

Policy Concerns  
404 Permit Program  
Corps of Engineers/Jacksonville District

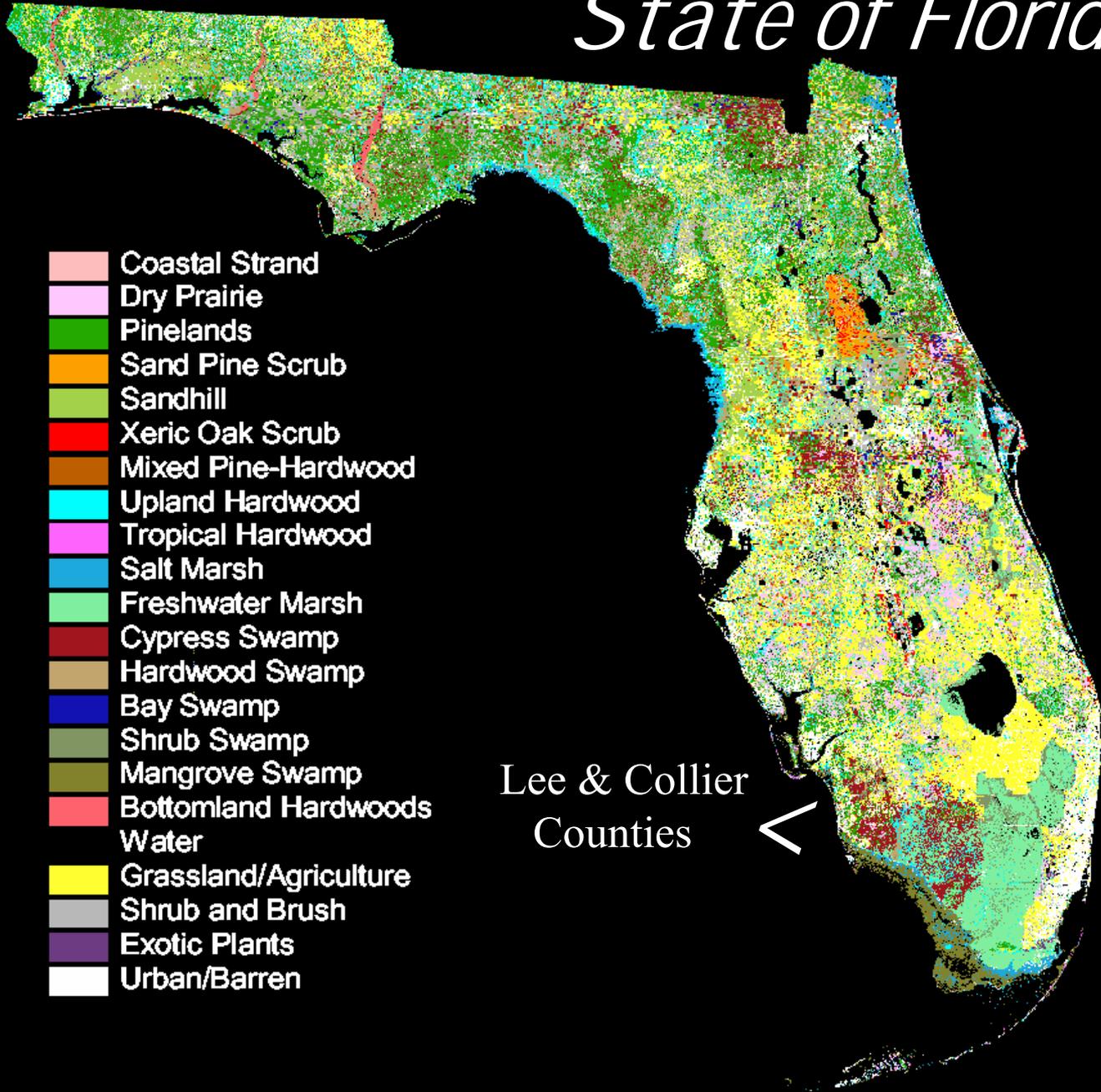


*Southeast  
Region*

*Fish &  
Wildlife  
Service*



# *State of Florida*



- Coastal Strand
- Dry Prairie
- Pinelands
- Sand Pine Scrub
- Sandhill
- Xeric Oak Scrub
- Mixed Pine-Hardwood
- Upland Hardwood
- Tropical Hardwood
- Salt Marsh
- Freshwater Marsh
- Cypress Swamp
- Hardwood Swamp
- Bay Swamp
- Shrub Swamp
- Mangrove Swamp
- Bottomland Hardwoods
- Water
- Grassland/Agriculture
- Shrub and Brush
- Exotic Plants
- Urban/Barren

Lee & Collier  
Counties



# Policy Concerns

- Defining Project Purpose
- Conducting Alternative Analyses
- Considering Compensatory Mitigation
- Assessing Cumulative Impacts
- ***Significant Degradation of Waters of the U.S.***



# Defining Project Purpose

- Prerequisite for proper evaluation of alternatives
- “In this regard, as with other aspects of the Guidelines, it is the responsibility of the Corps district to emphasize independent judgement” [Old Cutler Bay guidance]
- FWS Concern: improperly defining project purpose restricts alternatives analyses



# Defining Project Purpose

## Example

“To provide an upscale residential community of approximately 950 dwelling units along with 2 championship 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.”

*This overall project purpose is too narrowly defined by including amenities, # of units, subcomponents (lakes), aesthetics or preserves.*

*A correct overall project purpose is to construct a residential development and golf course.*



# Conducting Alternatives Analyses

- Guidelines require alternatives analysis to determine the least environmentally damaging practicable alternative.
- For non-water dependent projects there is a presumption that practicable alternatives are available that do not involve impacts to special aquatic sites.
- Applicant must adequately rebut this presumption.
- Level of analysis commensurate with scale/scope/complexity of project.
- 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.



# Conducting Alternatives Analyses

- Practicable alternatives must be capable of being done (feasible) and available. An applicant's unwillingness to pursue an alternative does not mean it is not practicable.
- Costs are also considered. Guidelines state "the mere fact that an alternative may cost somewhat more does not necessarily mean it is not practicable."
- Undue deference cannot be given to the applicant's preferred project plan or project criteria such as integration of non-related project components, land ownership, property access, and zoning.
- "The Corps must determine, and [document] whether in fact some components of the project [those in waters of U.S.] could be dropped from the development altogether or reconfigured or reduced in scope, to minimize or avoid adverse impacts to waters of the U.S."  
[Plantation Landing Guidance]



# Conducting Alternatives Analyses

## Example

Alternative analysis criteria for a residential, golf course, commercial development included 500 contiguous acres of land for all project components, and a property with “no permits” nor local planning review requirements. Additionally project purpose stated “785-units, around golf course with 14-acre commercial parcel.” For on-site project viability the applicant stated he must have “785 units without back-to-back lots, with 18-hole golf course, clubhouse, lakes, and 15-acre commercial center.”

*A less restrictive project purpose may have resulted in less required acreage. There was no analysis of the necessity of unrelated project components being located on a contiguous block of land. Local permits or review of projects cannot be used to reject potential alternative project sites. A design with “no back-to-back lots” will necessarily require more land and restricts avoidance and minimization measures. The Corps did not independently evaluate practicability of alternatives and “viability” statements made by applicant.*



# Considering Compensatory Mitigation

- “Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least damaging practicable alternative for the purposes of requirements under Section 230.10(a).”  
[Mitigation MOA (EPA/DOA)]
- “We [Corps] fully support the Army-EPA MOA on mitigation, ... 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 Feb. 1990.”  
[Twisted Oaks Joint Venture Guidance]



# Conducting Cumulative Effects Analyses

- Required by 404(b)(1) Guidelines, NEPA, and Corps' Public Interest Review.
- 33 CFR 325.3 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."
- Guidelines clearly state 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.



# Adverse Impacts on Fish and Wildlife Resources and Significant Degradation of Waters of the U.S.

- “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 these Guidelines. The guiding principle should be that degradation or destruction of special [aquatic] sites may represent irreversible loss of valuable aquatic resources.”  
[404(b)(1) Guidelines Section 230.1]



# Recommendations

Ensure that issuance of 404 permits maintains and restores aquatic resources consistent with the 404(b)(1) Guidelines, RGLs, Policies, and court decisions.

