet of pond filled along the east side during ADOT’s construction of New Western Drive (a 1½ to 1 ratio), the replacement of part of the excavated area with vegetation from the disturbed area of the pond, and planting native plants tolerant of occasional brackish inundation on all newly established side slopes. However, to refer to the entire 1590 square foot excavation area within the ADOT mitigation site as a “wetland mitigation area” or a “wetland creation area” (as the Decision Document does) is somewhat misleading, and even broader statements in the administrative record, such as the *Anchorage Daily News*’ statement that the “pond and marsh were built years ago to take the place of another wetland,” implying that the entire pond and marsh were constructed as a mitigation project, should be carefully read and analyzed in light of the facts. The entire pond and marsh were artificial to begin with, created “by accident” in 1989, nine years before the ADOT mitigation site was added to the pond in 1998, and there seems to be no prohibition in the law or regulations that would prevent replacing one mitigation site at an artificial pond with another mitigation site at another artificial pond, if that turns out to be a reasonable solution to satisfy competing public interests.

73. The Decision Document states that the proposed project fails to comply with the Guidelines in part because “[t]he proposal to construct a small low value sediment pond and preserve existing wetlands nearby that are not threatened by development will not compensate for the loss of the pond/wetland/mudflats ecological functions and values” and because “[n]o adequate mitigation for the adverse impact to the ecologically valuable complex created by the freshwater drainage, tidal flooding, estuarine pond, wetlands, and mudflats has been identified.” The Decision Document also contains other statements about the inadequacy of the applicant’s proposed compensatory mitigation, for example, referring various times to aquatic resource losses that would be “unacceptable without being adequately replaced” or “unacceptable without adequate mitigation.” These statements in the Decision Document reflect the ecological judgments by the District referred to above relating to the “ADOT mitigation site” issue—i.e., that the two-foot-deep settling pond proposed by the applicant and required by the State as mitigation would not adequately replace the shallow pond/wetland/mudflat complex, part of which was included in the ADOT mitigation site. Appellant’s RFA, on the other hand, includes a 35-page section entitled “Habitat Value and Mitigation,” which details no less than 36 “reasons for appeal” grouped into nine “subjects,” many of which deal with these same issues. In essence, that section of the RFA asserts that material facts regarding compensatory mitigation considered during the course of the District’s evaluation were incorrect, omitted and/or misrepresented, resulting in incorrect and/or contradictory conclusions regarding compensatory mitigation. Additionally, that section of the RFA asserts that the District did not comply with regulatory guidance, provided unqualified biological opinions and “did not work in good faith with applicant” regarding compensatory mitigation.

74. Indeed, on the surface there seems to be an unsettling element of circularity in the District’s reasoning and statements regarding application of the Guidelines and the applicant’s proposed compensatory mitigation, although on closer inspection that circularity seems to have been more the result of a cautious adherence to regulatory guidance than the result of any lack of

“good faith” on the District’s part. On several occasions, the District told the applicant essentially that mitigation can only be considered “after” the project is determined to comply with the Guidelines, and the District (according to Appellant’s RFA) seemed actively to discourage the applicant from submitting additional information or clarifying previously submitted information about compensatory mitigation. According to Appellant, there is no final mitigation plan in the administrative record “because the applicant/appellant was not given the opportunity to complete the mitigation plan.” However, the Decision Document itself says that the proposed discharge fails to comply with the requirements of the Guidelines, in part, “because...[n]o adequate mitigation...has been identified.” This leads to the circular and apparently absurd conclusion that the District couldn’t consider the adequacy of identified mitigation to find the proposed project in compliance with the Guidelines, because the applicant had identified no adequate mitigation, because the applicant (in compliance with the Guidelines) had been discouraged from submitting (or at least was led to believe it should not submit) a complete mitigation plan to the District for the proposed project.

75. The frustration of the applicant (and the landowner Railroad) with this apparent circularity in the District’s reasoning on compensatory mitigation is captured on page 5 of the Railroad’s November 17, 2003, letter to the District Engineer, following his denial of the permit:

It is surprising that the Decision Document uses the lack of an adequate mitigation plan against the applicant in determining compliance with the [Guidelines] when the [District] previously indicated that mitigation can only be considered after the project is determined to comply with the [Guidelines].

In fact, the obvious frustration of all the parties regarding misunderstandings and disagreements over compensatory mitigation that led to this apparent circularity of thought was expressed at the appeal conference itself. According to the appeal conference MFR:

The Alaska District determined that the Appellant needed to avoid/minimize impacts before considering and evaluating the adequateness of the compensatory mitigation. Mr. Mortensen [for the applicant] stated at no time, verbally or by writing, did he state their final mitigation plan or that [the applicant was] unwilling to provide additional compensatory mitigation. Mr. Fretwell [for the Railroad] stated that it was communicated to him that the compensatory mitigation would be considered after complied [sic, after the applicant had complied] with [the Guidelines]. The [R]ailroad offered adjacent marsh tidal lands to be considered in the process. The Alaska District refused to consider until [the Guidelines] were met.

76. Unfortunately, the District’s apparent circularity of reasoning in its consideration of compensatory mitigation is invited to some extent by the sequencing requirements of the Guidelines themselves, and by the Corps’ own internal regulatory guidance which states that “[c]ompensation is the last step in the sequencing requirements” of the Guidelines and that, “for standard permit applications, Districts should not require detailed compensatory mitigation plans until they have established the unavoidable impact.” It is easy to see why some might interpret the District’s attempted good faith compliance with this regulatory guidance as a lack of “good faith” under certain circumstances—especially where, as here, the parties have been unable to agree on “the unavoidable impact,” because they haven’t been able to agree on the existence (or non-existence) of a “practicable alternative,” in turn because they are deadlocked in

disagreement over the “real project purpose.” Here, far from the District’s “requiring” a “detailed compensatory mitigation plan” before they had “established the unavoidable impact” (which would have been discouraged though not prohibited by the regulatory guidance quoted above), the District seems actively to have *discouraged* the applicant from submitting a more detailed compensatory mitigation plan because the District already apparently had determined that all impacts to the pond/wetland/mudflat complex might be “avoidable” by simply moving the proposed activity to an alternative site.

77. Since this permit denial is being remanded in any event, and since the District in the Decision Document already has considered (negatively) the adequacy of the applicant’s proposed compensatory mitigation measures, and since Appellant in its RFA has suggested that it has actually offered mitigation in excess of what the District thought the applicant was offering, the parties are advised on remand to explore fully all the reasonable mitigation measures the applicant might offer. Without limitation, that might include the applicant’s offering to construct a new artificial pond/wetland/mudflat complex that more nearly replicates the depths, salinity range, and ecological functions of the artificial pond and associated special aquatic resources that would be lost, including any wetlands that were successfully created as part of the 1998 ADOT mitigation project. Something along this line apparently was suggested at the applicant’s last meeting with the District Engineer, when District’s personnel purportedly repeated to the applicant’s representatives that “they could meet the law if they would replace the pond/wetlands in the Ship Creek Estuary.”

78. **Appellant’s Reason No. 7: “The incorrect conclusion that the permit denial does not have a takings implication under EO 12630.”**

Finding: This reason for appeal is outside the purview of the regulatory appeal process.

Action: No action is required.

Discussion:

79. Executive Order No. 12630, by its own terms, is intended only “to improve the internal management of the Executive branch” and is explicitly “not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.”

CONCLUSION

80. For the reasons stated above, I conclude that the administrative record, as currently developed, indicates that Appellant’s first six main reasons for appeal all have partial merit, and the seventh main reason for appeal is beyond the scope of this administrative procedure. On remand the parties are advised to supplement the administrative record to clarify matters this Final Appeal Decision addresses, consistent with the “Discussion” sections above.

81. The denied permit modification request is remanded to the Alaska Engineer District, for reconsideration consistent with this Final Appeal Decision.

5 Oct 04

Date



Robert L. Davis
Brigadier General, U.S. Army
Division Engineer