DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECW-OR (1145)

31 JAN 2001

MEMORANDUM THRU COMMANDER, SOUTH ATLANTIC DIVISION

FOR COMMANDER, JACKSONVILLE DISTRICT

SUBJECT: U.S. Department of Interior, Elevation Request for Section 404 Permit Decision, Naples Reserve Golf Club, Collier County Florida

1. On 19 January 2001, the Acting Assistant Secretary of the Army (Civil Works) (ASA(CW)) sent a letter to the Department of the Interior indicating the subject permit case will not be elevated and that the U.S. Army Corps of Engineers Jacksonville District Engineer may proceed with the final decision. Enclosed is a copy of the letter signed by the ASA(CW), as well as the HQUSACE analysis and recommendation to the ASA(CW).

2. In accordance with Part IV(g)(1) of the Memorandum of Agreement with the Department of the Interior, the District may proceed to issue the subject permit. Our review indicated, that the District's decision was made in accordance with all applicable policies and regulations. The District also gave the applicant's purpose statement no more than the appropriate level of consideration it deserved. The District met the requirement to look for other potentially "practicable" alternatives by limiting consideration to a reasonable overall project purpose. The District's project purpose was not unreasonably constrained by the applicant's specific project considerations.

3. The District's decision to issue a permit reflects the Corps balanced approach to regulation. It recognizes the low value of the existing aquatic resources and requires reasonable and appropriate onsite changes to the project to minimize impacts. In this case, the site is one the District might have recommended as an alternative location for any similar project proposed in more natural wetlands. This is a factor that also contributes to the applicant's decision to develop the site. The District's efforts also result in buffers separating the developed areas of the project from adjacent high value ecosystems. Finally, the offsite enhancement and preservation mitigation that will be provided, increases the high value of the adjacent ecosystems.

4. The ASA(CW) and Corps Headquarters would like to thank the District for the documentation they provided and their coordination during our consideration of this case. If you have any additional questions concerning this decision, please contact Mr. Jack Chowning, Project Manager, Regulatory Branch at (202) 761-4614.

FOR THE COMMANDER:

Encl

HANS A. VAN WINKLE
Major General, USA
Director of Civil Works

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECW-OR (1145)

16 JAN 2001

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)

SUBJECT: U.S. Department of Interior, Elevation Request for Section 404 Permit Decision, Naples Reserve Golf Club, Collier County Florida

1. This is in response to your memorandum, dated January 3, 2001, concerning the U.S. Department of Interior, Fish and Wildlife Service (FWS) quest for elevation of the U.S. Army Corps of Engineers Jacksonville District proposal to issue a permit to the Naples Reserve Golf Club. The permit would authorize the filling of 86.02 acres of aquatic resources located primarily in the Henderson Creek Watershed of Collier County, Florida. The FWS request contends that issuance of the proposed permit will cause substantial and unacceptable adverse impacts to an aquatic resource of national importance. The FWS alleges that the District did not: conduct a thorough evaluation as required by the Section 404 (b)(1) Guidelines. Specifically, the FWS alleges the District did not (1) conduct a full and adequate study of the direct, indirect, secondary and cumulative impacts of the project, (2) complete a thorough alternatives analysis, including adequate avoidance and minimization, and (3) require an adequate mitigation package for wetlands impacts. The FWS recommend that in light of these deficiencies that the application be denied and a more thorough evaluation made resulting in modifications to the proposed work.

2. We have reviewed the Fish and Wildlife Service's request and relevant District documentation. We do not agree that the aquatic resources located within this project qualify as an aquatic resource of national importance. The wetlands onsite are largely a result of recent pumping of agricultural water into the southwestern portion of the site. Moreover, the wetlands onsite are mostly heavily infested with exotic invasive species, such as Brazilian Pepper and Melaluca trees. We do not agree that the proposed permit will result in substantial and unacceptable adverse impacts to the aquatic environment or that other alternatives need to be reviewed. We support the District's determinations on these issues, including their application of the Section 404(b)(1) Guidelines that resulted in a determination that the applicant's project was the least environmentally damaging practicable alternative. The District's review and evaluation of this permit application fully comports with all regulation and policy guidance. Moreover, the decision in fact shows a careful consideration of regional development pressure, the functions and values of the impacted wetlands, and a sound and complete mitigation package to offset unavoidable losses of wetlands. The overall project purpose was adequately presented and resulted in a fully acceptable alternatives analysis. Few onsite changes were required by the District after the permit application was submitted, because the applicant had designed the project taking into consideration the pre-application recommendations of the Corps and State

CECW-OR January 16, 2001

HQUSACE ANALYSIS AND OPTIONS PAPER

SUBJECT: U.S. Department of Interior, Elevation Request for Section 404 Permit Decision, Naples Reserve Golf Club, Collier County Florida

1. PURPOSE: This paper provides the Headquarters, U.S. Army Corps of Engineers analysis of the request for elevation from the FWS of a proposed decision by the Corps Jacksonville District to issue a Section 404 permit to the Naples Reserve Golf Club.

2. BACKGROUND: The Corps proposes to issue a permit to the Naples Reserve Golf Club. The permit would authorize a project involving the construction of a residential community on a 691.69-acre site that will include 552-dwelling units, 36 holes of golf, clubhouse, lakes and natural preserve. The project will discharge approximately 555,001 cubic yards of fill into 86.02 acres of wetlands and other waters and excavate approximately 422,838 cubic yards from 22.55 acres of wetlands and other waters.

3. PROJECT SETTING: The project site involves freshwater forested and herbaceous wetlands within the Henderson Creek watershed and is located on the west side of Greenway Road approximately 0,38 miles north of U.S. 41. The project site is approximately 688.03 acres and is predominantly croplands and associated improvements (73%). The north half and southeastern quarter of the site are farm fields with the exception of two small wetland areas (8.9 acres) located within the southeastern quarter section.

a. Resources. The southwestern quarter of the site is primarily undeveloped and consists of forested uplands and wetlands, dominated by slash pine forests and saw palmetto clusters, with scattered cypress, melaleuca, Brazilian pepper, and cabbage palm (150 acres). This is the are of most concern to the Fish and Wildlife Service in their request for elevation of this project. Much of the northern half and southeastern quarter of the quarter section is impacted by various densities of Brazilian pepper invasion (50-95%). A 60-foot wide cleared area extends diagonally, from northeast to southwest, through this undeveloped area. The cleared area consists of a six-foot high water management berm, a 20-foot wide drainage swale, and a 25-foot wide maintenance conveyance. North of the berm, which is the retention portion of the agricultural cropland's water management system, is primarily a densely forested cypress and pine/cypress community with a Brazilian pepper dominated midstory. South of the berm the area consists of open pinelands and pine-cypress wet prairie with scattered pine-palmetto flatwoods.

b. Development. The project also includes a 2000-foot by 80-foot road right-of-way (3.63 acres) that provides access to the project site from U.S. 41. The total project area consists of the project site (688 acres) and the 3.63 acre-access area (total of 691.69 acres). The area to be developed is 73% actively used agriculture land, with similar agricultural use to the east, housing development to the south and open undeveloped land to the north and west.

4. AGENCY POSITION: The Fish and Wildlife Service's request for elevation cites the criteria of Part IV of the Section 404 (q) Memoranda of Agreement (MOA). The primary issues raised, and on which this analysis focuses, are summarized as follows:

a. Aquatic Resources of National Importance (ARNI). According to the MOA, the elevation of specific individual permit cases will be limited to those cases that involve an ARNI. The FWS contends that the resources involved in this application deserve this designation for the following reasons: (a) Hydric pine flatwoods, the predominate wetlands cover type in question on the site, have been reduced in coverage by 88% during the last century, (b.) the remaining aquatic resources on the site, Cypress swamp, fresh water marshes and wet prairies are regionally important habitat types.

b. Substantial and unacceptable impacts. According to the MOA, cases elevated under this MOA will cause resource damages similar in magnitude to cases evaluated under Section 404 (c) of the Clean Water Act (CWA). Section 404 (c) relates to unacceptable adverse effect resulting from the discharge of fill material on municipal water supplies, shellfish beds and fishery areas, and wild life or recreation areas. The FWS contends that the direct loss of 109 acres of wetlands on the project site contributes to the continuing loss of the pine flatwoods, which they assert is unacceptable. The service further contends that the modifications to the approximately 150 acres of wetlands in the S.W. ¼ of the property represents a lack of minimization of onsite impacts, which could be avoided. Finally, the indirect effects on habitat surrounding the site caused by the intrusion of another golf course community project in the Rookery Bay watershed, when taken together with this project, constitute a substantial unacceptable impact after consideration was given to the mitigation proposed for the project. The Service believes that the project will cause habitat fragmentation and that the mitigation is not appropriate, nor sufficient to offset the losses that would be permitted

c. Alternatives to the proposed project. The alternatives analysis is part of the CWA's Section 404(b)(1) Guidelines analysis that contains a rebuttable presumption that for non-water dependent projects, there are practicable alternatives that are less damaging to the environment. In the case of this proposed project, the purpose of the fill is for the construction of the housing and the golf course complex. While the Service does not object to the project at this location, it does believe there are alternative designs that would result in a reduction in the number of houses, and in the size of the golf courses, that would be less environmentally damaging. The service does not see that need for two golf courses on this project, and believe that the alternatives analysis was based too specifically on the applicant's desires, because there are two golf courses and the District discussed the number of dwellings to be built in the development.

5. HQUSACE ANALYSIS:

a. ARNI. The Jacksonville District does not concur with the FWS determination that the resources on the project site represent an ARNI. The majority of the forested habitats on the site were not considered to be jurisdictional when surveyed in 1987. This was before the area was converted to agricultural use (which resulted in flooding the southwest 1/4 of the property with excess water from the agricultural fields) and at a time the system was functioning in a more natural manner. Most of the natural pine flatwoods and other wooded areas were not sufficiently inundated to meet the Corps wetland criteria. After the area was converted to agricultural use, areas within the project site became part of the surface water retention facilities for the agricultural practices that were occurring around the site. As a result, they were inundated to the extent that they were considered to be jurisdictional, when the owner decided to develop the area. Also with passage of time, the area has been invaded by exotic plants, and now provides a lower habitat value substrate for native mammals, amphibian, reptiles, birds and fish, as well as a seed source for invasion by the exotic species into adjacent natural areas. With the exception of its location near the city of Naples and it's availability as one of the last areas converted to agriculture, there are no features present at the project site that would make this wetland system more valuable than other wetland systems in Collier County. Indeed, the wetlands onsite, including those in the southwest 1/4 of the property, are isolated from surrounding natural ecosystems to the west and north by berms that support the agricultural activity on the property. Moreover, the extensive level of infestation has substantially reduced the wetlands values, and serves as a active seed source for adjacent areas.

b. ARNI Determination. After reviewing the information relating to the FWSs ARNI determination and information in the applicant's and district's documentation concerning the status of the aquatic resources, we do not agree that aquatic resources located within the boundary of the proposed development constitute an ARNI. There is little doubt regarding the environmental importance of the remaining acres of natural Pine Flatlands in southern Florida, and no argument that these provide good habitat for fish and wildlife species. However, much of this type of landcover is not wet enough to be considered jurisdictional under the Clean Water Act. Most of this tract is only wet enough to be considered jurisdictional as a result of an artificial circumstance, the pumping of excess water onto the site from adjacent agricultural fields. Since it would be difficult to identify which wetlands exist solely because of the agricultural water pumping activities, the District has chosen to mitigate the impacts of all wetlands onsite. More importantly, the majority of the wetlands that will be impacted by this project are infested at greater than 50% by invasive wetland species. Although these species may provide some vegetation diversity in the current state, the species are known to become essentially monocultures over time, with very limited habitat value. Because of the extent that these wetlands are infested with invasive species, and the artificial pumping of excess water into the area, the area is not an ARNI. We believe that many of the natural area wetlands in the vicinity of the

project site, that are subject to natural hydrologic regimes, and not heavily infested with invasive exotic species would be considered ARNI.

c. Sustantial and Unacceptable Adverse Impacts. The District has taken numerous actions to minimize impacts to wetlands onsite and buffer adjacent natural systems from the proposed development. These modifications include realignment of the golf course to create a buffer to the north and west sides of the developed areas (the southwestern portion of the site is a mitigation enhancement and preservation area). Thus, all project boundaries shared with adjacent natural areas are either large preservation areas, or vegetated buffers. In addition, the golf courses were modified, after discussions with the District and the State regulatory agency, to impact the lower value wetlands in the southwestern 1/4 of the property to the extent practicable. Some housing must be located in the southwestern portion of the property because of County requirements. The District has established permit conditions that comprehensively offset the unavoidable impacts authorized. The mitigation includes creation of wetlands, enhancement of remaining wetlands by removing the exotic vegetation onsite, and preservation of those enhanced wetlands. The mitigation also includes enhancement by removal of the limited invasive exotic vegetation, and preservation of a 320 acre parcel of land that is generally in native condition northeast of the project site. The mitigation required is fully adequate to offset the permitted wetland losses, and is designed in a manner which will result in buffering the development from surrounding natural areas. We do not agree with the FWS that the project would result in habitat fragmentation. The project is bordered on the east and south by agricultural and developed areas. The natural areas on the north and west sides of the property will be buffered by preserve areas and vegetated buffers. The remaining wetlands in the southwestern portion of the property will be enhanced and reconnected with natural areas to the southwest, which will increase the function and value of these wetlands. Indirect effects of the project will be minimized by enhancing the remaining wetlands onsite, and treating water that will leave the site. The buffers and preserve areas will ensure that indirect effects on adjacent habitat areas will be minimized. With the District required mitigation, the project will not result in substantial or unacceptable adverse impacts to the aquatic environment. In addition to fully mitigating the loss of the low value wetlands onsite, the project and mitigation will remove a large source of exotic vegetation seed source, thus reducing damage to adjacent native wetland and pine flatwoods ecosystems.

d. 404(b)(1) Guidelines Analysis. The FWS has expressed concern that the District has not properly evaluated the project under the 404(b)(1) Guidelines, including concerns regarding the offsite alternatives analysis, minimization onsite, and use of mitigation to offset project impacts. The FWS stated that they believe that the Corps should have only allowed the applicant to have one golf course and erred in discussing the number of housing units in the final decision document. The District required that the applicant conduct a reasonable evaluation of other potential sites for the project in Collier County, Florida. The offsite alternatives analysis was conducted based on a project purpose statement in the public notice stating as follows: "The applicant

proposes to construct a residential subdivision and two 18-hole golf courses to be known as 'Naples Reserve Golf Club'". It would have been more complete to have stated some reasonable geographic bounds in the project purpose (e.g., in Collier County, Florida). However, this lack of specific wording in the project purpose statement did not adversely impact the evaluation of offsite alternatives actually conducted by the applicant as required by the District (which were done in Collier County, Florida). The District did reasonably bound the geographic scope of the alternatives analysis. Moreover, the criteria established by the District for evaluation of offsite alternatives were reasonable and resulted in a comprehensive evaluation of alternatives. These criteria included, among others, "Location" (Collier County), "Size/Geometry" (size of 1 square mile of land area to develop), "Future Land Use Map Designation" (Collier Counties growth plan, including 500-550 units), "Wetland Impacts" (have little or not wetlands, or disturbed low value wetlands), "Economic Need" (other site must providing a residential community of the type needed in western Collier County), and others. These are very reasonable and appropriate criteria under which to evaluate an offsite alternative project site.

e. 404 (b)(1) Project Purpose. We have in the past provided guidance that the overall project purpose must not be so specific that it precludes any reasonable possibility of other sites being potentially practicable to the applicant. For example we have stated that the districts must not say that an exact given number of housing units are required. The District here did not do that. In the Decision Document the District stated the overall project purpose to be: "Provide an residential community of approximately 552 dwelling units along with two 18 hole golf courses, lakes for stormwater management purposes and aesthetics, and natural preserves". This project purpose did not drive the alternatives analysis, the one in the public notice did, and since the District stated that ***approximately*** 550 dwelling units were needed the overall purpose statement would have been acceptable in any event. It would have been better, in retrospect, to leave off the statements regarding stormwater management and natural preserves, since these are arguably results of the project mitigation, not purposes themselves. The ideal overall project purpose statement for this project would have been something like: "To construct a viable mid-priced housing development, with two associated regulation golf courses in the Collier County, Florida area". This project purpose statement is very similar to the one the District used to evaluate this project, including offsite alternatives. Moreover, the results of the offsite evaluation of alternatives would not have changed in any way had the project purpose been more precisely formulated. The criteria used to evaluate offsite alternatives by the District would have been the same with this overall project purpose statement. We must not penalize with further delays an applicant who has been subject to a substantially proper alternatives analysis.

1. The elements of the overall project purpose that were appropriate in this case are that the applicant proposed a development with two golf courses; the applicant wanted to construct mid-priced dwellings; and the location in Collier County, Florida. Moreover, to yield a viable project, the applicant required a large number

of dwellings (500-550 under the County Plan) because they will be mid-priced, and approximately 1 square mile of land for a development this size. It would be inappropriate for the Corps to attempt to decide whether the market in the area supported one or two golf courses. That is for the applicant to decide. It would have been inappropriate for the applicant to demand a certain absolute layout for its golf course and for every dwelling on the project. But the applicant did not do that. The applicant showed flexibility in modifying the golf course layouts to avoid higher value wetlands onsite, and to reconfigure the golf courses to provide vegetated buffers between adjacent natural areas potentially used by Florida Panthers and other sensitive species and dwellings and other active development. It is also very worthy to note that the applicant provided a permit application ***after*** discussions with the Corps and the State regulatory personnel that had already minimized onsite impacts and focussed them on the low value wetland areas. The Corps should advocate applicants being responsive in this manner, and the fact that little additional minimization onsite was practicable is a credit to pre-application discussions, not an error on the District's part not requiring additional minimization. The district evaluation of the applicant's alternatives analysis found that other sites which met the criteria for development would require more adverse impacts to aquatic and environmental resources. The fact of the matter is that this site is one of the most suitable for such a development in southwest Florida, because it is largely upland, and the wetlands that exist onsite are largely degraded with significant infestation of invasive exotic species. If the Corps had an application for a project of this scale, they would be looking to see if just such a site were available to the applicant. Finally, use of mitigation on this project was not only appropriate in that it was for unavoidable losses of wetlands, it provides an exceptional mix of creation, enhancement, and preservation of exceptional existing high value wetland areas.

2. In summary, the District properly established the overall project purpose, conducted an appropriate offsite alternatives analysis, considered the functions and values of the wetlands onsite in locating and minimizing fill to be authorized, and required appropriate and practicable mitigation.

6. <u>OPTIONS:</u> The MOA with DOI provides three basic options:

a. <u>Proceed with Final Action</u>. ASA(CW) would inform the District Engineer to proceed with final action on the permit decision;

b. <u>Proceed Based on Case Specific Policy Guidance</u>. ASA(CW) would inform the District Engineer to proceed with final action in accordance with case specific policy guidance; or

c. Elevate the Decision. ASA(CW) would elevate the permit decision to the MSC, HQUSACE, or the ASA(CW) to review the case and make the final permit decision in accordance with 33 CFR 325.8 or provide case specific guidance back to the District.

7. HQUSACE DECISION AND RECOMMENDATION: Based on this analysis the case specific options are as follows:

a. Proceed with Final Action. Selection of this option is contingent on a determination that there are not substantial unacceptable impacts to aquatic resources of national importance, as a result of the District's proposed permit decision. Our analysis clearly supports selection of this option

b. Proceed Based on Case Specific Policy Guidance. Selection of this option also requires a determination that there are not substantial unacceptable impacts to aquatic resources of national importance, as a result of the District's proposed permit decision, but further recognizes that policy guidance may be necessary to ensure that the decision is appropriate. We do not believe that policy guidance is required in this case.

c. Elevate the Decision. This option requires a determination that there would be substantial unacceptable impacts to aquatic resources of national importance as a result of the proposed permit or that the permit review/ decision should be made at a higher level in the organization. We do not believe this to be the situation, and therefore do not consider this action is required.

8. CONCLUSION AND RECOMMENDATION: We do not believe that the aquatic resources located within the project site qualify as an ARNI and we do not believe that the proposed project to be permitted would cause substantial and unacceptable adverse impacts to the aquatic environment. Moreover, we believe that the District's decision is not only in accordance with all policy and regulation, but shows a sound application of those regulations and policy to reach a reasonable decision that is appropriately mitigated. The District has worked with the applicant to minimize all impacts, and offset those unavoidable impacts with mitigation.

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

19 JAN 2001

REPLY TO
ATTENTION OF

Honorable Ken Smith
Assistant Secretary for Fish
and Wildlife and Parks
United States Department
of the Interior
Washington, D.C. 20240

Dear Mr. Smith:

This is in reply to your letter of December 22, 2000, requesting that I review the proposed decision on the Army Corps of Engineers Jacksonville District decision to issue a Department of the Army permit to Naples Reserve Golf Club. Because your request was made pursuant to our Section 404(q) Memorandum of Agreement, my staff carefully reviewed the concerns raised in your letter, the District's decision documents and draft permit, and information provided by the applicant. The review also included a conference call with those parties concerned in the issues being raised.

The permit is for the construction of a residential and golf course complex in Collier County, Florida. The permit would authorize the filling of 86.02 acres of aquatic resources located primarily in the Henderson Creek Watershed of Collier County. The Fish and Wildlife Service request was based on the view that the aquatic resource to be impacted would qualify as aquatic resources of national importance (ARNI), and that there would be substantial unacceptable impacts to these resources, thus requiring attention at this level.

After a review of the resources in question, we disagree with the conclusion that the aquatic resources qualify as an ARNI and we do not agree that substantial and unacceptable adverse impacts will result from the District's proposed permit. Most of the forested habitats on the site were too dry to be jurisdictional when the Disrict surveyed the site in 1987, before the area was converted to agricultural use. The conversion to agricultural use resulted in those habitats being artificially inundated to the extent that they were considered jurisdictional at the time the applicant decided to develop the property. The artificial nature of the jurisdiction over these resources, with the invasive exotic vegetation that has degraded most of the aquatic resources on the site, led to the determination that these are not an ARNI.

Our review has also affirmed the District's determination that the project complies with the Section 404(b)(1) guidelines and that adequate consideration was given to alternatives and mitigation requirements. The project purpose used for the alternatives analysis was properly established and a comprehensive and reasonable analysis of off-site alternatives was conducted. Other sites that would provide for a similar project were found to have more aquatic resources that would be impacted. The Corps must accept basic project principles from the applicant in establishing its project purpose. In this case, these principles included the need in the marketplace for two regulation golf courses, mid-priced dwellings, and the location in Collier County, Florida. The District also properly used mitigation in this case. The District did require the applicant to change the project footprint of the golf courses and housing to establish buffers between the development and natural areas to the north and west. No additional on-site changes were necessary because the applicant had located fill in lower value disturbed wetlands and minimized on-site impacts as a result of pre-application discussions with the Corps and the State regulatory agency. The impact area and the off-site mitigation area were compared using an accepted methodology. The comparison showed that the measures proposed off-site would adequately compensate for the impacts that would result from the project.

In light of these findings, I have decided not to elevate this case and the District will be allowed to proceed with issuance of the permit. Although we have not agreed to elevate this proposed permit for further Corps review, there has been value added to the process through this case being brought to our attention. The need for our field staffs to prepare and defend their positions on this case has provided them an opportunity to learn from each other about the difficulties of applying the Section 404 (b)(1) Guidelines to projects. While those kinds of discussions have occurred in the past, it is always necessary to periodically revisit such issues because of staffing changes and changes in perceptions over time. This was especially important in this case, should your Fish and Wildlife Service Field Office decide to move forward with its concerns about application of the Guidelines in the future. Should you have any questions or comments concerning our decision in this case, please contact me or Mr. Chip Smith, my Assistant for Environmental, Tribal and Regulatory Affairs at (703) 693-3655.

Sincerely,

Marie Therese Dominguez
for

Joseph W. Westphal
Assistant Secretary of the Army
(Civil Works)