



May 13, 2005

Mr. James Palmer  
Regional Administrator  
U.S. Environmental Protection Agency  
Sam Nunn Atlanta Federal Center  
61 Forsyth St., SW  
Atlanta GA 30303-3104

**RE: J.D. Nicewonder, Jr./Mirasol Project, U.S. Army Corps of Engineers (Corps)  
Permit 200001926 (IP-SB)**

Dear Mr. Palmer:

We are writing on behalf of the National Wildlife Federation (NWF), the Conservancy of Southwest Florida (Conservancy), Sierra Club, and Public Employees for Environmental Responsibility (PEER) to thank you for your ongoing critical deliberation and to express our concerns regarding the above referenced permit application. Although we and other organizations have expressed some of these concerns in prior correspondence with you, the U.S. Army Corps of Engineers (Corps), and the U.S. Fish and Wildlife Service (USFWS), the recently revised Biological Opinion (BiOp) for the Mirasol project has heightened our concerns, particularly with respect to the potentially adverse effects of Mirasol on the endangered wood stork and the wetland habitat and water quality on which it depends.

In the 2003 BiOp, based on preliminary data supplied by the applicant, USFWS determined that the flowway would indirectly affect 2500 acres of wood stork foraging habitat leading to the incidental take of 292 nestlings *per year*. J. Slack, USFWS, letter to Colonel May, Corps, re: Service Log No.: 4-1-01-F-607; Corps Application No.: 200001926 (IP-SB); J.D. Nicewonder, Jr.; Collier County, 42-43 (Feb. 21, 2003). In the 2005 BiOp, based on the applicant's "completed" hydrological model, USFWS determined that the flowway would indirectly affect 275 acres of wood stork foraging habitat, reducing the estimate of incidental take to 47 nestlings *per year*. J. Slack, USFWS, letter to Colonel Carpenter, Corps, re: Service Log No.: 4-1-01-F-607; Corps Application No.: 200001926 (IP-SB); J.D. Nicewonder, Jr.; Collier County, 80-81 (Mar. 9, 2005). **Because the revised BiOp predominately relies on the applicant's hydrological model to support its reduction in incidental take and its "no jeopardy" opinion, and because this model suffers from serious scientific deficiencies noted (detailed below), we again strongly urge the Environmental Protection Agency (EPA) to veto the Mirasol project, pursuant to § 404(c) of the Clean Water Act.**

Furthermore, we continue to have serious concerns over the potentially significant adverse effects of Mirasol on other valuable natural resources, including 1500 acres of jurisdictional wetlands, the historic Cocohatchee Slough flowway, and two Outstanding Florida Waters, the Cocohatchee River and Wiggins Pass Estuarine Area. Many of these adverse effects are traceable to potential hydrological changes associated with the flowway. **As we have stated in previous correspondence, the applicant's hydrological model and supporting data suffer from several serious scientific deficiencies that cast doubt on the USFWS no jeopardy opinion for the wood stork as well as any determination that the Mirasol project will not impair water quality. Namely, the applicant's model**

- (1) **fails to address potential regional hydrological effects** on the Corkscrew watershed, and therefore fails to adequately address Mirasol's effects on wood stork core foraging habitat and associated nesting productivity;
- (2) **fails to justify the need for regional flood reduction through wetland drainage** through either data analysis or modeling approaches;
- (3) **fails to consider whether implementation of the South Lee County Watershed Plan (SLCWP) has already effectively reduced the risk of flooding rendering the flowway nonessential**—the applicant has yet to compare 1995 water staging data with more recent 2003 data to determine whether provisions already implemented under the SLCWP, such as the cleaning and snagging of flow-ways, has effectively reduced the risk of flooding;
- (4) **fails to reconcile the apparent conflict between Mirasol's probable reduction in aquifer recharge with goals set out in the SLCWP;**
- (5) **inadequately assesses off-site impacts to Corkscrew Swamp and Wiggins Pass Estuarine Area** through flawed methodology that limits itself to four cells rather than the entire region to assess off-site impacts and includes pumped irrigation water as a model input, resulting an inaccurate water balance;

- (6) **fails to address potential impacts of discharge on the Cocohatchee Canal;**
- (7) **fails to address potential downstream impacts on Wiggins Pass** as a result of altered timing and distribution of freshwater flows;

Again, we strongly urge you to veto the Mirasol project. We also are aware that your office has asked the Corps to review the applicant's hydrological model and that this review has been unsatisfactory. Failing a veto, we strongly urge your office to insist upon an independent scientific review of the applicant's hydrological model.

**We further reiterate that the Mirasol project fails to comply with Clean Water Act § 404(b)(1) Guidelines and should be vetoed on that basis alone.** In particular, Mirasol violates the Guidelines because:

- (a) **Mirasol, a golf course/residential community, is not water-dependent and, therefore, a practicable alternative exists.** *See* 40 C.F.R. § 230.10(a) (prohibiting issuance of a § 404 permit where a practicable alternative to the proposed action exists that would have less adverse impacts on the aquatic ecosystem) & *id.* § 230.10(a)(3) (presuming that when a project is not water-dependent, a practicable alternative exists).
- (b) **Mirasol will cause or contribute to state water quality standard violations.** *See id.* § 230.10(b)(1). Both the Cocohatchee River and the Wiggins Pass Estuarine Area are Outstanding Florida Waters (OFW). The designation of OFW is given to waters "worthy of special protection due to their natural attributes." Fla. Admin. Code Ann. r. 62-302.700. Mirasol's extensive drainage system will convey large volumes of run-off to the Cocohatchee River, which feeds the Wiggins Pass Estuarine Area, degrading both OFWs.
- (c) **Mirasol will cause or contribute to a significant degradation of the aquatic environment.** *See id.* § 230.10(c). Florida Department of Environmental Protection (DEP) has listed the Cocohatchee River Canal and the Cocohatchee River as impaired for low dissolved oxygen, high coliform bacteria, and high iron. *See*, Order Amending 2002 Verified List of Impaired Waters, Group 1 Basins—OGC Case NO. 03-0429; U.S. EPA Region IV Decision Document Regarding Department of Environmental Protection's § 303(d) List; Amendment Submitted on October 1, 2002 and Subsequently Amended on May 12, 2003 (June 11, 2003). Mirasol, in conjunction with adjacent pending developments, will cause a substantial increase of pollutants in the already impaired waters of the Cocohatchee River watershed. Furthermore, Mirasol will adversely impact 1500 acres of jurisdictional wetlands, reduce the historic Cocohatchee Slough to a 200-foot wide, 4-foot deep, and 3-mile long ditch, and destroy 800 acres of essential Florida panther habitat and 960 acres of wood stork core foraging habitat. Finally, Mirasol, in conjunction with adjacent developments, will have adverse cumulative effects on the Slough, wetlands, wood storks, panthers, and water quality in the region.

- (d) **Mirasol's water quality certification would be based upon a flawed methodology that is under peer review by EPA Region IV.** The evaluation of Mirasol's impacts on water quality by the applicant is based on the so-called Harper methodology, which is undergoing peer review by EPA Region IV. Florida DEP's peer review found major flaws in this methodology. Among other things, in comparing post-development versus pre-development pollutant loadings, the methodology assumes that wetlands in their natural state are sources of pollutant loadings. It also assumes unproven high removal efficiencies of dissolved nutrients by stormwater treatment ponds, which makes the post-development loadings seem much lower than they will likely be.
- (e) **Mirasol may jeopardize the survival of the endangered wood stork.** *See* 40 C.F.R. § 230.10(b)(3). According to the revised BiOp, Mirasol will directly destroy 587 acres of wood stork core foraging area (CFA), indirectly destroy 375 acres of wood stork CFA, and potentially take 47 wood stork nestlings each year. 2005 Mirasol BiOp at 80. As we note above, these estimates of habitat destruction and incidental take are suspect because they rely upon the applicant's flawed hydrological model. Furthermore, we note that not only are productivity trends deteriorating but the number of nesting pairs is now roughly a fourth (865 in 2004, Mirasol BiOp at 50) of that required for wood stork recovery (2,500 in USFWS, Wood Stork Recovery Plan, 17 (1997)). Finally, according to a recent news report, the number of wood storks fledged in the Corkscrew Sanctuary, which lies within the action area, is expected to be zero for 2005. *See* C. Gillis, Corkscrew tallies zero wood stork fledglings this season (May 13, 2005), available at [http://www.naplesnews.com/npdn/news/article/0,2071,NPDN\\_14940\\_3773757,00.html](http://www.naplesnews.com/npdn/news/article/0,2071,NPDN_14940_3773757,00.html).
- (f) **Appropriate and practicable steps have not been taken to minimize adverse effects of Mirasol.** *See* 40 C.F.R. § 230.10(d). **Furthermore, the 1990 Corps/EPA Mitigation Memorandum of Agreement (MOA) requires sequential mitigation beyond impact minimization:**
- (1) **avoid impacts to the maximum extent practicable,**
  - (2) **minimize impacts, and**
  - (3) **provide compensatory mitigation for unavoidable wetland losses that provide full functional replacement for impacted wetlands.**

*See* MOA, The Determination of Mitigation Under the Clean Water Act Section 404(B)(1) Guidelines (1990). **While Mirasol fails to satisfy all 3 requirements, the compensation element is the most egregious.** Preservation of wetlands on-site is not compensatory mitigation. Nonetheless, the applicant's proposed mitigation consists of preservation and enhancement of 793 acres of *existing* wetlands. 2005 Mirasol BiOp at 21. Most of this on-site wetlands preserve will be located within the drainage system itself. The applicant has yet to explain how this drainage system will sustain, much less enhance, the quality and quantity of existing on-site wetlands.

Additionally, both excavation and operation of the drainage canal will itself destroy and degrade many acres of high quality wetlands, not only on the Mirasol site, but also on the Terafina and Olde Cypress sites. Furthermore, wetlands on the Parklands site may be partially drained by the operation of the canal. Finally, the portion of the flowway to be located on the Olde Cypress property will destroy over 30 acres of wetlands currently within Olde Cypress' preserve that have already been dedicated to offsetting wetland impacts attributable to the original Olde Cypress Golf Club project. Rather than serve as mitigation for wetland losses, the full wetland impacts of the entire drainage system must themselves be fully assessed and mitigated in order to be permitted.

Finally, because several adjacent projects are either dependent upon or will be affected by the Mirasol flowway, and because Mirasol's effects on the human environment are likely to be not only directly and indirectly but also cumulatively significant, EPA should recommend that the Corps prepare an Environmental Impact Statement, pursuant to § 102 of the National Environmental Policy Act. 42 U.S.C. § 4332(c).

Based on the foregoing discussion of Mirasol's potentially adverse effects on wood storks, natural flowways, wetlands, and water quality, we strongly urge the EPA to veto this project.

Again, we thank you for your continuing careful consideration of this project as well as our concerns. Please keep us apprised of the status of this project.

Sincerely,



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