

**ADMINISTRATIVE APPEAL DECISION  
CHARLES MITCHELL, MITCHELL FAMILY INTERESTS, LLC  
DENIED PERMIT  
NEW ORLEANS DISTRICT (District)  
MVN-2011-00717-CQ**

**Division Engineer:** Major General Kimberly Peeples, Mississippi Valley Division<sup>1</sup>

**Review Officer (RO):** Brian Oberlies, Mississippi Valley Division

**Appellant:** Charles Mitchell, Mitchell Family Interests, LLC, represented by John King, of Breazeale, Sachse & Wilson, LLP, Appellant's legal counsel

**Regulatory Authority:** Section 404 of the Clean Water Act (33 U.S.C. 1344 *et seq.*)

**Date Acceptable Request for Appeal Received:** June 23, 2020

**Date of Appeal Conference/Site Investigation:** July 13, 2021

**Summary of Appeal Decision:** Dr. Charles Mitchell of Mitchell Family Interests, LLC, (Appellant) is appealing the decision of the U.S. Army Corps of Engineers (Corps) New Orleans District (District) to deny an after-the-fact (ATF) request under Section 404 of the Clean Water Act (file no. MVN-2011-00717-CQ). This denial carries implications for the Appellant, requiring restoration of wetlands impacted by unauthorized activities undertaken over a decade ago. The resolution of this appeal hinges on application of the 404(b)(1) Guidelines, particularly concerning alternatives analysis and the balancing of public and private interests. The permit was sought to construct a leveed borrow pit and recreational pond, totaling approximately 18.01 acres, on a 37-acre parcel of land west of Prairieville in Ascension Parish, Louisiana.

Reasons for appeal A.1 and A.2 (Conflicts of Interest) are not acceptable reasons for appeal. Reasons for appeal B (Invalid Request for Appeal Form), C.1 (Disregard of Dual Purposes), C.3 (More Stringent Practical Alternatives), C.4 (Secret Discussions with LDOTD), C.6.a (Inadequate 404(b)(1) Review - Information Solicitation), C.6.b (Improper Impact Evaluation), C.6.d (LDEQ Water Quality Certification), C.6.e (Incorrect Facts - Substrate), C.7 (Reforestation Plan), D.1 (Untimely Comments), D.2 (SLR Comments Disqualification), E.1 (Null Tolling Agreement), and E.2 (Cypress Farms Tolling Agreement) do not have merit. Reasons for appeal C.2 (Alternative Site Review), C.5 (Contradictory Requirements), and C.6.c (404(b)(1) Review - Added

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<sup>1</sup> Pursuant to 33 C.F.R. 331.3(a)(1), the Division Engineer has the authority and responsibility for administering the administrative appeal process. The Division Engineer accepted the request for appeal and identified the Mississippi Valley Division (MVD) as the decision authority of the final appeal decision. The Division Engineer delegated the review of this denied permit to the Mississippi Valley Division RO. The MVD Division Engineer retains overall responsibility for the administrative appeal process. The New Orleans District Engineer retains the final Corps decision-making authority for the approved jurisdictional determination (AJD).

Considerations) have merit and the permit denial decision is remanded to the District for reconsideration consistent with the discussion in this document.

**Background Information:** On April 21, 2008, the District received a complaint regarding a potential unauthorized activity involving the mechanized land clearing of 18.01-acres impacting approximately 9.15 acres for the excavation of a lake on a 37-acre parcel of land in Bluff Swamp. After verifying the violation, the District issued a cease-and-desist order on April 14, 2010, to protect the impacted aquatic resources on the property.

The District later issued an AJD on January 25, 2011, which identified the extent of the unauthorized activities on the property. In response, the Appellant submitted an ATF permit application, along with a Tolling Agreement, to the District on March 23, 2011.

The ATF application proposed to permanently impact 2.63 acres of wetlands for a pond levee and 6.52 acres of wetlands for excavation associated with a borrow pit and recreational pond. The District published a public notice on April 4, 2011, to inform the public about the proposal.<sup>2</sup> The notice generated comments from federal and state agencies, local organizations, and members of the public, which were conveyed to the Appellant, along with the District's concerns, on May 12, 2011.<sup>3</sup>

The Appellant modified the project and responded to the comments on August 15, 2011,<sup>4</sup> and provided additional information and revisions to the application on September 7, 2011.<sup>5</sup> After consideration, due to various factors, including the complexity of the case and the need for additional information, the District finalized its decision to deny the permit on April 20, 2020. The denial included a Site Restoration and Reforestation Plan to mitigate the impacts of the unauthorized activity.<sup>6</sup>

### **Information Received and Its Disposition During the Appeal:**

The administrative record (AR) is limited to information received by the District as of the signed date of the Notification of Administrative Appeal Options and Process Form, which is April 20, 2020. Pursuant to 33 C.F.R. 331.2, no new information may be submitted on appeal. This limitation ensures that the Division Engineer's decision on appeal is based on the same record that was available to the District Engineer when the permit was denied, thus preserving the integrity of the administrative review process.

To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the AR, because the

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<sup>2</sup> AR 0440

<sup>3</sup> AR 0390-0392

<sup>4</sup> AR 0341

<sup>5</sup> AR 0329-0331

<sup>6</sup> AR 0006-0008

District Engineer did not consider it in making the decision on the denied permit. However, in accordance with 33 C.F.R. 331.7(f), the Division Engineer may use such explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision. The information received during this appeal review and its disposition is as follows:

On June 23, 2020, the Appellant's legal counsel submitted a Request for Appeal (RFA) to the MVD, which was received the same day. MVD acknowledged the appeal request and confirmed that it met the necessary criteria for an administrative appeal. The District subsequently provided a copy of the AR to both the RO and the Appellant. In response to the Appellant's inquiries and Supplement to Reasons for Appeal, the District identified several documents that were erroneously omitted from the AR when initially transmitted. On August 11, 2020, the District provided a detailed breakdown of each omitted item in a table format and explained why specific items were not included in the ATF permit review.<sup>7</sup>

The informal appeal conference and site visit were conducted on July 13, 2021, in accordance with 33 C.F.R. 331.7. The purpose of the appeal conference was to clarify the Appellant's and the District's positions regarding the appeal. Discussion topics from the conference are documented in the "FINAL Appeal Conf MFR - MVN-2011-00717" memorandum. A draft of this document was circulated to attendees on November 24, 2021, but was not immediately finalized. The RO incorporated the Appellant's written comments into the draft and finalized the MFR on March 19, 2024 (attached).

In May 2022, a new MVD RO was assigned to the review of this appeal. On July 7, 2023, the Appellant submitted a supplemental memorandum providing his interpretation of the U.S. Supreme Court's decision in *Sackett vs. EPA* and its applicability to the wetlands identified on the site. However, this information is not relevant to the appeal because the District determined that the on-site wetlands directly abut a relatively permanent water, which maintains jurisdiction under the regulatory standards regardless of the *Sackett* decision.

## **Evaluation of the Appellant's Reasons for Appeal, Findings, and Instructions to the District Engineer**

### **REASON FOR APPEAL A: Conflicts of Interest Irredeemably Taint the Permit Decision**

This reason for appeal consists of two parts (A.1 and A.2), both alleging conflicts of interest as the basis for overturning the permit denial. While presented as distinct claims, both ultimately argue that these conflicts compromised the District's impartiality. The discussion of these two parts is combined and addressed below.

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<sup>7</sup> Supplement to RFA – Exhibit H

## 1. The District's Conflict of Interest

The Appellant alleges that the Spanish Lake Restoration (SLR) mitigation bank, located adjacent to the property, has sold credits to the District that were generated from property it did not own. The Appellant claims that the District was aware of this discrepancy, citing Dr. Mitchell's response to comments dated August 15, 2011, which pointed out that the mitigation bank incorrectly includes 28 acres belonging to "Mitchell and related interests".<sup>8</sup>

The Appellant argues that the District cannot retroactively undo those transactions or simply debit SLR for a corresponding number of credits.<sup>9</sup> As a result, the Appellant believes that the environmental impacts associated with these credit purchases have not been properly mitigated. The Appellant suggests that the District's decision to deny the subject permit and seek restoration of the property is an attempt to avoid addressing the issue of the incorrectly purchased and/or sold credits.

The Appellant further claims that this situation has compromised the District's ability to make a fair and impartial decision in this case. By allegedly ignoring the issue of the incorrectly sold credits, the Appellant believes that the District has demonstrated a lack of fairness and impartiality in its decision-making process.

## 2. Spanish Lake Restoration's Conflict of Interest

The Appellant alleges that a manager and member of the organization responsible for managing the SLR mitigation bank has a personal connection to Natural Resource Professionals, LLC, a company that was hired by the Appellant in 2010 to conduct a jurisdictional delineation of the property. Specifically, the Appellant claims that this individual is also the owner and beneficiary of Natural Resource Professionals, LLC.

The Appellant further states that SLR later submitted comments in opposition to the Appellant's application. The Appellant asserts that this constitutes a conflict of interest, as the individual in question had a personal stake in both the mitigation bank and the company hired by the Appellant. The Appellant claims that this conflict of interest was not disclosed to either the District or the Appellant, and that it may have influenced the decision-making process.

**Finding:** The allegations of a conflict of interest, whether attributed to the District's mitigation credit purchases from SLR or the connection between SLR and the Appellant's consultant, do not constitute acceptable reasons for appeal under the applicable regulations. The Appellant's claims, even if factually accurate, do not demonstrate how the District's permit decision was based on procedural errors or violations as defined by 33 CFR 331.5(a)(1), or an incorrect application of law, regulation, or policy; omission of material fact; incorrect application of regulatory criteria or guidelines; or use of incorrect data as defined by 33 CFR 331.5(a)(2). The record

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<sup>8</sup> AR 0333-0334

<sup>9</sup> RFA page 4.

reflects that the District was made aware of the Appellant's concerns regarding SLR's property ownership. However, awareness of these concerns alone does not transform allegations into valid grounds for appeal under 33 CFR 331.5(a)(1) or (a)(2). These are not acceptable reasons for appeal.

**Action:** No further action required.

**Discussion:** The appeal regulations, specifically 33 CFR 331.5(a)(1) and (a)(2), outline the exclusive reasons for appeal. These regulations define that an appeal can only be based on a procedural error, or a violation as defined by 33 CFR 331.5(a)(1); or that the decision was based on incorrect application of law, regulation, or policy; omission of a material fact; incorrect application of regulatory criteria or guidelines; or use of incorrect data as defined by 33 CFR 331.5(a)(2). A perceived conflict of interest, without the required demonstrable evidence that it resulted in a procedural error, or a violation as defined by 33 CFR 331.5(a)(1); or that the decision was based on incorrect application of law, regulation, or policy; omission of a material fact; incorrect application of regulatory criteria or guidelines; or use of incorrect data as defined by 33 CFR 331.5(a)(2). These conflict-of-interest allegations, even if factually accurate, do not, on their face, demonstrate how the District's permit decision was based on procedural errors or violations; or that the decision was based on incorrect application of law, regulation, or policy; omission of a material fact; incorrect application of regulatory criteria or guidelines; or use of incorrect data.

Therefore, the Appellant's claims of a conflict of interest, without any evidence that a procedural error or violation exists, are not acceptable bases for appeal under 33 CFR 331.5(a)(1) and (a)(2).

### **REASON FOR APPEAL B: The Request for Appeal Form Provided to Mitchell Is Invalid**

The Appellant contends that the Notification of Administrative Appeal Options and Process and Request for Appeal Form (NAO/NAP form) provided by the District is invalid due to a discrepancy in the identification of the applicant. Specifically, the Appellant notes that Charles Mitchell was the individual who submitted the ATF application, whereas the NAO/NAP form provided by the District with the April 20, 2020, permit denial listed the applicant as Mitchell Family Interest, LLC. The Appellant argues that this discrepancy in applicant identification invalidates the appeal process because the NAO/NAP form was not properly addressed to the correct party, thereby preventing Dr. Mitchell from exercising his appeal rights.

**Finding:** This reason for appeal does not have merit.

**Action:** No further action required.

**Discussion:** The Appellant alleges that a discrepancy in the identification of the applicant on the NAO/NAP form (listing Mitchell Family Interests, LLC, instead of Charles Mitchell) invalidates the form and prevents proper exercise of appeal rights.

According to appeal regulations, an administrative appeal can only be pursued by an "affected party" defined as a permit applicant, landowner, or individual with an identifiable and substantial legal interest in the property.<sup>10</sup> However, procedural errors that do not prejudice the substantive rights of a party are considered "harmless" and do not invalidate administrative process. This principle is rooted in the concept of administrative efficiency and fairness, recognizing that minor technical flaws should not derail an otherwise valid decision-making process. The relevant issue is whether the alleged error prevented the affected party from understanding their appeal rights or effectively exercising those rights.

The AR demonstrates that the District's identification of Mitchell Family Interests, LLC on the NAO/NAP form was not an error, and even if it were, it constituted harmless error that did not prejudice Dr. Mitchell's appeal rights.

First, the record shows that Dr. Charles Mitchell possesses financial interest in multiple companies, including Mitchell Family Interests, LLC, and Cypress Farms, LLC.<sup>11</sup> These entities were consistently referenced throughout the permit review process, with Dr. Mitchell holding authority to act on behalf of these entities.

Second, the District made efforts to clarify the identity of the applicant during the permit process. The District specifically requested notification of any changes to the applicant's name or contact information.<sup>12</sup> In response, the Appellant's agent requested that the applicant's name be changed to Mitchell Family Interests, LLC, a change that was subsequently reflected in the revised application submitted on August 31, 2011.<sup>13</sup> This demonstrates that both parties understood Mitchell Family Interests, LLC to be the appropriate applicant entity.

Third, Dr. Mitchell's role as the representative and point of contact for Mitchell Family Interests, LLC throughout the permit process establishes his clear authority to act on behalf of the entity. The record shows no confusion about Dr. Mitchell's standing to represent the company's interests or his ability to pursue administrative remedies.

The District's identification of Mitchell Family Interests, LLC, as the applicant on the NAO/NAP form accurately reflected the permit application record and enabled Dr. Mitchell to effectively pursue his appeal rights. Dr. Mitchell received the form, understood his appeal options, and successfully exercised those rights by filing this appeal.

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<sup>10</sup> 33 C.F.R. 331.2

<sup>11</sup> AR 0335-0336, AR 0134

<sup>12</sup> AR 0340

<sup>13</sup> AR 0335

Any technical discrepancy in applicant identification constitutes, at most, harmless error that did not impact Dr. Mitchell's substantive rights or ability to challenge the permit denial. Consequently, the Appellant's claim that the NAO/NAP form is invalid due to incorrect applicant identification does not have merit.

## **REASON FOR APPEAL C: The Decision Document**

This reason for appeal consists of 11 parts (C.1, C.2, C.3, C.4, C.5, C.6.a, C.6.b, C.6.c, C.6.d, C.6.e, and C.7):

### **1. The District Improperly Disregarded the Project's Dual Purposes**

The Appellant claims that the project at issue served a dual purpose. First, the project was intended to serve as a borrow pit, providing foundation material for various construction projects associated with Interstate 10 and Highland Road. Second, the project was designed to create a pond for aesthetic or recreational purposes.<sup>14</sup>

The Appellant alleges that the District acted arbitrarily and capriciously by unilaterally determining that "the overall purpose of the project is to provide foundation material for highway construction projects." The Appellant contends that the District improperly limited its review to this single purpose, thereby disregarding the Appellant's assertion that the project served a dual purpose: providing foundation material for highway construction and creating a recreational pond.

**Finding:** This reason for appeal does not have merit.

**Action:** No further action required.

**Discussion:** The Appellant argues that the District acted arbitrarily and capriciously by defining the project's overall purpose as providing foundation material for highway construction,<sup>15</sup> thereby disregarding the Appellant's claim that the project served dual purposes: both providing foundation material and creating a recreational pond.<sup>16</sup>

The Secretary of the Army, acting through the District, has authority to permit the discharge of dredged or fill material in waters of the United States.<sup>17</sup> The District conducts its analysis pursuant to the 404(b)(1) Guidelines,<sup>18</sup> the National Environmental Policy Act (NEPA),<sup>19</sup> and considers alternatives as part of its public interest review (PIR) evaluation.<sup>20</sup>

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<sup>14</sup> AR 0010, 0012, 0018

<sup>15</sup> AR 0011-0012

<sup>16</sup> AR 0010

<sup>17</sup> 33 C.F.R. 323.6(a)

<sup>18</sup> 40 C.F.R. 230

<sup>19</sup> 33 C.F.R. 325 Appendix B and 40 C.F.R. 1508; These regulations were in effect at the time the decision was made.

<sup>20</sup> 33 C.F.R. 320.4(a)(2)(ii)

Under NEPA, the District must consider the environmental impacts of permit decisions under Section 404 of the Clean Water Act (33 U.S.C. § 1344). As part of this review, the District must define the “project purpose,” which is critical because it frames the scope of environmental analysis and dictates the range of reasonable alternatives that must be considered. The District bears responsibility for determining the overall project purpose, and this determination must be reasonable and consistent with the applicant's goals and applicable regulations.<sup>21</sup>

The 2009 Regulatory Standard Operating Procedures establish that the overall project purpose should be specific enough to define the applicant's needs but not so restrictive as to constrain the range of alternatives that must be considered under the 404(b)(1) Guidelines.<sup>22</sup> The District has discretion to base the purpose determination on various factors, including but not limited to the applicant’s stated goals, and makes the final determination even if it differs from the applicant’s submission.<sup>23</sup>

The project purpose determination directly influences alternatives evaluation. Under the 404(b)(1) Guidelines, an alternative must be “practicable” – meaning available and capable of being accomplished considering cost, existing technology, and logistics in light of the overall project purposes.<sup>24</sup> Therefore, an alternative’s practicability is assessed based on its ability to achieve the defined project purpose.

The District's determination that the project's primary purpose is foundation material extraction is supported by the AR and represents a reasonable interpretation of the project design. While the Appellant asserted dual purposes, examination of the project reveals that the recreational pond results directly from the primary commercial activity rather than constituting a separate, independent purpose. The Appellant intends to utilize the excavation created by foundation material extraction as a recreational pond. The extraction activity drives the project economics and design, while the pond represents the intended beneficial use of the resulting excavation. As the District's decision document (page 2) states, "The Corps has identified the overall project purpose as a commercial borrow pit. The applicant already has an approximate 2.77-acre recreational area with a leveed fishing pond on the property, immediately adjacent to the subject permit area." This demonstrates the District's consideration of the pre-existing recreational opportunities on the property when defining the project's primary purpose.

The District properly evaluated the project's design and intent rather than simply accepting the Appellant's characterization at face value. This approach ensures consistency with both the 404(b)(1) Guidelines and NEPA requirements. The AR

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<sup>21</sup> 2009 Regulatory Standard Operating Procedures

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> 40 C.F.R. 230.10(a)(2)

supports the District's conclusion that foundation material provision constitutes the primary purpose, with the recreational pond serving as an incidental benefit.<sup>25</sup>

The District's project purpose determination aligns with the 2009 Regulatory Standard Operating Procedures and applicable regulatory frameworks under the Clean Water Act. The District did not omit material facts or misapply regulations when determining that the overall project purpose is foundation material provision for highway construction. The evidence supports the conclusion that the recreational pond is an incidental component rather than an essential, independent purpose.

The Appellant failed to demonstrate that the project truly serves dual purposes rather than a primary purpose with secondary benefits. Therefore, the District's decision to define the project purpose as foundation material extraction for highway construction projects was reasonable and legally supportable.

## **2. The District Improperly Limited Its Alternative Sites Review**

The Appellant argues that the District failed to properly evaluate alternative sites for the project.<sup>26</sup> The Appellant provided the District with alternative site criteria and evaluated 12 different sites within a 20-mile radius based on those criteria. However, the Appellant claims that the District failed to properly consider this information or provide independent facts to support its decision.

The Appellant alleges the District unilaterally disregarded and ignored the criteria it had identified to evaluate the alternative sites, instead relying on a single criterion - the Louisiana Department of Transportation and Development (LDOTD) criteria for soils used in roadways - to judge all alternative sites. The Appellant contends that the District did not provide any facts to refute its own conclusion that the 12 alternative sites evaluated did not contain the necessary soils and instead relied on speculation to presume that an alternative site existed.

The Appellant also challenges the District's reliance on alleged statements from the LDOTD that were incorrect. For example, LDOTD allegedly stated that "source distance is not a factor" in determining the suitability of a borrow site. However, the Appellant claims this statement is incorrect, as transportation costs from the borrow site to the project site would significantly impact the bid and contract price. The Appellant believes that the District's failure to consider this factor and its reliance on incorrect information demonstrates a lack of thoroughness and fairness in their evaluation of the alternative sites.

Overall, the Appellant argues that the District failed to provide a full and fair review of the alternative sites, instead relying on speculation to reject the proposed site and that the District's actions were not supported by evidence and were contrary to the law and regulations governing the evaluation of alternative sites.

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<sup>25</sup> AR 0072, 0288.

<sup>26</sup> RFA p. 6-7.

**Finding:** This reason for appeal has merit.

**Action:** Upon remand, the District should re-evaluate the project's purpose and water dependency in accordance with the 404(b)(1) Guidelines. The District should clearly explain in its decision document why the proposed project is not water-dependent, if that is the District's conclusion. This is critical, as the water dependency dictates how alternatives must be assessed.

The District should also re-examine the project's potential impacts on the aquatic ecosystem and fully consider practicable alternatives to the proposed discharge that would have less adverse effects on the aquatic ecosystem. This analysis should be clearly documented in the decision document, and the District should provide a thorough explanation of its consideration of the availability of practicable alternatives. Specifically, the District should provide detailed analyses of the Appellant's 12 alternative sites and explain *specifically* why each one was rejected based on a clear and documented application of the "practicability" criteria outlined in the 404(b)(1) Guidelines. Simply citing LDOTD standards is insufficient; the District must demonstrate how those standards directly relate to cost, existing technology, and logistics in light of the overall project purpose for each site. The District should justify its reasoning for requiring that LDOTD requirements were met and that if the project could not be economically or logistically considered, provide information as to why the alternatives in question could not be environmentally impactful and still serve the project purpose.

**Discussion:** The key issue is whether the District properly evaluated alternative sites under the 404(b)(1) Guidelines, specifically whether the District properly applied the presumption that practicable alternatives exist for non-water-dependent projects and whether the District's analysis was sufficiently documented and reasoned.

Under the 404(b)(1) Guidelines, the District must consider practicable alternatives to the proposed discharge that would have less adverse effects on the aquatic ecosystem. For projects that are not water-dependent, the Guidelines establish a rebuttable presumption that practicable alternatives exist unless the applicant clearly demonstrated otherwise.<sup>27</sup> A "practicable alternative" is one that is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose."<sup>28</sup>

The District's evaluation of alternatives was flawed in several key respects. First, while the District's decision document contains a water dependency determination, this determination is not clearly articulated in the project purpose section but is buried in the "General evaluation" section of the decision.<sup>29</sup> This placement creates ambiguity about

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<sup>27</sup> 40 C.F.R. 230.10(a)(3).

<sup>28</sup> 40 C.F.R. 230.10(a)(2).

<sup>29</sup> AR 0041

whether the District properly applied the presumption that practicable alternatives exist for non-water-dependent projects.

Second, the District's analysis needs further clarification regarding the consideration of the rebuttable presumption established by the Section 404(b)(1) Guidelines. For non-water-dependent projects like borrow pits, there is a presumption that practicable alternatives exist that would have less adverse impact on the aquatic ecosystem. While the District's decision document states that the "applicant did not provide convincing evidence to rebut the less damaging alternative presumption, when considering the no-build alternative due to the high quality of forested wetlands located in the project area (page 10)," the record lacks a transparent and detailed explanation of how this presumption was specifically addressed and analyzed.

Third, the AR does not contain sufficient documentation of the District's independent evaluation of the Appellant's alternative sites analysis. The Appellant evaluated 12 alternative sites within a 20-mile radius in its application. While the District's response does provide some rationale for rejecting each site, this rationale appears to rely heavily on general statements from LDOTD without providing detailed analysis of each proposed alternative or clear factual support for rejecting the Appellant's analysis on a site-specific basis. For instance, the District often cites LDOTD standards without demonstrating how those standards directly relate to the "practicability" criteria outlined in the 404(b)(1) Guidelines (cost, existing technology, logistics in light of the overall project purpose). For example, with regards to Alternative 1, the District's decision document (page 5) mentions that "This site was not considered viable due to approximately 40% of the mapped soils did not meet criterion number 3b." while the Agent's comment that said soil was "upland (non-hydric)". In addition, the site was removed due to "40% contained potential wetlands." A more independent evaluation would have sought to determine if Alternative 1's wetland and upland location was less environmentally damaging compared to the preferred alternative site's transitional hardwood-cypress forest and cypress-tupelo swamp. It also would have been appropriate for the District to justify its criteria by considering the amount that 40% and LDOTD qualifications factor into consideration when analyzing practicable and environmentally impactful alternatives.

The District's failure to clearly document its water dependency determination and adequately consider the presumption of practicable alternatives in conjunction with site-specific analyses undermines the validity of its alternatives analysis. This is particularly problematic because the alternatives analysis is a critical component of the 404(b)(1) Guidelines evaluation and directly affects whether a permit can be issued. It appears the District's criteria were arbitrary in nature, as there was a presumption that LDOTD requirements were met, and that the alternatives could not be economically or logistically considered to be constructed when a less impactful alternative that was in accordance with the project purpose could have been achieved (District's permit denial decision document, pages 6, 9).

### 3. The District Imposed A More Stringent Requirement Regarding Practical Alternatives

The Appellant argues that the District failed to properly apply the rebuttable presumption standard, which requires that the Appellant be given an opportunity to demonstrate that no practicable alternative exists. The Appellant claims that the District's use of the phrase "clear and convincing evidence" in its analysis<sup>30</sup> is inconsistent with the regulation and effectively raises the bar to an impossible standard. By using this language, the District allegedly made it impossible for the Appellant to rebut the presumption, thereby violating the regulatory framework.

**Finding:** This reason for appeal does not have merit.

**Action:** No further action required.

**Discussion:** The Appellant argues that the District did not properly apply the rebuttable presumption standard under 40 C.F.R. 230.10(a)(3) in its denial of the Appellant's permit application. Specifically, the claim is that the District, by using the phrase "clear and convincing evidence," imposed a more stringent requirement, making it impossible for the Appellant to demonstrate that no practicable alternative exists (i.e., the Least Environmentally Damaging Practicable Alternative or (LEDPA)). This reason for appeal does not challenge the water dependency determination of the project, or the specific results of the alternative site analyses, but rather whether the standard of review was appropriate.

40 C.F.R. 230.10(a)(3) establishes a rebuttable presumption that no discharge of dredged or fill material should be permitted 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. The applicant bears the burden of rebutting this presumption by demonstrating that no such practicable alternative exists. The alternative analysis must consider all relevant factors, including but not limited to, costs, existing technology, logistics, and overall project purposes. The District's role is to review the applicant's analysis to determine whether the applicant has successfully rebutted the presumption and demonstrated the LEDPA.

The Appellant objects to the District's use of the phrase "clear and convincing evidence" arguing that it imposed a higher standard. However, the use of this language does not represent an increased burden of proof or an altered legal standard. Rather, it reflects the District's expectation that the applicant will provide a thorough and convincing analysis to support their claim that no practicable alternative exists. The District's internal standard for review of the evidence put forward requires the District to find that the applicant's evidence be "thorough and convincing." Critically, the record supports the District's determination that the Appellant's alternatives analysis was incomplete and failed to adequately consider all relevant factors. The requirement that the District

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<sup>30</sup> RFA, citing Decision Document p. 10 and 31, AR 0039.

consider thorough and convincing evidence put forth by the agent is not for a procedural violation, but rather to determine that it made no error in the determination of the alternatives analysis based on information and facts that were submitted.

While the Appellant had the opportunity to provide sufficient evidence to support their claim and demonstrate the LEDPA, the District's decision document clearly indicates that the Appellant did not provide the type of analysis that supported their determination of having met the LEDPA. The District's rejection of the alternative analysis was based upon the analysis being an unsubstantiated claim in its conclusion.

Therefore, the District did not use an improper or unduly restrictive standard when analyzing the alternatives analysis or making the decision, although the District's decision to reject an alternative that was improperly supported was the underlying cause. The burden of proof remained on the Appellant throughout the process, regardless of the use of "clear and convincing evidence" language.

#### **4. The District's Secret Discussions With LDOTD Prejudices Mitchell**

The Appellant asserts that because the District met with LDOTD without the Appellant present, and the District appeared to largely rely on information received during that meeting in its decision making, the Appellant was deprived of any opportunity to address or rebut the information discussed.

**Finding:** This reason for appeal does not have merit.

**Action:** No further action required.

**Discussion:** The Appellant argues that because the District's met with LDOTD without the Appellant present, and the District appeared to rely on information received during that meeting in its decision-making, the Appellant was deprived of any opportunity to address or rebut the information discussed, thereby prejudicing the decision. The key question is whether this lack of opportunity to respond to the LDOTD input undermines the fairness and validity of the District's decision.

According to 33 C.F.R. 320.4(a)(3), full consideration and appropriate weight will be given to all comments, including those of federal, state, and local agencies, and other experts on matters within their expertise. The District is authorized to consult with federal, state, and local agencies, as well as other stakeholders, to gather information and inform its decision-making process. The District's review of the applicant's documentation and proposal also took into consideration input received from those with subject matter expertise, such as the LDOTD. However, this process must be fair and not deprive the applicant of a reasonable opportunity to present their case.

In this instance, the District's meeting with LDOTD was an informational gathering meeting with a state agency that is a recognized expert on the use of borrow material for highway projects in Louisiana, a legitimate effort to gather information and clarify

issues related to the permit application. The question is whether the Appellant had a reasonable opportunity to address the substance of the LDOTD's feedback.

The notes of the conversation with Mr. Savoie, as reflected in the AR at page 71, do not introduce new data or evidence but confirm that the LDOTD had made statements on the use of similar material for highway projects. This information did not introduce a new basis for denial. The Appellant had ample opportunity to provide evidence, information, and argument, and the District's decision demonstrates, through an evaluation of all the information in its record, that the Appellant's argument failed. The Appellant had ample opportunity to provide information and comments on the permit application, and the District's decision was based on a comprehensive evaluation of all relevant factors, including the information provided by LDOTD.

Therefore, the Appellant's assertions that the meeting with LDOTD was improper and that it was deprived of an opportunity to address or rebut the information discussed do not have merit. The process followed here was consistent with regulatory requirements and was implemented in a reasonable and unbiased manner. The District followed 33 C.F.R. 320.4(a)(3) requirements during the project review.

## **5. The District's Contradictory Requirements Imposed on Mitchell**

The Appellant claims that the District applied contradictory standards simultaneously requiring the Appellant to be "an established business that provides borrow material",<sup>31</sup> while also acknowledging that "borrow material can be sourced from any location."<sup>32</sup> The Appellant argues that these conflicting positions create an impossible standard: the District demands specialized business experience in borrow material provision while simultaneously recognizing that such specialized experience is not necessary since material can come from anywhere.

**Finding:** This reason for appeal has merit.

**Action:** The District should re-evaluate the permit application focusing on potential environmental impacts and the adequacy of proposed mitigation, excluding any consideration of Mitchell's business history, and clarify the role of alternative borrow sites in its decision. A revised decision document should clearly articulate the rationale for any denial based on regulatory criteria and demonstrable impacts.

**Discussion:** The relevant issue is whether the District improperly applied extra-regulatory criteria by requiring the Appellant to demonstrate status as an 'established business that provides borrow material,' when such requirements are not found in applicable regulations and contradict the District's own acknowledgment that borrow material sourcing is not location- or operator-specific.

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<sup>31</sup> AR 0012

<sup>32</sup> AR 0014-015, 0038

Section 404 permitting regulations (33 C.F.R. Part 320 *et seq.*) focus on potential environmental impacts from proposed activities and the applicant's ability to mitigate those impacts. While the District may consider factors related to a project proponent's capacity to ensure regulatory compliance, such considerations must be directly linked to potential environmental impacts and clearly articulated in the decision document.

The AR reveals contradictory positions that undermine the decision's rational basis. The District's decision document states that the Appellant lacks documentation demonstrating operation as "an established business that provides borrow material sites to dirt pit contractors."<sup>33</sup> However, the same decision acknowledges that "landowners frequently make their property available as a source of borrow material" and that such material "can be sourced from any location."<sup>34</sup>

These contradictory positions create several problems. First, the District has not established a regulatory basis for requiring specialized business experience in borrow material operations. Second, the District's acknowledgment that material can be sourced from any location by any landowner directly contradicts the apparent requirement for specialized business credentials. Third, the District has failed to establish a clear nexus between the Appellant's business history and the likelihood of adverse environmental impacts from this specific project.

The inclusion of business experience criteria not found in applicable regulations, combined with contradictory statements about the necessity of such experience, creates confusion about the actual basis for permit denial. This represents an application of extra-regulatory criteria that lacks rational connection to environmental protection objectives under Section 404.

The District's failure to provide a clear regulatory basis for the business experience requirement, coupled with its contradictory acknowledgment that specialized experience is unnecessary, undermines the transparency and validity of the decision-making process.

## **6. The District Failed to Properly Review The 404(b)(1) Guidelines**

### **a. The District did not provide a full and adequate review of the 404(b)(1) Guidelines**

The Appellant asserts that the District's 404(b)(1) Guidelines review was flawed due to its failure to solicit essential information from the Appellant. Despite the District's claim that the Appellant was unwilling to provide additional information, the Appellant maintains that the District did not make any requests for information after 2011. The Appellant argues that this lack of diligence on the part of the District resulted in an incomplete review, which in turn prevented the District from making a well-informed decision about the project's compliance with the Guidelines. The Appellant concludes

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<sup>33</sup> AR 0012

<sup>34</sup> AR 0014-015, 0038

that the District's failure to request necessary information was a critical omission that undermined the integrity of the permit review process.

**Finding:** This reason for appeal does not have merit.

**Action:** No further action required.

**Discussion:** The Appellant argues that the District failed to properly review the 404(b)(1) Guidelines by not soliciting essential information from the Appellant, despite the Appellant's claim that no such requests were made after 2011, resulting in an incomplete review and an uninformed decision.

The District's review of the 404(b)(1) Guidelines takes into account the information provided by the applicant, as well as other relevant factors.<sup>35</sup> While the District may solicit additional information from the applicant, it is not required to do so beyond what is necessary to make a determination, provided the District has made a reasonable effort to obtain all necessary information.<sup>36</sup> The regulations do not require the District to repeatedly solicit information from the applicant but rather make a reasonable evaluation based on the information on hand. If an applicant refuses to provide information, the regulations do not suggest that action prevents an agency from making its own decision.<sup>37</sup>

In this instance, the District did not request additional information from the Appellant after 2011 because the Appellant's agent had explicitly stated that "we will not submit additional information on this application."<sup>38</sup> While the Appellant's agent also offered to provide information if the need arose, the District reasonably interpreted this statement as a clear indication that the applicant was standing by its existing submission. Furthermore, the application was submitted and processed under the understanding that there was a violation of the Clean Water Act occurring; therefore, the applicant is responsible for providing a complete and accurate application with the data and analysis necessary to demonstrate compliance with applicable regulations.<sup>39</sup> The record is clear that, at no point after 2011 did the applicant proactively submit any further evidence to address any of the concerns that had been raised.

Based on the available information, the District affirmatively determined that it had sufficient information to make a determination regarding the permit application. The District's determination considered the potential impacts of the project on the aquatic environment. While the District acknowledges the project's completion date, its analysis under the 404(b)(1) Guidelines considers both the actual impacts observed, ATF Permit

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<sup>35</sup> 40 C.F.R. 230.10(b), 33 C.F.R. 325.1(e), and 33 C.F.R. 325.1(d)(8).

<sup>36</sup> 33 C.F.R. 325.1(e)

<sup>37</sup> Id.

<sup>38</sup> AR 0044

<sup>39</sup> 33 C.F.R. 325.1(e)

application date, and the potential for ongoing or future impacts stemming from the project as it currently exists.<sup>40</sup>

Consequently, the District followed the 404(b)(1) Guidelines, and its analysis was consistent with those requirements. The Appellant's assertion that the District failed to request necessary information to complete the 404(b)(1) Guidelines review does not have merit.

**b. The District improperly evaluated anticipated impacts vs. actual impacts**

The Appellant argues that the District's 404(b)(1) Guidelines review was inadequate because it failed to assess the actual environmental impacts of a project that has existed since before 2008. The Appellant contends that instead of evaluating the observable effects of the completed pond, the District improperly relied on anticipated impacts and predictive effects when conducting its 404(b)(1) Guidelines review.

The Appellant cites 40 C.F.R. 230.11, which requires consideration of the "long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic environment." The Appellant asserts that since the discharge occurred over a decade ago, the District was obligated to evaluate actual environmental effects rather than speculative impacts.

The Appellant concludes that the District's failure to assess demonstrable environmental impacts from the completed project renders the 2020 decision deficient and contrary to law, arguing that a thorough evaluation of actual impacts is necessary to determine 404(b)(1) Guidelines compliance.

**Finding:** This reason for appeal does not have merit.

**Action:** No further action required.

**Discussion:** The relevant inquiry is whether the District was required to base its 404(b)(1) Guidelines analysis on observed environmental impacts from the completed project rather than standard impact assessment methodologies used for ATF permit applications.

Regulations at 40 C.F.R. 230.11 require consideration of the "long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic environment." However, Corps' regulations at 33 C.F.R. 326.3(e) specify that ATF permit applications must be processed according to the same procedures applicable to standard permit applications under 33 C.F.R. parts 320 through 325.

The regulations do not establish different analytical requirements for ATF permits based on project completion timeframes. The District's evaluation methodology must be

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<sup>40</sup> 33 C.F.R. 326.3(e)(1), 40 C.F.R. 230.11, 33 C.F.R. Part 320-332.

consistent with standard 404(b)(1) Guidelines procedures, which focus on assessing potential environmental impacts using established impact assessment protocols.

The District's evaluation was based on information available in the AR and followed standard impact assessment procedures. The regulations do not require Districts to conduct independent post-completion environmental monitoring studies or to base permit decision solely on observed impacts from completed projects.<sup>41</sup>

The Appellant bears responsibility for providing relevant information to support the permit application, including any data demonstrating actual environmental impacts. The AR shows that the District's evaluation considered the information provided by the Appellant without evidence that additional actual impact data was available but not considered.

The District was not obligated to conduct independent field studies to assess actual environmental impacts, particularly when the Appellant did not provide such data or request that the District consider specific observed impacts. Nothing in the correspondence, site visits, or application materials indicated that actual impact assessment was necessary or that relevant data existed but was not being considered.

The District properly applied the 404(b)(1) Guidelines using standard impact assessment methodologies appropriate for ATF permit applications. The regulations do not require different analytical approaches based on project completion timeframes, nor do they mandate independent assessment of actual impacts when applicants do not provide such information.

The Appellant's argument essentially requests preferential treatment that would require the District to conduct environmental studies not required by regulation. The District's approach was consistent with applicable regulatory procedures and the information available in the AR.

In conclusion, the District properly considered impacts in accordance with the relevant regulatory provisions and the Appellant's claims do not have merit.

### **c. The District added several considerations not specifically included in the Guidelines**

The Appellant states that the District added several considerations not specifically included in the 404(b)(1) Guidelines, such as, aquifer recharge, baseflow, mixing zone, traffic, energy consumption, safety, air quality, noise, land use; economics, farmland, and food and fiber production, and claims that it was never able to address these factors.

**Finding:** This reason for appeal has merit.

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<sup>41</sup> See 33 C.F.R. 326.3(e)(1), 33 C.F.R. 325.1(e), 33 C.F.R. 320.3(a), 33 C.F.R. 325.1(b).

**Action:** The District should establish that its documentation clearly distinguishes between its evaluation under the 404(b)(1) Guidelines and its PIR and should not combine or conflate these two evaluations. This separation is critical to ensure a fair and transparent decision-making process.

On remand, the Appellant should have the opportunity to participate in the re-evaluation process. The Appellant may request that the District consider additional factors or alternative approaches in its evaluation under the 404(b)(1) Guidelines and/or its PIR.<sup>42</sup> The District should consider any such requests and provide a clear and transparent explanation of its decision-making process in its revised evaluation and documentation.

**Discussion:** The Appellant argues the District improperly combined its evaluation under the 404(b)(1) Guidelines with its Public Interest Review (PIR), thereby confusing the analytical framework and denying the Appellant a fair opportunity to address relevant factors under the appropriate regulatory standards.

Under the Corps' regulatory program, the evaluation of effects under the PIR (33 C.F.R. 320.4) and the 404(b)(1) Guidelines (40 C.F.R. 230.10) are distinct analytical processes that serve different purposes and must be conducted separately. The 404(b)(1) Guidelines focus specifically on environmental impacts to aquatic resources from the discharge of dredged or fill material, while the PIR considers broader public interest factors to determine whether the overall project serves the public interest.

The Corps conducts a sequential analysis where it first determines whether the proposed project complies with the 404(b)(1) Guidelines. Only if the project meets the Guidelines does the analysis proceed to the PIR to determine if the overall benefits outweigh the potential negative impacts.<sup>43</sup> This sequential approach ensures that projects meet basic environmental standards before being evaluated for broader public interest considerations. It prevents the balancing of socio-economic benefits against unacceptable environmental damage.

The District's decision document improperly combines these two distinct evaluations. A review of the AR reveals that the District included PIR factors such as traffic, energy consumption, safety, air quality, noise, land use, economics, farmland, and food and fiber production within its 404(b)(1) Guidelines analysis.<sup>44</sup> While some factors listed by the Appellant, such as aquifer recharge, baseflow, and mixing zone effects, are directly related to impacts on aquatic resources and are appropriate considerations under the 404(b)(1) Guidelines, the inclusion of broader socio-economic factors within the Guidelines analysis represents an improper conflation of the two review processes.

This conflation creates several problems. First, it obscures the District's reasoning under each analytical framework, making it difficult to determine whether the project actually fails to meet the 404(b)(1) Guidelines or whether the District's concerns relate

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<sup>42</sup> 33 C.F.R. 325.2(d), 33 C.F.R. 320.4(a)(1), 33 C.F.R. 325.1(e)

<sup>43</sup> 40 C.F.R. 230.10(a), 33 C.F.R. 320.4(a)(1), 33 C.F.R. 320.4(b)

<sup>44</sup> AR 0021-0022, AR 0025-0026.

to broader public interest factors. Second, it denies the Appellant the opportunity to address factors under the appropriate regulatory standards and analytical framework. Third, it may result in the application of incorrect legal standards, as the 404(b)(1) Guidelines have specific requirements for alternatives analysis, mitigation sequencing, and environmental impact assessment that differ from PIR considerations.

The District's failure to maintain clear analytical separation between the 404(b)(1) Guidelines evaluation and the PIR undermines the transparency and validity of its decision-making process. The Appellant cannot adequately respond to the District's concerns without understanding which analytical framework applies to specific factors and what legal standards govern the District's evaluation of those factors.

Therefore, the District's decision to combine its evaluation of these PIR factors with its evaluation of the 404(b)(1) Guidelines was inappropriate. The District will ensure that its documentation clearly distinguishes between its evaluation under the 404(b)(1) Guidelines and its PIR and shall not combine or conflate these two evaluations. This reason for appeal has merit.

**d. Louisiana Department of Environmental Quality's (LDEQ) Water Quality Certification contain many of the same criteria as the Guidelines**

The Appellant alleges that the District failed to give proper consideration to the decision made by the LDEQ regarding criteria set forth in the Louisiana Code, which are similar to those found in the 404(b)(1) Guidelines. Specifically, the Appellant claims that the District disregarded or rejected the LDEQ's determination, which had already evaluated the project's compliance with state standards that it says are analogous to the federal guidelines. By doing so, the Appellant argues that the District failed to take into account relevant and applicable state criteria and instead made its own determination without properly considering the LDEQ's expertise and findings. This, the Appellant asserts, was an error that undermined the validity of the District's decision.

**Finding:** This reason for appeal does not have merit.

**Action:** No further action required.

**Discussion:** The Appellant asserts that the District failed to give proper consideration to the decision made by the LDEQ regarding criteria set forth in the Louisiana Code, which are similar to those found in the 404(b)(1) Guidelines, by disregarding or rejecting the LDEQ's determination. However, the Appellant is conflating two separate and distinct processes with this argument. The LDEQ's decision is solely applicable to a Section 401 Water Quality Certification, which is required to obtain a Section 404 permit. The District is required to conduct its own independent analysis of proposed projects under the 404(b)(1) Guidelines.<sup>45</sup> The District has no regulatory role in the

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<sup>45</sup> 33 C.F.R. 320.4(d).

Section 401 process but must ensure the certification is received prior to issuance of a permit.

The District's independent analysis of the proposed project, as required by the 404(b)(1) Guidelines, was conducted in accordance with the Corps' regulatory authority and confirmed that the LDEQ had issued the required Section 401 Water Quality Certification.<sup>46</sup> The District also considered any conditions or limitations included in the LDEQ's certification during its alternatives analysis. While the receipt of a Section 401 Water Quality Certification indicates that the proposed project, in general, meets the state's water quality standards the District retains the responsibility to ensure its permitting decision is consistent with those standards as reflected in the certification and to independently evaluate practicable alternatives under the 404(b)(1) Guidelines was conducted independently. To ensure transparency in this regard, the District should explicitly demonstrate in the record how the conditions or limitations within the LDEQ's certification were integrated into and influenced its analysis of practicable alternatives and the overall determination of the LEDPA.

Therefore, the District properly considered the Section 401 Water Quality Certification, as required by regulation, and the District's actions were appropriate and consistent with regulation and policy. The Appellant's claim that the District disregarded or rejected the LDEQ's decision does not have merit.

**e. The District considered facts that are incorrect i.e. "Substrate"**

The Appellant argues that the District's analysis of the project's impact on the substrate contains a factual error. Specifically, the District stated that the project would involve adding "additional hauled in fill material" to the site. However, the Appellant contends that this statement is inaccurate because the levee was constructed entirely from material excavated on-site from the borrow pit, with no external fill material imported to the project.

**Finding:** This reason for appeal does not have merit because any error was harmless and did not affect the outcome of the decision.

**Action:** No further action required.

**Discussion:** The issue is whether the District's incorrect characterization of fill material sources constitutes a material error that undermines the validity of the substrate impact analysis under the 404(b)(1) Guidelines.

The District's analysis under the 404(b)(1) Guidelines must be based on accurate information and properly assess the project's potential impacts on the aquatic environment. However, not all factual errors invalidate a decision. Errors are considered "harmless" when they do not affect the analytical outcome or decision rationale.

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<sup>46</sup> AR 0006-0043, 40 C.F.R. 230.10(a), 33 C.F.R. 320.3

The District's decision document stated: "The proposed activities would redistribute native soil profiles and add additional hauled in fill material to the site."<sup>47</sup> Review of the AR reveals that there is no evidence that fill material was imported from external sources during the construction of the pond. The Appellant correctly identifies this as a factual error.

However, this error does not undermine the District's substrate analysis. The District's evaluation properly focused on the redistribution of native soil profiles, which represents the actual environmental impact regardless of whether materials originated on-site or off-site. The AR demonstrates that the District considered the relevant environmental effects: impacts on subsurface water flows, stormwater runoff, and water storage capacities resulting from soil redistribution.

The incorrect characterization of fill material sources did not influence the District's impact assessment or contribute to the permit denial rationale. The District's analysis addressed the substantive environmental concern - soil profile redistribution and its hydrological effects - rather than relying on the source of materials as a determining factor.

The District's substrate analysis was conducted in accordance with 404(b)(1) Guidelines requirements and was based on thorough review of available data regarding the actual environmental effects of soil redistribution, independent of material sourcing details.

Therefore, this appeal reason does not have merit.

## **7. The Reforestation Plan**

The Appellant challenges the District's reforestation plan as arbitrary, capricious, and contrary to law.<sup>48</sup> The Appellant raises several specific objections to the plan's development and scope.

First, the Appellant claims inadequate consultation, arguing that it was not consulted about the plan's development and that the District failed to provide supporting evidence in the AR, including basic technical details such as seedling density requirements necessary to assess the plan's feasibility.

Second, the Appellant contends the plan is technically unachievable due to site conditions, specifically arguing that low water levels will prevent the area from meeting wetland criteria within the prescribed three-year timeframe and that the plan's prohibition on soil management activities after the levee degradation will hinder restoration success.

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<sup>47</sup> AR 019

<sup>48</sup> 33 C.F.R. 326.3(e)(2)

Third, the Appellant questions the plan's scope, arguing that requiring restoration of all 18 acres is excessive since not all area were fully cleared, making the requirement overly broad and poorly tailored to actual site conditions.

Finally, the Appellant challenges the plan's structure, questioning why compensatory mitigation from a mitigation bank is only available as a backup option rather than as an alternative to on-site restoration, suggesting this approach is inconsistent and unnecessarily restrictive.

**Finding:** This reason for appeal does not have merit.

**Action:** No further action required.

**Discussion:** The Appellant argues that the District's requirement exceeds regulatory authority or lacks adequate justification, considering the Appellant's claims regarding consultation, technical feasibility, appropriate scope, and alternative mitigation options.

Corps regulations at 33 C.F.R. 326.3(e)(2) explicitly authorize the District Engineer to prescribe final corrective actions, including restoration measures, when an ATF permit is denied. This regulatory authority allows the District to adopt restoration proposals submitted by applicants or develop appropriate restoration requirements based on site conditions and impact scope.

The District's reforestation plan was not developed unilaterally but was based substantially on the Appellant's own restoration proposal. In December 2011, the Appellant's consultant submitted a "Site Restoration Plan"<sup>49</sup> proposing restoration measures for 8.86 acres of temporary impacts. The District developed its "Reforestation Plan"<sup>50</sup> using information from the permit application and the Appellant's consultant's report as the foundation.

While the scope differed between the two plans, this difference reflects the distinction between the Appellant's voluntary restoration proposal (8.86 acres of temporary impacts) and the District's authority to require complete restoration following permit denial (18.01 acres representing total disturbance area). The District's expanded scope is reasonable given that permit denial requires restoration of all impacts, not just those the applicant originally proposed to address voluntarily.

The District's plan adopted the same restoration approaches, tree species composition, and planting densities proposed by the Appellant's own consultant, undermining claims that the plan lacks technical basis or is unfeasible. The Appellant's consultant presumably considered site conditions when developing the original restoration plan, and the District's adoption of these technical specifications suggests appropriate consideration of feasibility factors.

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<sup>49</sup> AR 0174-0184

<sup>50</sup> AR 0006-0008

The District's plan includes provisions for alternative mitigation (compensatory mitigation from mitigation banks) specifically to address potential restoration challenges, demonstrating reasonable planning for contingencies rather than rigid inflexibility.

The requirement to restore the entire 18-acre impact area is consistent with regulatory authority to require complete remediation following permit denial. The District was not required to limit restoration to areas the Appellant originally proposed to address voluntarily, particularly when permit denial necessitates comprehensive impact remediation.

Regarding consultation, the AR shows the District based its plan on information provided by the Appellant during the permit process, representing meaningful consideration of the Appellant's technical input and restoration expertise.

The District's reforestation plan represents a reasonable exercise of regulatory authority based on the Appellant's own restoration proposal and technical specifications. The plan's scope appropriately reflects the comprehensive restoration requirements following permit denial, while maintaining technical approaches the Appellant's consultant determined were feasible for site conditions.

Therefore, this reason for appeal does not have merit.

#### **REASON FOR APPEAL D: Comments In Opposition**

This request for appeal consists of 2 parts (D.1 and D.2):

##### **1. Most Comments in Opposition Were Untimely and Should Not Have Been Considered**

The Appellant argues that the District's denial decision was flawed because it improperly considered comments opposing the projects that were submitted after the public comment period had closed. Specifically, the Appellant contends that the District should have excluded from late comments from the United States Fish and Wildlife Service (USFWS), LDWF, and SLR because they were received outside of the designated comment period.

**Finding:** This reason for appeal does not have merit.

**Action:** No further action required.

**Discussion:** The issue is whether the District violated procedural requirements by considering comments that the Appellant characterizes as untimely, thereby undermining the fairness of the decision-making process.

Under 33 C.F.R. 325.2(d)(2), the District establishes public comment periods for a reasonable time and has discretion to manage the comment process to ensure

adequate public participation. The District has established practice of considering extension requests from all parties, including applicants, their representatives, and project opponents or supporters.<sup>51</sup> Additionally, the District has a regulatory responsibility to consider all relevant information, particularly comments from federal agencies, when making permit decisions.<sup>52</sup>

The AR establishes the following timeline for the public comment process:

- Initial comment period: Set to close on April 24, 2011
- Extension granted: Comment period extended to May 4, 2011, at EPA's request<sup>53</sup>
- USFWS and LDWF comments: Submitted on April 29, 2011 (within extended period)
- SLR comments: Submitted on May 4, 2011 (final day of extended period)

The Appellant's characterization of these comments as "late" or "untimely" is factually incorrect. All challenged comments were submitted within the extended comment period that closed on May 4, 2011. The District's extension of the comment period was a reasonable accommodation requested by the Environmental Protection Agency (EPA) to ensure adequate agency review time, consistent with the District's established practices for managing public participation.<sup>54</sup> As summarized in the District's decision document (pages 21-23), in an electronic message dated April 21, 2011, the EPA expressed concerns about the loss of high-quality habitat, the circumvention of the 404 permitting process, and the lack of a less environmentally damaging practicable alternative (District's decision document, Section III.B.1.a.i).

The District's consideration of comments from federal agencies (USFWS and LDWF) and other stakeholders (SLR) within the extended comment period was procedurally proper and consistent with regulatory requirements for comprehensive permit review.

The Appellant's argument is unsubstantiated because it is based on the incorrect premise that the comments were untimely when they were actually submitted within the properly extended comment period.

## **2. Spanish Lake Restoration's Offer Disqualifies Its Comments**

The Appellant challenges the credibility and validity of SLR's comments, alleging they are tainted by an improper attempt to manipulate the permitting process for financial gain. The Appellant claims that on April 27, 2011, SLR proposed a quid pro quo arrangement, offering to withhold adverse comments on the project in exchange for a substantial cash payment for compensatory mitigation.<sup>55</sup>

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<sup>51</sup> AR 0285-0286, 0388-0389, 0397, 0401, 0403, 0406-0408

<sup>52</sup> 33 C.F.R. 320.4(a)(3)

<sup>53</sup> AR 0434

<sup>54</sup> AR 0437-0438

<sup>55</sup> RFA - Exhibit F

The Appellant argues that this alleged offer completely discredits SLR's subsequent comments and renders them unworthy of consideration. The Appellant contends that SLR's willingness to trade environmental opposition for financial compensation undermines the integrity of their technical comments and requests that these comments be stricken from the AR as an improper attempt to manipulate the permitting process.

**Finding:** This reason for appeal does not have merit.

**Action:** No further action required.

**Discussion:** The issue is whether SLR's comments should be excluded from consideration based on alleged improper conduct that the Appellant claims undermine the credibility of those comments.

Under the administrative appeal regulations, the District's decision must be evaluated based on information and comments that were actually submitted and considered in the AR during the permit review process.<sup>56</sup> New information that was not previously available to or considered by the District cannot be used to challenge the permit decision during the appeals process.<sup>57</sup>

The Appellant's challenge to SLR's comments is based on a settlement agreement from SLR's attorney that allegedly proposed withholding negative comments in exchange for financial compensation. However, this document was not part of the AR and was not considered by the District during its decision-making process. The Appellant's submission of this settlement agreement in their Request for Appeal represents an attempt to introduce new information that was not previously available to the District.

The appeal process is limited to reviewing whether the District's decision was reasonable based on the information actually before the District at the time of the decision. The Appellant cannot use evidence that was not part of the original decision-making process to challenge the validity of comments that were properly submitted and considered.

SLR's comments<sup>58</sup> were evaluated by the District based on their technical content and relevance to the project's potential environmental impacts, not on any knowledge of alleged behind-the-scenes negotiations. The District's consideration of these comments was one factor among many in reaching its permit decision, and the comments were assessed on their substantive environmental merits rather than on the commenters' motivations or conduct.

The Appellant's challenge fails because it relies on information that was not part of the AR and therefore could not have influenced the District's decision-making process. The appeal regulations do not permit challenges based on evidence that was not available

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<sup>56</sup> 33 C.F.R. 331.2 (1).

<sup>57</sup> 33 C.F.R. 331.8 (c)(2).

<sup>58</sup> AR 0393-0396

to the District during permit review. Even if the alleged quid pro quo attempt occurred, it was not known to the District and therefore could not have affected the decision-making process.

## **REASON FOR APPEAL E: Tolling Agreements**

This request for appeal consists of 2 parts (E.1 and E.2):

### **1. The Tolling Agreement Is Null**

The Appellant contends that the District erred in requiring him to sign a Tolling Agreement as a prerequisite for submitting an ATF permit application. The Appellant claims this agreement was null and void under Louisiana law as it existed in 2010, arguing that it improperly attempted to extend the statute of limitations beyond the period established by state law.

The Appellant further asserts that the District's enforcement authority is subject to prescription under Louisiana law. The Appellant contends that the ten-year prescriptive period for personal actions, including those of a penal character, has elapsed. Since the District became aware of the violation in 2008, the Appellant argues that any enforcement action against him would have prescribed by 2018.

**Finding:** This reason for appeal does not have merit.

**Action:** No further action required.

**Discussion:** The Appellant argues that the District erred in requiring the Appellant to sign a Tolling Agreement as a prerequisite for submitting an ATF permit application, and whether state law can invalidate a federally required tolling agreement, thereby rendering the District's enforcement authority time-barred.

Regulations at 33 C.F.R. 326.3(e)(1)(v) and 33 C.F.R. 331.11(c) explicitly require a signed statute of limitations tolling agreement as a prerequisite for the District to accept and process ATF permit applications or administrative appeals associated with unauthorized activities. The Corps' regulatory process is governed exclusively by federal law and regulations.

The Appellant's assertion that the Tolling Agreement is invalid under Louisiana law as it existed in 2010 does not affect the validity of the agreement under federal law. Federal regulations control the Corps' permitting process, and state law limitations cannot override federal regulatory requirements. The District is bound by Corps regulations requiring tolling agreements as a condition for processing ATF applications, regardless of state law provisions. This is a principle of federal supremacy, which holds that federal laws, when valid, take precedence over conflicting state laws. Without the supremacy of federal law, states would not be held accountable to CWA standards.

The fact that Louisiana law may not have recognized certain tolling provisions in 2010 does not render the federally required agreement invalid within the Corps' regulatory framework. Federal law governs the permitting process, and state statute of limitations provisions do not control federal enforcement authority when proper federal tolling agreements are in place. The Appellant's attempt to invoke state law to invalidate a federally required tolling agreement lacks merit. The Corps' regulatory process operates under federal authority, and compliance with federal regulatory requirements for tolling agreements is controlling. Therefore, this reason for appeal does not have merit.

## **2. There Is No Tolling Agreement Applicable for Property Owned by Cypress Farms, LLC**

The Appellant argues that the Tolling Agreement does not cover property owned by Cypress Farms, LLC, a separate legal entity from Mitchell Family Interests, LLC. Although Dr. Charles Mitchell has substantial legal interest in both entities, the Appellant contends that Cypress Farms, LLC – which has owned the property since 2005 – did not independently sign a Tolling Agreement or file for an ATF permit.

The Appellant claims that because Cypress Farms, LLC did not execute its own tolling agreement, any claims against the company for violations, remediation, or restitution have prescribed under applicable statutes of limitation by 2018. Therefore, the Appellant argues that restoration requirements imposed by the Reforestation Plan are time-barred as to the Cypress Farms property.

**Finding:** This reason for appeal does not have merit.

**Action:** No further action required.

**Discussion:** The issue is whether the Tolling Agreement signed by Dr. Mitchell applies to property owned by a separate corporate entity (Cypress Farms, LLC) and whether the absence of a separate agreement by that entity renders enforcement claims time barred.

Corps regulations at 33 C.F.R. 331.11(c) provide that any person who appeals an AJD or applies for an ATF permit agrees to toll the statute of limitations regarding any violation associated with that determination or application.

While Cypress Farms, LLC is technically a separate legal entity from Mitchell Family Interests, LLC, Dr. Mitchell's substantial legal interest in both entities establishes him as an affected party regarding unauthorized activities on all properties. The regulatory framework focuses on the individual's relationship to the violations and affected properties rather than strict corporate formalities.

Dr. Mitchell's signature on the Tolling Agreement constitutes a binding commitment that extends to all properties in which he maintains substantial legal interests, including

those owned by Cypress Farms, LLC. The regulation does not require separate tolling agreements from each corporate entity when the controlling individual has executed the agreement and has substantial interests in multiple related entities.

As the property owner, Cypress Farms, LLC remains responsible for environmental damages and violations that occurred on the property, regardless of whether the entity independently signed a tolling agreement. Dr. Mitchell's authority to act on behalf of entities in which he has substantial legal interests, combined with his execution of the Tolling Agreement, provides sufficient legal basis for tolling the statute of limitations on claims against all related properties.

The Tolling Agreement signed by Dr. Mitchell effectively tolls the statute of limitations for claims against Cypress Farms, LLC, based on his substantial legal interests in both entities and his authority to act regarding the subject properties. The company remains subject to restoration requirements and other remedial measures imposed by the District.

**Conclusion:** After thorough review and evaluation of the Appellant's reasons for appeal, the District's AR, and recommendation of the RO, and for the reasons stated above, I find that reasons for appeal B, C.1, C.3, C.4, C.6.a, C.6.b, C.6.d, C.6.e, C.7, D.1, D.2, E.1, and E.2 do not have merit. Alternatively, I find that reasons for appeal C.2 (Alternative Site Review), C.5 (Contradictory Requirements), and C.6.c (404(b)(1) Guidelines Review) have merit. The permit denial decision is remanded to the New Orleans District Engineer for reconsideration consistent with the specific actions in the discussion of reasons for appeal C.2, C.5, and C.6.c above.

In reaching this decision, I affirm that all information and comments submitted by the Appellant and other interested parties were given full and fair consideration, consistent with applicable laws and regulations. This remand is not a determination that the District's original decision was made in bad faith, but rather a recognition that certain aspects of the analysis require further scrutiny to ensure full compliance with the standards of the Clean Water Act and its implementing regulations.

The District shall conduct further analysis and provide additional documentation in accordance with 33 C.F.R. 331.10(b). The District Engineer's decision made pursuant to this remand will constitute the final Corps permit decision for this action. The administrative appeals process for this matter is hereby concluded.

19 December 2025

(Date)

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Kimberly A. Peeples  
Major General, U.S. Army  
Commanding