

Fish & Wildlife Service Policy Concerns
404 Permit Program
Army Corps of Engineers/Jacksonville District
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INTRODUCTION

The Service believes that Jacksonville District has not properly applied the 404(b)(1) Guidelines (Guidelines) on a consistent basis in reaching decisions on individual permit applications in southwest Florida. Jacksonville District has not required a rigorous alternatives analysis and documentation for many permit applications, resulting in permits being issued that are not in compliance with the Guidelines. Additionally, Jacksonville District has failed to assess cumulative impacts of permitted activities as required by the National Environmental Policy Act (NEPA), the Corps' Public Interest Review, and the Guidelines. The Service has concerns with Jacksonville District's implementation and application of Corps policies and regulations at several levels. The Service has identified four specific concerns:

Failure to properly define project purpose;

Failure to properly conduct alternatives analyses;

Improper consideration of compensatory mitigation when evaluating project impacts; and

Failure to conduct cumulative effects assessments.

The level of environmental impacts resulting from 404 permit issuance in this region has caused significant degradation of waters of the U.S. (40 CFR 230.10) which is not offset by compensatory mitigation efforts, which generally are in the form of enhancement and preservation of existing wetlands.

If a project is not water dependent and will involve discharges into waters of the U.S., the Guidelines establish a rebuttable presumption that a less environmentally damaging practicable alternative exists, unless it is clearly demonstrated otherwise. The Guidelines state that "this presumption should have the effect of forcing a hard look at the feasibility of using environmentally preferable sites," to discourage avoidable discharges in special aquatic sites. Failure to comply with the Guidelines is cause for permit denial, as reiterated in a joint U.S. Environmental Protection Agency and Department of the Army memorandum to the field (USEPA and DOA 1993). This memorandum states that "the burden of proof to demonstrate compliance with the Guidelines rests with the applicant; where insufficient information is provided to determine compliance, the Guidelines require that no permit be issued [40 CFR 230.12(a)(3)(iv)]."

Jacksonville District has failed to evaluate permit applications consistent with the extensive guidance provided to districts on implementation of the Guidelines. The guidance stresses that the Corps is responsible for, and must control, all aspects of the Guidelines analysis, and must not give undue deference to an applicant's wishes. This responsibility is discussed in the Corps Headquarters memoranda to the field regarding the Plantation Landing Resort (Corps 1989a), Hartz Mountain Development (Corps 1989b), Old Cutler Bay Associates (Corps 1990), and Twisted Oaks Joint Venture (Corps 1991) permit elevations. These landmark cases have guided Corps districts nationwide in the evaluation of individual permit applications for more than a

decade.

Jacksonville District has also failed to document compliance with the Guidelines as required by Corps regulations and policies in its decision documents, which contain an Environmental Assessment and Statement of Findings. The lack of proper documentation makes it unclear whether, or to what extent, Jacksonville District conducts proper alternatives analyses. The Regulatory Guidance Letter (RGL) 93-2 (Corps 1993) states that there is inherent flexibility provided in the Guidelines; however, it also states that "notwithstanding this flexibility, the record must contain sufficient information to demonstrate that the proposed discharge complies with the requirements of Section 230.10 (a) of the Guidelines."

The issuance of permits by Jacksonville District that are not in compliance with the Guidelines has exacerbated wetland losses in southwest Florida and has hastened the loss of other important wildlife habitat. The Service has reviewed and summarized 24 permits (Table 1) and their decision documents issued by Jacksonville District for projects in southwest Florida, specifically Lee and Collier Counties. The permits reviewed were issued between 1995 and 2000; 75 percent of reviewed permits were issued in 1999 and 2000. These examples are not intended to be a comprehensive list, but illustrate Jacksonville District's inconsistency in complying with the Guidelines when issuing permits for a variety of residential, commercial, and public projects in southwest Florida. The Service reviewed permits in this region because it is one of the fastest growing areas in the United States and has a landscape with a significant amount of sensitive aquatic habitats, utilized by migratory birds as well as numerous Federal- and State-listed fish and wildlife species. The Service has reiterated our concerns by cooperating with and commenting on the Corps Environmental Impact Statement (EIS) "Improving the Regulatory Process in southwest Florida, Lee and Collier Counties, Florida" (Corps 2000). Authorized project impacts associated with the 24 permits reviewed ranged from 0.3 acre to 431 acres, and averaged 74.6 acres per project.

The Service is discussing these concerns with Jacksonville District and the USEPA in an attempt to work together to halt the systematic issuance of permits that do not satisfy the review requirements of the 404(b)(1) Guidelines. There are 15 current permit applications for projects in Lee and Collier Counties for which the Service has written 3(b) letters (Table 2), pursuant to the 404(q) Memorandum of Agreement (MOA) between the Department of the Interior and the Department of Army (DOI and DOA 1992). The Service has determined that each of these projects as proposed will result in substantial and unacceptable adverse impacts to aquatic resources of national importance. Additionally, thorough alternatives analyses have not been completed for these projects and wetland impacts have not been avoided and minimized to the maximum extent practicable. The Service believes that the continued submission of such applications is due to an improperly implemented regulatory program in southwest Florida. The following sections of this document provide discussions of Corps policies and regulations pertaining to the four policy issues identified above. Following each discussion are examples of projects authorized by Jacksonville District that fail to meet the standards required of the Guidelines analysis and other Corps policies and regulations. The Service's evaluation of all 24 permits and decision documents reviewed can be found in Appendix A, Permit Summaries.

Table 1. Permits Reviewed. Jacksonville District permits and decision documents reviewed by the Service which authorized impacts to a total of 1789.9 acres of wetlands and other waters of the United States in southwest Florida. Permit Summaries are in Appendix A.

	Permittee Project	Permit Number Date Permit Issued	Project Type	Authorized Impacts
1	Jack Thomas & Jerry Arzy Otter Creek	199230218 (IP-CC) September 8, 1995	Residential	73.4 acres
2	Immokalee Road Partnership The Woodlands	891PI-90960 April 18, 1996	Residential with recreation (golf course)	273.0 acres
3	Brittany Associates, Ltd. Brittany Apartments	199700646 (IP-CC) August 4, 1998	Residential with recreation (various amenities)	17.9 acres
4	Riverside Baptist Church Church Complex	199041238 (IP-MN) September 25, 1998	Church complex	6.5 acres
5	Mule Pen Quarry Corporation Florida Rock Industries (mod. #1)	198700380 (IP-ML) September 28, 1998	Commercial (rock mining)	431.0 acres
6	Toll Brothers, Incorporated Naples Lake County Club	199701927 (IP-SB) September 28, 1998	Residential with recreation (golf course) & commercial	243.2 acres
7	U.S. Home Corporation Heritage Cove	199801651 (IP-CC) February 3, 1999	Residential	5.2 acres
8	Naples Golf Partners, Inc. Naples Executive Golf Course	199231054 (IP-SB) February 18, 1999	Recreational (golf course)	7.6 acres
9	Panthers Grey Oaks, Inc. Naples Grand	199404037 (IP-AM) March 8, 1999	Commercial with recreation (hotel and golf course)	7.3 acres
10	Arthur R. Wintle, Jr. Westwood Estates	199406350 (IP-AM) April 12, 1999	Residential	14.5 acres
11	U.S. Home Corporation Cedar Hammock	199801232 (IP-MN) May 21, 1999	Residential with recreation (golf course)	223.7 acres
12	Whittenberg Develop. Corp. Whittenberg Estates	199801285 (IP-SB) July 20, 1999	Residential	17.0 acres
13	Vanderbilt Partners II, Ltd. The Dunes	199402860 (IP-DY) September 10, 1999	Residential	11.9 acres
14	A.M. Papineau Bonita Land Resources	199703500 (IP-MN) October 14, 1999	Commercial (borrow pit/access road)	23.8 acres
15	Ocean Boulevard Pt. South Ltd. Activity Center	199607579 (IP-AM) October 29, 1999	Commercial (activity center)	25.9 acres
16	Toll Brothers, Incorporated Sanibel View	199902273 (IP-DY) November 15, 1999	Residential	8.9 acres
17	Hyatt Equities, LLC Hotel/Conference Center	199901381 (IP-SR) November 15, 1999	Commercial (hotel/conference center)	0.3 acres
18	Don Lazenby Sherrill Point	199404522 (IP-AM) November 19, 1999	Residential	1.2 acres

Table 1. Continued.

	Permitter Project	Permit Number Date Permit Issued	Project Type	Authorized Impacts
19	Greyhound Commerce Park, LLC Greyhound Commerce Park	199804578 (IP-MN) November 26, 1999	Commercial/Industrial	8.1 acres
20	Collier County Commission Immokalee Road Widening	199302409 (IP-ML) December 13, 1999	Infrastructure (road construction)	6.1 acres
21	Long Bay Partners, LLC Mediterra	199900076 (IP-SB) January 3, 2000	Residential with recreation (golf course)	116.0 acres
22	Daniel T. Carabine Summerlin Commercial Center	199706151 (IP-MN) January 25, 2000	Commercial	14.7 acres
23	Collier Development Corp. Collier Section 21	199707941 (IP-SB) March 2, 2000	Recreational (golf course)	16.3 acres
24	Miromar Development, Inc. Miromar Lakes	199507483 (IP-MN) July 10, 2000	Residential with recreation (golf course) & commercial	236.4 acres

Table 2. 3(b) Letters. Current (as of December 31, 2000) Corps permit applications for which the Service issued a 3(b) letter for projects in Lee and Collier Counties, Florida. Fourteen of the 15 applications have proposed impacts to a total of 1406.3 acres of wetlands and other waters of the United States. One application (Number 10 in the Table) proposes impacts to 2.75 miles of a jurisdictional canal, but the acres of impact were not provided by Jacksonville District.

	Applicant Project	Application Number Date of 3(b) letter	Project Type	Proposed Impacts
1	Florida Rock Industries, Inc. Rock Mine	199402492 (IP-ML) April 29, 1998	Commercial (rock mine & road)	346.2 acres
2	The Richard E. Jacobs Group University Village Center	199900524 (IP-AM) June 16, 1999	Residential and commercial (hotel & retail)	67.5 acres
3	Collier Co. Airport Authority Marco Island Exec. Airport	199702362 (IP-SB) June 21, 1999	Airport expansion	21.1 acres
4	Naples Reserve Golf Club ¹	199900619 (IP-SB) October 25, 1999	Residential with recreation (two golf courses)	108.6 acres
5	Linda Marszalkowski, Trustee Office Park	199805413 (IP-SB) October 25, 1999	Commercial (office park)	15.5 acres
6	First Assembly of God Church Complex Mod. #1	199605090 (IP-SB) February 14, 2000	Church complex (amenities/structures)	8.3 acres
7	William T. Higgs White Lake Corporate Park	199302264 (IP-DY) February 14, 2000	Commercial	17.8 acres
8	Long Bay Partners, LLC B&F Parcel	199704962 (IP-SR) April 14, 2000	Residential with recreation (golf course)	53.7 acres
9	Lee County DOT Briarcliff/Fiddlesticks Ditch	199902264 (IP-SR) May 9, 2000	Flood control (dredging)	21.4 acres
10	SFWMD Cocohatchee Canal phase IV	199200377 (IP-MN) June 1, 2000	Drainage canal widening	2.75 miles of canal
11	Worthington Communities Colonial Golf & Country Club	199900411 (IP-SR) August 4, 2000	Residential with recreation (golf course)	33.2 acres
12	Prime Residential, LLC Whippoorwill Woods	199801008 (IP-DY) September 21, 2000	Residential	22.2 acres

¹The Service has sent a 3(d) letter for this project and is seeking higher level review.

Table 2. Continued.

	Applicant Project	Application Number Date of 3(b) letter	Project Type	Proposed Impacts
13	Tamiami Square, LLC Office/Medical/Restaurant	199904302 (IP-EF) September 21, 2000	Commercial	1.8 acres
14	Prime Residential, LLC Malibu Lakes & Brentwood	199902496 (IP-MH) September 22, 2000	Residential and commercial	28.2 acres
15	Lee County Port Authority SWFL International Airport	199301156 (IP-MN) September 29, 2000	Airport expansion	660.8 acres

POLICY CONCERNS

Failure To Properly Define Project Purpose

Jacksonville District has failed to correctly define the project purpose for permit applications on a consistent basis, which is a prerequisite to the proper evaluation of alternatives. An ill-defined or improperly restrictive project purpose can lead to the development of a faulty or inadequate alternatives analysis, and to noncompliance with the 404(b)(1) Guidelines. The Corps has provided districts with extensive guidance on how to determine an appropriate project purpose for a permit application. The guidance stresses that the Corps is responsible for defining the project purpose, and must not give undue deference to an applicant's preferred project proposal.

The memorandum regarding the Old Cutler Bay permit elevation (Corps 1990) emphasizes that the Corps is responsible for determining project purpose:

- "In this regard, as with other aspects of the Guidelines, it is the responsibility of the Corps district to emphasize independent judgement. While the Corps needs to consider the applicant's views and information regarding the project purpose and existence of practicable alternatives, this must be undertaken without undue deference to the applicant's wishes."
- "The alternatives analysis required under the Guidelines relies on a reasonably defined project purpose [see 40 CFR 230.10(a)(1) and (a)(3)], and requires substantive evaluations and judgement on the part of the Corps..."
- "In this case, the project purpose description was determined to be too restrictive, because it referenced a specific number of units (428) and a golf course of specific design."

The memorandum concerning the Hartz Mountain permit elevation (Corps 1989b) provides further clarification to the field that the Corps should not give undue deference to the applicant, which can result in an inappropriately defined project purpose and restricted alternatives analysis:

- "Hartz has clearly stated that their project purpose was to construct 3,301 units of residential housing in the IR-2 [Island Residential] area. ... Limiting project sites to those that can facilitate a 3,301 unit development may preclude the evaluation of otherwise practicable alternatives. Acceptance of this very restrictive alternatives analysis negates all attempts to otherwise more generically define basic project purpose."
- "In this case the District's administrative record gives the appearance of having given too much deference to the applicant's narrowly defined project purpose. This may have very well resulted in the exclusion of otherwise practicable alternatives."

Corps guidance provides clear direction to districts regarding the proper determination of project

purpose, and emphasizes that the Corps is responsible for making an independent determination.

Examples of Southwest Florida Permits
Failure to Properly Define Project Purpose

The *Long Bay Partners, LLC* permit authorized impacts to 116 acres of wetlands and other waters of the U.S. for the construction of a residential development and golf course. The overall project purpose is defined in the decision document as "to provide an upscale residential community of approximately 950 dwelling units along with two championship 18-hole golf courses and a driving range, related amenities for the community (towncenter with clubhouse, restaurant facilities, educational/enrichment center, and tennis facilities plus community parks), lakes for stormwater management purposes and aesthetics, and natural preserves." Jacksonville District did not use independent judgement in determining the project purpose and gave undue deference to the applicant's wishes. The correct overall project purpose would be to construct a residential development and golf course. The project purpose as defined is so restrictive that it precluded the existence of other practicable alternatives. To achieve the development specifications described in the overall project purpose, the applicant "required approximately 1,250 to 1,600 undivided acres." The requirement for such a large tract of land effectively eliminated all but a few alternative sites from consideration and evaluation for practicability. A less specific project purpose might have resulted in less required acreage and the subsequent analysis may have identified either potential alternative sites or on-site configurations requiring less filling of wetlands.

The *Collier County Commission* permit authorized impacts to 6.1 acres of wetlands to widen Immokalee Road. The project purpose is defined in the decision document as the widening of a two lane road to a four lane road. This project purpose is too restrictive; a more accurate project purpose would be to provide additional east-west vehicle capacity in the Bonita Shores area. The project purpose as defined focused the alternatives analysis solely on the Immokalee Road corridor. Jacksonville District should have required the applicant to conduct an off-site alternatives analysis and to demonstrate that the Immokalee Road corridor provided the least environmentally damaging project site in the area that would serve to increase east-west vehicle capacity.

The *Mironar Development, Inc.* permit authorized impacts to 236.4 acres of wetlands and other waters of the U.S. for the construction of residential, golf course, and commercial developments. The overall project purpose is stated in the decision document as: "To develop a large scale master planned residential community containing commercial components, containing a golf course and the ability to provide a major water related amenity internal to the development." Jacksonville District did not use independent judgement in determining the project purpose and gave undue deference to the applicant's preferred project. There is no justification provided to support the assumption that the various project components must necessarily be on the same property. Additionally, the statement that a water-related amenity must be provided internal to the development is to infer that this non-water dependent project must be located on a site

containing waters of the United States. To achieve the development specifications described in the project purpose, the applicant determined that the project site should be at least 1,000 acres. The requirement of such a large tract of land to accommodate all non-related project components eliminated many sites from consideration as practicable alternatives. The project purpose is extremely restrictive and precluded the alternatives analysis from being completed in accordance with the Guidelines requirements.

Failure to Properly Conduct Alternatives Analyses

Jacksonville District has failed to consistently conduct a thorough alternatives analysis for permit applications in southwest Florida. The 404(b)(1) Guidelines provide criteria that must be met prior to the issuance of a permit by the Corps. These criteria require that an alternatives analysis be conducted to determine the least environmentally damaging practicable alternative for a project. The Guidelines presume that if a project is not water dependent, practicable alternatives are available which do not involve impacts to special aquatic sites. The burden of proof to rebut this presumption lies with the applicant; furthermore, the Guidelines state that the Corps cannot issue a permit if an applicant does not adequately rebut this presumption. The Guidelines also state that a permit will not be issued unless all appropriate and practicable steps have been taken to minimize adverse impacts on the aquatic ecosystem. The Mitigation Memorandum of Agreement (Mitigation MOA) between the USEPA and the DOA (1990) sets forth a sequencing approach to mitigation for wetland impacts: avoidance, minimization, and lastly compensation.

The Flexibility RGL (RGL 93-2) (Corps 1993) and the Guidelines (40 CFR 230.6) recognize that the level of analysis will vary depending on the nature, significance, and complexity of a proposed project. In general, as the scope/cost of a project increases, so should the level of analysis. RGL 93-2 states:

- "The Guidelines clearly afford flexibility to adjust the stringency of the alternatives review for projects which would have only minor impacts."
- "Minor impacts are associated with activities that generally would have little potential to degrade the aquatic environment and include one, and frequently more, of the following characteristics: are located in aquatic resources of limited natural function; are small in size and cause little direct impact; have little potential for secondary or cumulative impacts; or cause only temporary impacts."
- "It is not proper to consider compensatory mitigation in determining whether a proposed discharge will cause only minor impacts for purposes of the alternatives analysis...."
- "This guidance concerns application of the Section 404(b)(1) Guidelines to projects with minor impacts. Projects which may cause more than minor environmental impacts on the aquatic environment, either individually or cumulatively, should be subjected to a proportionately more detailed level of analysis to determine compliance or noncompliance

with the Guidelines.”

During the Guidelines analysis, the Corps will consider an alternative to be practicable if it is available and capable of being done after taking into consideration cost, existing technology and logistics in light of the overall project purpose [40 CFR 230.3(q)]. Furthermore, “capable of being done” is a feasible alternative and “available” includes sites not presently owned by the applicant, but which can be obtained, utilized, expanded, or managed to fulfill the project purpose. An applicant’s unwillingness to pursue an alternative does not mean it is infeasible.

Along with logistics and existing technology, costs are considered in evaluation of alternatives, however, the preamble to the Guidelines states that “the mere fact that an alternative may cost somewhat more does not necessarily mean it is not practicable.” The memorandum regarding the Plantation Landing permit elevation (Corps 1989a) clarifies the role of cost in analyzing alternatives:

- “While the applicant’s wish to minimize his costs is obviously a factor which the Corps can consider, that factor alone must not be allowed to control or unduly influence the Corps’ definition of project purpose or ‘practicable alternative’, or any other part of the 404(b)(1) evaluation.”
- “... often wetland property may be less expensive to a developer than comparably situated upland property. The Guidelines obviously are not designed to facilitate a shift of development activities from uplands to wetlands, so the fact that an applicant can sometimes reduce his costs by developing wetland property is not a factor which can be used to justify permit issuance under the Guidelines.”

Applicants may set forth criteria to determine if alternative project sites are available and feasible for project development. These criteria must not be inappropriate or too restrictive and have the effect of precluding the existence of otherwise practicable alternatives, similar to an alternatives analysis resulting from an ill-defined project purpose. The Corps has provided guidance which limits deference given to criteria such as integration of non-related project components, land ownership, property access, and local zoning. The memorandum regarding the Plantation Landing permit elevation (Corps 1989a) provides guidance for evaluation of multi-component projects, specifically when the applicant claims they must be located on one tract of land:

- “When an applicant proposes to build a development consisting of various component parts, and proposes that all those component parts be located on one tract of land (including waters of the United States), a question of fact arises: i.e., whether all component parts, or some combination of them, or none, really must be built, or must be built in one contiguous block, for the project to be viable.”
- “... the Corps must determine (and appropriately document its determination) whether in fact some component parts of the project (e.g., those proposed to be built in waters of the

United States) could be dropped from the development altogether, or reconfigured or reduced in scope, to minimize or avoid adverse impacts on waters of the United States.”

Concerning deference given to land ownership, the preamble to the Guidelines indicate that “the mere fact of ownership or lack thereof, does not necessarily determine reasonable availability.” Section 230.10(a) specifically states: “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 project purpose of the proposed activity may be considered.” In Van Abbema v. Fornell (7th Cir. 1986) the court rejected the Corps’ argument that an alternative may not be feasible because the applicant does not own the site or perhaps cannot gain access to it. The court stated that lack of ownership of an alternative site is “only marginally relevant (if it is relevant at all) to whether feasible alternatives exist...”.

An alternatives analysis limited by restrictive criteria concerning accessibility is also inappropriate. In Bersani v. USEPA (N.D.N.Y. 1987), the court upheld USEPA’s rejection of an applicant’s claim that the lack of sufficient access to a proposed shopping mall and the lack of sufficient traffic volume, made an alternative site impracticable. Local decisions on land use may not be used to restrict the implementation of Federal policies designed to administer the Clean Water Act. The Corps provided guidance on consideration of local zoning in the memorandum regarding the Hartz Mountain permit elevation (Corps 1989b): “... federal concerns over the environment, health and/or safety will often result in decisions inconsistent with local land use approvals. In this respect, the Corps should not give undue deference to HMDC [Hackensack Meadowlands Development Commission] or any other zoning body.”

Examples of Southwest Florida Permits Failure to Properly Conduct Alternatives Analyses

The *Toll Brothers, Inc./Naples Lake Country Club* permit authorized impacts to 243.2 acres of wetlands to construct a residential subdivision, golf course and commercial/office area. The parameters for the consideration of potential alternative sites include property with 500 contiguous acres to accommodate a golf course and a residential development and property which did not have any permits nor require review by the local planning department. Additionally, although not stated as a parameter, the applicant dismissed sites with “no access,” which was not defined or substantiated in any manner. The alternatives analysis criteria and the project purpose, as stated in the decision document, are so restrictive they precluded the examination of reasonable alternative sites, and greatly reduced opportunities to avoid and minimize on-site wetland losses.

The applicant’s requirement for parcel size was not substantiated in the decision document. Jacksonville District did not make a determination that the un-related project components needed to be on the same property to achieve a viable project. The requirement that the parcel in question must not have a permit nor require review by a unit of local government is indefensible; this criterion is artificial, and may not be used to evaluate practicability of alternative sites nor to determine compliance with the Guidelines. Additionally, the decision document for this permit

did not discuss whether the development would be practicable without the commercial parcel, since its construction is also not dependent on either the golf course or the residential development. Because of Jacksonville District's acceptance of a restrictive project purpose and site review criteria, and its failure to conduct a thorough alternatives analysis, the presumption that a less damaging practicable alternative exists for this non-water dependent project was not clearly rebutted.

The *Mule Pen Quarry Corporation* permit authorized impacts to 431 acres of wetlands for the development of a rock quarry. Jacksonville District's decision document for the project states: "This site is owned by the applicant, and there are no upland-only sites available that would serve the basic project purpose." The fact that the applicant already owns the project site does not release the applicant or the Corps from the examination of practicable off-site alternatives. While a wetland-free alternative site suitable for mining may not be available, it is possible that a feasible alternative site with fewer wetlands exists. In any case, the Corps is required to examine off-site alternatives. Furthermore, Jacksonville District did not justify that further avoidance and minimization of on-site wetland impacts would not be feasible. Jacksonville District did not conduct a thorough alternatives analysis and, therefore, the determination that this project, as designed and at the selected site, is the least damaging practicable alternative is not substantiated.

The *Toll Brothers, Inc./Sanibel View* permit authorized impacts to 8.9 acres of wetlands for the construction of a mid-rise, multi-family residential development. Jacksonville District's decision document for this project states that the applicant's requirements for potential project sites include specific zoning (category MF-2), views of the ocean or preserved natural areas, a location in the Summerlin-Sanibel corridor, and enough space for tennis courts, a pool and a beach. The decision document describes further constraints on the site selection process set forth by the applicant, stating that no other parcel of land offered the same number of allowable units per acre as the preferred location, as determined by local zoning and comprehensive plan regulations. The project description and alternative site review criteria inappropriately includes local zoning and planning requirements, amenities, and a specific number of units. The criteria are too restrictive and are unacceptable for the Guidelines analysis; they precluded the consideration of potential alternative sites and further avoidance and minimization of on-site wetland impacts by reduction or reconfiguration of the project design.

The *Jack Thomas and Jerry Arzy* permit authorized impacts to 73.4 acres of wetlands for the construction of a residential development. Jacksonville District did not require the applicant to consider off-site locations for the project because the current owner bought the property in 1982 with the intent to develop it and the project was consistent with the Southwest Florida Planning Council Regional Comprehensive Plan. Neither present ownership of a property or the existence of a regional comprehensive growth plan may be used to limit the alternatives analysis required by the Guidelines. Jacksonville District also did not specify why impacts to wetlands at the project site could not be further avoided or minimized through project design modifications.

The *Naples Golf Partners, Inc.* permit authorized impacts to 7.6 acres of wetlands to build a golf

course. In the decision document for the project, Jacksonville District stated that the adverse impacts to on-site wetlands had been minimized to the extent practicable, while still complying with the National Golf Association's guidelines for golf course construction. The use of voluntary guidelines established by a non-governmental association such as the National Golf Association cannot be used to limit the scope of alternative analysis for the Guidelines.

Several of the Jacksonville District decision documents we reviewed showed little to no evaluation of measures taken to avoid and minimize wetland impacts on project sites. Other decision documents included inappropriate reasoning to determine that project impacts were minimized to the greatest extent practicable. All 24 permit examples in Appendix A were issued without justification for the selection of the least environmentally damaging practicable alternative and, therefore, do not comply with the Guidelines.

Improper Consideration of Compensatory Mitigation when Evaluating Project Impacts

Jacksonville District has justified issuing permits by using compensatory wetland mitigation to satisfy the alternatives analysis requirements and to select the least environmentally damaging practicable alternative. The use of compensatory mitigation to satisfy the Guidelines fails to comply with existing Corps regulations and policies. The Mitigation MOA (USEPA and DOA 1990) emphasizes the importance of avoiding and minimizing impacts prior to considering wetland mitigation: "Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternative for the purposes of requirements under Section 230.10(a)."

The memorandum regarding the Twisted Oaks permit elevation (Corps 1991) states that mitigation buy down is unacceptable for permit applications received after the Mitigation MOA was implemented, and that this practice is not in compliance with the Guidelines: "We fully support the Army-EPA MOA on mitigation, in part because it will facilitate more consistent decision-making by Corps districts by clarifying the applicability of mitigation to a practicable alternatives analysis under the Guidelines. Apart from certain limited exceptions, the MOA on mitigation precludes acceptance of mitigation in lieu of first avoiding, then minimizing adverse impacts in conjunction with permit applications received after 7 February 1990."

Examples of Southwest Florida Permits

Improper Consideration of Compensatory Mitigation when Evaluating Project Impacts

The *Arthur R. Wintle Jr.* permit authorized impacts to 14.3 acres of wetlands for the construction of a residential development. The decision document for this project states that "the project has been minimized as much as possible while still fulfilling the applicant's project purpose. The mitigation offered has been reviewed and been determined to be sufficient to offset the proposed impacts to wetlands. The project as proposed is the least environmentally damaging practicable alternative." Jacksonville District did not investigate other potential project sites and did not require avoidance and minimization of wetland impacts (99.7 percent of on-site wetlands were

destroyed), yet found the project to be the least damaging practicable alternative and in compliance with the Guidelines because of proposed compensatory mitigation.

The *Whittenberg Development Corporation* permit authorized impacts to 17 acres of wetlands for construction of a residential subdivision. The decision document for this permit concludes the alternatives analysis by discussing the special conditions of the permit which would be used to ensure that the compensatory mitigation plan was completed as proposed. Jacksonville District states: "With the above conditions, the project design is the least damaging practicable alternative, which would also accomplish the applicant's objectives." Jacksonville District based the determination of the least damaging practicable alternative solely on the applicant's willingness to provide compensatory mitigation.

Jacksonville District determined that several projects reviewed by the Service (Appendix A) were in compliance with the Guidelines, even though off-site alternatives analyses were not conducted, and on-site avoidance and minimization of wetland impacts was not required. Jacksonville District predicated their evaluation and determination of compliance with the Guidelines upon the implementation of compensatory mitigation proposals. Additionally, a number of projects were deemed to be the least environmentally damaging practicable alternative because of proposed compensatory mitigation, which is clearly in contradiction to Corps guidance.

Failure to Conduct Cumulative Effects Assessments

Jacksonville District has failed to conduct cumulative effects assessments for permitted activities, which is a central tenet of the Corps regulatory program. NEPA, the 404(b)(1) Guidelines and other Corps' regulations discussing the public interest factors of the decision-making process, stress the need to assess cumulative impacts. The regulations [33 CFR 325.3 (c)(1)] state: "The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative impacts of the proposed activity on the public interest. That decision will reflect the national concern for both the protection and utilization of important resources."

The Guidelines make it clear that effects contributing to significant degradation of waters of the United States must be considered both individually and cumulatively in determining compliance with the Guidelines and such consideration must be documented:

- "Under these Guidelines, effects contributing to significant degradation considered individually or collectively, include: ... 3. Significant adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy. "
- "Cumulative impacts are the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material. Although the impact of a particular discharge may constitute a minor change in itself, the

cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems.”

- “The permitting authority shall collect information and solicit information from other sources about the cumulative impacts on the aquatic ecosystem. This information shall be documented and considered during the decision-making process concerning the evaluation of individual permit applications...”

The Corps issued Regulatory Guidance Letter (RGL) 92-1 (Corps 1992) concerning the roles and responsibilities of Federal agencies that stated: “The Corps will fully consider comments regarding the site from a watershed or landscape scale, including an evaluation of potential cumulative and secondary impacts.” Additionally, recent court cases such as United States v. Mango (2nd Cir. 1999) and Montana Council of Trout Unlimited v. USCOE (D. Mont. 2000) have reaffirmed the Corps obligation to consider cumulative impacts when reviewing permit applications.

Other Corps guidance has discussed the importance of cumulative impacts. The Corps' New Orleans District had asserted that the loss of wetlands by development of the Plantation Landing Resort was inconsequential because there was an abundance of the habitat type in the project vicinity and in coastal Louisiana. The memorandum regarding this permit elevation (Corps 1989a) states, in reference to provisions of the Guidelines, that “the proposed destruction of 22 acres of special aquatic sites by the subject proposed development cannot be dismissed as unimportant.” The memorandum for the Twisted Oaks permit elevation (Corps 1991) also states that the cumulative effects of many projects can add up to very significant wetland losses and are not inconsequential.

Examples of Southwest Florida Permits

Failure to Conduct Cumulative Effects Assessments

The *Greyhound Commerce Park* permit authorized impacts to 8.1 acres of wetlands for the construction of an industrial park. The decision document for the project states that: “There should be no adverse cumulative or secondary impacts associated with this development. Secondary impacts of increased storm water from impervious surfaces would be handled through an approved storm water management system reviewed and authorized by the SFWMD [South Florida Water Management District].” This statement only cursorily addresses one of the public interest factors detailed in 33 CFR 325.3(c)(1), i.e., flood hazard. Important public interest factors such as wetlands, fish and wildlife values, water quality and conservation are not addressed. Simply stating a conclusion that there should be no adverse cumulative impacts is not sufficient for confirming compliance with the Guidelines.

The *Brittany Associates, Limited* permit authorized impacts to 17.9 acres of wetlands to develop a residential subdivision. The decision document does not discuss cumulative impacts. There is no

section for consideration and evaluation of cumulative impacts as required by the 404(b)(1) Guidelines, NEPA, and the Public Interest Review.

An examination of many decision documents prepared by the Jacksonville District (Appendix A) shows that the failure to properly discuss and document cumulative effects is commonplace. Jacksonville District often simply states a conclusion that no cumulative impacts should result from proposed projects, yet just the 24 reviewed permits alone resulted in impacts to a total of 1789.9 acres of wetlands and other waters of the U.S. Jacksonville District is not issuing permits in compliance with either the Guidelines or other regulations requiring evaluation of cumulative effects. This has resulted in significant loss and degradation of aquatic resources in southwest Florida.

FISH AND WILDLIFE RESOURCES AT RISK IN SOUTHWEST FLORIDA

Wetlands in southwest Florida are diverse and contain habitat types that are rare in other states, such as hydric pine flatwoods and mangrove swamps. Ecological communities of significant concern in southwest Florida include wetland habitats such as hydric pine flatwoods, freshwater marshes/wet prairies, mangroves, salt marshes, nearshore and mid-shelf reefs, and seagrasses (Service 1999). Additionally, there are extensive open water resources and intertidal and subtidal resources which include oyster (*Crassostrea virginica*) bars and sand and mud flats.

Southwest Florida features floral assemblages characteristic of both temperate and subtropical systems, as well as influences from the Caribbean, which are most prevalent in forested uplands and swamps. Fakahatchee Strand in Collier County is the center of native orchid species diversity in the United States (Duever *et al.* 1986). Plant species diversity in the hydric pine flatwoods is high with over 900 species recorded, including 80 rare and endemic species (Service 1999). Hydric pine flatwoods are unique to south Florida and are of critical regional importance as one of the principal dominant forest cover types. Hydric pine flatwoods are geographically limited, have subtropical vegetation, and have seasonal hydrologic variation which results in a habitat with high biodiversity.

Coastal areas in southwest Florida are characterized by mangrove-dominated estuaries, salt marsh habitats, seagrasses, oyster bars, and mudflats. Coastal wetlands provide nursery grounds for numerous recreationally and commercially important fish species, as well as crustaceans and shellfish. At least 70 percent of Florida's recreationally sought fishes depend on these estuarine habitats for at least part of their life histories (Harris *et al.* 1983, Estevez 1998, Lindall 1973). Mangrove swamps are among the most productive plant communities in the world due to the wide variety of spatial and temporal microhabitats they support (Day *et al.* 1989); mangrove roots provide attachment surfaces and cover for various marine organisms and mangrove forests are utilized by a highly diverse population of birds (Odum *et al.* 1982). Seagrasses also provide habitat and nursery grounds for many fish and invertebrate communities and are the primary feeding grounds of the endangered West Indian manatee (*Trichechus manatus*). Waterfowl and wading birds also rely on seagrass systems as forage areas.

The south Florida ecosystem is located along a major migratory route for bird species that breed in temperate North America and winter in the tropics of the Caribbean and South America. Species such as bobolink (*Dolichonyx oryzivorus*), blackpoll warbler (*Dendroica striata*), tanager (*Piranga* spp.), royal tern (*Sterna maxima*), and blue-winged teal (*Anas discors*) use south Florida as their primary migratory pathway. Because the south Florida ecosystem is located near Cuba and the West Indies, it draws Caribbean species that rarely appear elsewhere in North America, including the smooth-billed ani (*Crotophaga ani*), mangrove cuckoo (*Coccyzus minor*), Antillean night hawk (*Chordeiles gundlachi*), and the white-crowned pigeon (*Columba leucocephala*) (Service 1999). Fifteen species of herons, storks, and ibises nest in south Florida.

Southwest Florida habitats are utilized by 34 mammal, 48 reptile, 20 amphibian, and 54 freshwater fish species (Service 1999). Nearly 300 species of migratory birds occur in southwest Florida (Appendix B), and five species of shorebirds nest there: the least tern (*Sterna antillarum*), black skimmer (*Rhinchops niger*), Wilson's plover (*Charidrius wilsonia*), snowy plover (*Charidrius alexandrinus*), and American oystercatcher (*Haematopus palliatus*). Seventeen federally-listed or candidate species (Appendix C) use or depend on southwest Florida's wetland communities for all or part of their life history needs including breeding, feeding, and sheltering. Another 236 State-listed species and other species of concern (Appendix D) also use or depend on these same ecological communities. In supporting wide-ranging wildlife species such as the federally-listed Florida panther (*Puma concolor coryi*), wood stork (*Mycteria americana*), and the State-listed Florida black bear (*Ursus americanus floridanus*), the southwest Florida area likely represents the most important region of Florida (Cox *et al.* 1994).

ADVERSE IMPACTS TO FISH AND WILDLIFE RESOURCES AND SIGNIFICANT DEGRADATION OF WATERS OF THE U.S.

The south Florida ecosystem contains four of the top ten fastest growing metropolitan areas in the United States, including the Naples and the Fort Myers-Cape Coral areas (the first and fourth fastest-growing areas of the Country, respectively) (Service 1999). Southwest Florida is undergoing tremendous development pressure; on average, southwest Florida counties are expected to experience a 68 percent increase in population growth from 1995 levels to the year 2020. The largest actual population increases will occur in Lee and Collier Counties; an increase of 166,267 people, or 91 percent of the current population, is expected in Collier County and an increase of 219,062 people, or 58 percent of the current population, is expected in Lee County by 2020 (SFWMD 2000).

The slash pine forests of southwest Florida, particularly hydric pine flatwoods, have been identified as an imperiled ecosystem due to a documented loss of 88 percent in southwest Florida from 1900 to 1989 (Noss and Peters 1995). Mangrove, saltmarsh, and seagrass communities are increasingly threatened as coastal development intensifies, and recreational boating pressure and navigational needs increase. Over 90 percent of mangroves in Florida occur in four south Florida counties (Lee, Collier, Miami-Dade and Monroe) (Service 1999) and Lee County alone has lost 19 percent of its original mangroves (Estevez 1981). Since the early 1900's, mangrove

communities in south Florida have steadily disappeared (Lugo and Snedaker 1974) due to development of shorelines with bulkheads and impoundment by dikes for mosquito control. Seagrass communities continue to be lost due to water quality degradation, dredging and filling activities, and increases in boater usage of Florida's coastal waterways.

The issuance of permits by Jacksonville District that are not in compliance with the Guidelines has exacerbated wetland losses and significantly affected the fish and wildlife species utilizing these habitats in southwest Florida. Although exotic plant invasion is prevalent in some wetland communities and may reduce the functions of these systems, functions can be improved by exotic plant removal and/or hydrological restoration. Wetland functions are not improved by conversion of these systems to development. Urban and agricultural development has destroyed large acreages of wetland habitats and altered the landscape distribution of these habitats. Other direct, indirect, and cumulative impacts include habitat fragmentation, loss of wetland-upland connectivity, human-related disturbances to wildlife (e.g. noise, light, pollution, and traffic), and surface and ground water alterations which result in significant changes in plant and animal community structure, increased invasion of exotic species, reduction of base flows, modification of the timing and duration of freshwater discharges, and nutrient and contaminant accumulations in remaining adjacent and downstream wetland and estuarine ecosystems.

The 404(b)(1) Guidelines (Section 230.1) state "From a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special [aquatic] sites may represent an irreversible loss of valuable aquatic resources." A 404 permit may not be issued if a proposed project will cause or contribute to significant degradation of waters of the United States (Section 230.10). Effects contributing to significant degradation, individually or cumulatively, include adverse effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites; recreational, aesthetic, and economic values; and aquatic ecosystem diversity, productivity and stability, such as loss of fish and wildlife habitat.

A number of factors need to be considered when determining whether the adverse effects of a proposed project are significant. These factors include the size and extent of impacts (considering direct, indirect, secondary, and cumulative impacts), the permanence of the impacts, the quality of the functions and values of the affected resource; the landscape setting; the rarity of the resource; and the refuge value of the resource. The 404 permit authorized cumulative destruction and degradation of aquatic resources in southwest Florida has resulted in permanent, landscape-scale impacts to several of the significant degradation factors mentioned above. For example, development projects are further taxing local water supplies; modifying hydrologic pattern, suspension of substrates and release of contaminants affect downstream shellfish, finfish, and other aquatic organisms; direct loss of habitat and human-related disturbances impact wildlife associated with aquatic ecosystems, including resident and transient mammals, birds, reptiles, and amphibians, by destroying breeding and nesting areas, escape cover, travel corridors, food sources, and water availability and quality, thereby lowering ecosystem diversity and productivity; and dredge and fill activities destroy wetlands directly and indirectly, reduce or eliminate their productivity, alter substrates and water movement, degrade water quality and quantity, and reduce flood capacity.

To offset project impacts, compensatory mitigation in southwest Florida most commonly involves the enhancement and preservation of existing wetland systems. Creation and restoration of wetlands is infrequent. This has resulted in a significant net loss of acreage of aquatic habitats on a landscape scale in this region, and fragmentation of remaining wetland systems. Although enhancement activities may result in aquatic habitats with increased wildlife usage and productivity, the Service is concerned with the adequacy of the compensatory mitigation projects on a cumulative basis. Enhancement and preservation does not replace the net loss of wetland acreages, or the spatial distribution of these habitats. Several species of wildlife, including Federal- and State-listed species, require large areas of contiguous habitats, travel corridors, seasonal food and cover variations, and buffers from human-related disturbances. Enhancement and preservation mitigation does not compensate for several direct, indirect, and cumulative impacts to wildlife resources.

The Service cooperated with the Corps and the USEPA on development of an Environmental Impact Statement (EIS) (Corps 2000) to improve the regulatory process in Lee and Collier Counties, from late Fall 1997 through July 2000. The EIS, with a Study Area that encompassed a 988,000-acre region, had a stated agency goal of providing information to assist Corps staff in the evaluation of the cumulative effects of individual permit decisions on a regional landscape scale. Jacksonville District has admitted that there is concern regarding adequate review of cumulative impacts, as stated in the EIS: "The Corps initiated the EIS out of concern whether the incremental (permit-by-permit) reviews were adequately addressing cumulative and secondary effects of the wetland fill in the rapidly growing Southwest Florida area." Although the Service worked extensively with Jacksonville District on development of the document, several comments and recommendations of the Service were not incorporated in the final EIS.

The Service stated, via a Department of Interior letter to the Corps dated March 1, 2000, that the

EIS should reiterate the Corps' responsibilities under Section 404 of the Clean Water Act and provide additional guidance concerning Corps policies with regard to alternatives analysis, water-dependency, avoidance and minimization of wetland impacts, and compensatory mitigation in the study area. The Service expressed concerns that there is a preponderance of non-water dependent proposals being permitted in wetlands and that mitigation sequencing (avoidance, minimization, then compensation of wetland impacts) is being circumvented.

The Service repeatedly expressed concerns that the EIS did not adequately evaluate indirect (secondary) effects and did not constitute a cumulative effects analysis. The Service requested historical vegetation and wetland loss information numerous times to assist in a cumulative impact analysis of the Corps regulatory program on wetlands in southwest Florida. The final EIS does not address these comments and concerns, does not consider effects of past and present actions, and does not constitute a cumulative effects analysis as defined in 40 CFR 1508.7. Based on the number and type of applications that the Service has received for review, we believe that applications to fill wetlands in the EIS study area have increased significantly since inception of the EIS and therefore the data in the EIS underestimates impacts to wetlands and our trust resources. From mid-May, 1998 (four months after the Notice of Intent was published for the EIS) to the beginning of November, 2000, the Service reviewed 70 Nationwide Permits, 39 Letters of Permission, and 187 Individual Permit applications in Lee and Collier Counties alone. Our technical assistance and pre-application coordinations indicate that this trend will continue.

In the EIS the Corps indicates that since 1991, permitted wetland fill in the study area (portions of Lee, Collier, and Hendry Counties), has averaged 553 acres per year. However, of the 24 permits reviewed by the Service (Table 1), 14 were issued in 1999 and these 14 permits alone had over 360 acres of impacts. Additionally, 14 current applications with unresolved 3(b) letters (Table 2), are for projects that have cumulative proposed impacts to 1406.3 acres of wetlands and other waters of the U.S. Watershed level habitat loss and fragmentation in southwest Florida is not being offset by compensatory mitigation efforts, which typically consist of preservation and management of existing wetland systems. The tremendous development pressure and lack of a rigorous regulatory program are resulting in significant direct, indirect, and cumulative fish and wildlife resource losses and are rapidly precluding opportunities for conservation, resource management, and restoration in southwest Florida. These impacts are now exacerbated by movement of urban development and development infrastructure (roads and canals) outside the urban boundary.

CONCLUSIONS AND RECOMMENDATIONS

The southwest Florida region is experiencing increased pressures on natural resources similar to those experienced by Florida's east coast in the remnant Everglades. The Federal government is now spending billions of dollars to re-examine the operation and needs of the Central and Southern Florida Project under the Comprehensive Everglades Restoration Plan (CERP), in order to better balance the needs of natural areas with the needs of agriculture and the increased population in south Florida. Objectives of the CERP include enhancing ecological values by

increasing the spatial extent of natural areas, improving habitat and functional quality, and improving plant and animal species abundance and diversity (Service 1999). The Service supports these objectives and recommends that Jacksonville District pursue such goals which do not conflict with these objectives in southwest Florida, while the opportunities remain to maintain and restore the ecological integrity of the aquatic resources of the region.

The Service has completed a preliminary analysis of potential project impacts in southwest Florida and is alarmed by the trend in wetland habitat loss and its contribution to significant degradation of aquatic ecosystems. Our review of decision documents for permits issued by Jacksonville District in southwest Florida, indicates that the 404(b)(1) Guidelines requirements are routinely not being satisfied prior to permit issuance, resulting in substantial direct, indirect, and cumulative impacts on aquatic ecosystems and fish and wildlife resources, including Federal- and State-listed species. Jacksonville District has accepted and permitted applicant's preferred project proposals without utilizing independent judgement in the determination of project purpose and evaluation of the alternative analysis. Jacksonville District has repeatedly given undue deference to applicant's desires and has allowed them to direct the review and outcome of the Guidelines analysis. Jacksonville District has also been negligent in documentation of compliance with the Guidelines in its permit decision documents.

Many of the decision documents the Service reviewed contain no summaries of measures examined to avoid or minimize wetland losses. With respect to off-site alternatives, several decision documents simply state that the applicant already owns the project site, and no off-site locations were considered. With respect to minimization, many decision documents merely state that the project has been designed to minimize wetland impacts to the maximum extent practicable, but provide no documentation to support this claim. Additionally, Jacksonville District has not undertaken a cumulative impacts study to characterize and quantify the habitat loss, modification, and fragmentation that arise from permitted activities within the rapidly growing southwest Florida region.

The memorandum issued in response to the Hartz Mountain permit elevation (Corps 1989b) concludes, in part, that: "the Army Corps of Engineers is serious about protecting waters of the United States, including wetlands, from unnecessary and avoidable loss. The Corps districts should interpret and implement the Guidelines in a manner that recognizes this. Further, the Corps should inform developers that special aquatic sites are not preferred sites for development and that non-water dependent activities will generally be discouraged in accordance with the Guidelines." The Service supports this position, and requests that the Corps' South Atlantic Division and Headquarters offices take all measures necessary to ensure that Jacksonville District properly evaluates permit applications in accordance with the 404(b)(1) Guidelines requirements and Corps regulations, policies and guidance.