



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

JAN 03 2001

REPLY TO  
ATTENTION OF

Mr. Kenneth L. Smith  
Acting Assistant Secretary for Fish  
and Wildlife and Parks  
MS 3156 - MIB  
Department of the Interior  
Washington, D. C. 20240-0002

Dear Mr. Smith:

This is in further response to your letter dated December 8, 1999, which requested review of the proposed decision by the Army Corps of Engineers Mobile District (District) to issue a Department of the Army permit to the Baldwin County Electric Membership Cooperative. The permit would authorize the installation of four 5-inch utility conduits beneath Terry Cove between Walker Avenue in Orange Beach and Robinson Island, in Baldwin County, Alabama.

On January 7, 2000, I concurred with your request, made pursuant to Part IV of the Memorandum of Agreement (MOA) between the Army and the Department of the Interior (DOI). In my response, I concurred that aquatic resources in and surrounding Robinson Island are aquatic resources of national importance. I also agreed that the proposed permit, as well as a recently issued permit to Mr. Frank A. Hughes authorizing, piers, dredging, and rip rap, in support of a proposed residential development, raised important national issues regarding the scope of analysis, as well as the consideration of secondary and cumulative impacts. Further, I agreed that additional information was required concerning the determination of the least environmentally damaging, practicable alternative. For these reasons both the proposed permit, as well as the previously issued permit to Mr. Hughes, were forwarded to Corps Headquarters (HQUSACE) for additional review of the policy and environmental impact implications of the entire project.

Pursuant to our Section 404(q) MOA, the Corps has completed its review of the administrative records for the aforementioned permit applications and discussed its review and findings with my staff. First, we agree that the NEPA scope of analysis should be expanded and that the secondary and cumulative impacts of the entire island development to the bird rookery in the center of the island and the adjoining marine waters should be evaluated. We believe that these impacts, resulting from the construction of the residential subdivision, would not occur but for the installation of utilities and dredging and docking facilities which induce home construction. Therefore,

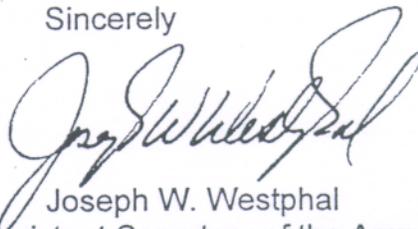
CECW-2E

CECW-2A

we believe it is appropriate in this case for the Corps to consider reorienting and/or reducing the number of homes in the proposed residential subdivision, to address those impacts. Second, while we do not agree that the District necessarily piecemealed (from a NEPA perspective) its decisions regarding the Baldwin County EMC and Hughes permits, we do agree that the permit applications should be processed/evaluated on the same timetable, rendering the permit decisions concurrently. Third, while we agree with FWS that Robinson Island provides habitat for migrating Neotropical birds, we do not agree that it is particularly unique or important to these species as the aforementioned breeding habitat is to waterbirds. We note that reorientation and/or reduction of the residential subdivision would benefit Neotropical birds as well as the waterbirds. We believe the District did a good job addressing the direct effects of the project concerning long term degradation of aquatic habitats on and adjacent to the island.

Again, we believe that this elevation request reflects the complexity and considerable effort required for the evaluation of permit applications, especially with regard to the proper establishment of the scope of analysis. We appreciate the opportunity to provide additional guidance for the field on this difficult issue. Attached, please find a copy of the Corps analysis and findings document, as well as the memorandum to the District. If you have additional questions or comments concerning this case, please contact me or Mr. Chip Smith, Assistant for Environment and Regulatory Affairs, at (703) 693-3655.

Sincerely

A handwritten signature in black ink, appearing to read "Joseph W. Westphal". The signature is fluid and cursive, with a large initial "J" and "W".

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



DEPARTMENT OF THE ARMY

U.S. Army Corps of Engineers  
WASHINGTON, D.C. 20314-1000

20 OCT 2000

REPLY TO  
ATTENTION OF:

CECW-OR (1145)

MEMORANDUM THRU COMANDER, SOUTH ATLANTIC DIVISION

FOR COMMANDER, MOBILE DISTRICT

SUBJECT: Assistant Secretary for Fish and Wildlife and Parks, Section 404(q) Elevation Request, Army Corps of Engineers Mobile District Permits to Baldwin County Electric membership Cooperative (EMC) and Frank A. Hughes

1. **Purpose:** The purpose of this memorandum is to transmit the review and findings of the Headquarters, U.S. Army Corps of Engineers (HQUSACE) regarding the policy and technical issues associated with the Baldwin County EMC and Frank A. Hughes permit applications pending before the U.S. Army Corps of Engineers Mobile District (District). This review was undertaken in accordance with the 1992 Memorandum of Agreement (MOA) between the Department of the Army and the Department of the Interior (DOI) pursuant to Section 404(q) of the Clean Water Act (CWA). HQUSACE's findings provide guidance under which the District will reevaluate its permit decision.

2. **Background:** On January 7, 2000, the Assistant Secretary of the Army (Civil Works) (ASA(CW)), based on recommendations from HQUSACE, responded to a request from the Assistant Secretary for Fish and Wildlife and Parks, pursuant to the Section 404(q) MOA. DOI requested that the ASA(CW) elevate the proposed decision by the Mobile District to issue a permit to Baldwin County EMC authorizing the installation of utilities to Robinson Island. In his response, the ASA(CW) concurred that aquatic resources in and surrounding Robinson Island are aquatic resources of national importance. The ASA(CW) also agreed that the proposed permit, as well as a recently issued permit to Mr. Frank A. Hughes authorizing, piers, dredging, and rip rap, in support of a proposed residential development, raised important national issues regarding the scope of analysis, as well as the consideration of secondary and cumulative impacts. Further, the ASA(CW) agreed that additional information was required concerning the determination of the least environmentally damaging, practicable alternative. For these reasons the ASA(CW), based on recommendations from HQUSACE, agreed to elevate both the proposed permit, as well as the previously issued permit to Corps Headquarters for additional review of the policy and environmental impact implications of the entire project.

3. **HQUSACE Review:** We have completed our review of the administrative records of the Baldwin County EMC and Frank A. Hughes permit applications. Clarification of information contained in the record was obtained from discussions with District personnel and Mr. Hughes. Project site information was obtained from discussions with the aforementioned individuals

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SUBJECT: Assistant Secretary for Fish and Wildlife and Parks, Section 404(q) Elevation Request, Army Corps of Engineers Mobile District Permits to Baldwin County Electric membership Cooperative (EMC) and Frank A. Hughes

along with review of pictures and information in the administrative record. HQUSACE personnel did not perform a site visit.

4. **Conclusions:** First, we agree with the FWS that the District should expand its NEPA scope of analysis and evaluate the secondary and cumulative impacts of the entire island development to the bird rookery in the center of the island and the adjoining marine waters. We believe that these impacts, resulting from the construction of the residential subdivision, would not occur but for the installation of utilities and dredging and docking facilities which induce home construction. In addition, given that the NEPA scope of analysis should be expanded in this case, we believe it is appropriate for the Corps to evaluate the impact information, and, consider reorienting and/or reducing the number of homes in the proposed residential subdivision, to address those impacts. Second, while we do not agree that the District piecemealed (from a NEPA perspective) its decisions regarding the Baldwin County EMC and Hughes permits, we do agree that the District should process/evaluate these applications on the same timetable, and render the permit decisions concurrently. Third, while we agree with FWS that Robinson Island provides habitat for migrating Neotropical birds, we do not agree that it is particularly unique or important to these species as the aforementioned breeding habitat is to waterbirds. We note that reorientation and/or reduction of the residential subdivision would benefit Neotropical birds as well as the waterbirds. We believe the District did a good job addressing the direct effects of the project concerning long term degradation of aquatic habitats on and adjacent to the island. However, the District needs to evaluate the indirect effects of the residential subdivision on those resources.

5. **Findings:** In accordance with the Section 404(q) MOA and in support of the above conclusions, the District Commander is directed to reconsider his decisions on the Baldwin County EMC and Frank A. Hughes permit applications in accordance with the following findings.

i. The District should give full consideration to the information provided by FWS regarding the bird rookery. This review should include the FWS information on the regional importance of the rookery as well as the recommendations to minimize impacts of the proposed residential subdivision on the rookery.

ii. The District should perform a new 404(b)(1) Guidelines analysis and public interest review based on the expanded scope of analysis, which includes consideration of the indirect effects of the entire upland development which is expected to be caused by the permitted activities. This reevaluation should consider any practicable reductions and/or revisions to the proposed residential subdivision, which would minimize the potential loss of the bird rookery and effects on adjoining marine waters.

CECW-OR (1145)

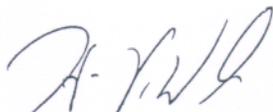
SUBJECT: Assistant Secretary for Fish and Wildlife and Parks, Section 404(q) Elevation Request, Army Corps of Engineers Mobile District Permits to Baldwin County Electric membership Cooperative (EMC) and Frank A. Hughes

iii. The reevaluation of the permits should be based on a purpose statement similar to the following: "To develop a viable water oriented residential subdivision in the coastal Baldwin County area." The original purpose ("provide... facilities...allowing future residents access to a proposed residential subdivision on a privately owned island to be accessible only by boat") is too restrictive.

iv. The District should revisit and revise the documentation for the suspended permit to Mr. Hughes, AL98-00542-L, and the pending permit application from Baldwin County EMC, AL98-00541-L, providing additional documentation of the District's evaluation and decision as discussed above.

v. Upon completion of its reevaluation and documentation, the District will make final decisions concerning the revocation, modification, or reissuance, of permit AL98-00542-L and for the pending permit application AL98-00541-L. Both decisions will be made concurrently, to avoid raising any concerns about "piecemealing" Corps decisions.

FOR THE COMMANDER:



HANS A. VAN WINKLE  
Major General, USA  
Deputy Commander for Civil Works

HQUSACE REVIEW AND FINDINGS  
BALDWIN COUNTY EMC - FRANK A. HUGHES  
SECTION 404(Q) REFERRAL

The purpose of this document is to present the findings of the Headquarters, U.S. Army Corps of Engineers (HQUSACE) review of the policy and technical issues associated with the Baldwin County EMC and Frank A. Hughes permit applications pending before the U.S. Army Corps of Engineers Mobile District (District). This review was undertaken in accordance with the 1992 Memorandum of Agreement (MOA) between the Department of the Army and the Department of the Interior (DOI) pursuant to Section 404(q) of the Clean Water Act (CWA). This document provides guidance under which the District will reevaluate its permit decision. The District's reevaluation should incorporate guidance, in this document, on the identification of a single and complete project, the determination of the scope of analysis for evaluations pursuant to the National Environmental Policy Act (NEPA), the analysis of secondary/cumulative environmental impacts, and the documentation of alternatives' practicability determinations pursuant to the Section 404(b)(1) Guidelines (Guidelines). All districts to the extent it applies to case – specific facts and issues presented should apply the guidance in this document.

I. BACKGROUND

**SECTION 404(q) REFERRAL REQUEST** - In a letter dated December 8, 1999, the DOI requested that the Assistant Secretary of the Army (Civil Works) [ASA(CW)] elevate the District's decision on the Baldwin County EMC permit for higher level review. In its Section 404(q) referral request, DOI contended that the proposed permit to Baldwin County EMC (utilities installation) and a previously issued permit to Frank A. Hughes (September 1999, residential subdivision) would cause unacceptable adverse effects to aquatic resources of national importance (ARNI) associated with Robinson Island. DOI contended that since adverse impacts to ARNIs from both permits would not occur but for the Corps permit authorizing the installation of utilities, that it was inappropriate not to consider both the Baldwin County EMC and the Hughes permits as one project, and elevate both of them for higher level review. DOI advised that it would have requested elevation of the Hughes permit but did not make the time constraints associated with the 404(q) process.

To summarize, the remainder of DOI's concerns were: that the District failed to adequately consider secondary and cumulative adverse impacts of the residential subdivision on a bird rookery providing nesting habitat for Great Blue Herons, Cattle Egrets, Little Blue Herons, and Green Herons; that the District failed to adequately demonstrate that the proposed residential subdivision represents the least environmentally damaging, practicable alternative as required by the Guidelines; that the District failed to consider the importance of habitat offered by Robinson Island to migrating neotropical birds; that the District should, prior to its final permit decision, pursue state (e.g., water quality certification) and local (e.g., Baldwin County subdivision approval) approvals

which are critical to minimizing the project's impacts to water quality; and that the project (utilities plus subdivision) will result in the long term degradation and loss of seagrass beds, fringe wetlands, as well as Robinson Island's interior wetlands which comprise part of the aforementioned rookery.

**BALDWIN COUNTY EMC** – The permit would authorize the installation of four 5 – inch – diameter conduits from Orange Beach to the northern tip of Robinson Island, within an approximate 1700 foot corridor leased from the State of Alabama, in Terry Cove, near Perdido Pass in Baldwin County, Alabama. The conduits would be installed, via water jet or jet plow, to a depth of four to six feet below the sandy bottom. The District's decision document identifies the project purpose as, "to provide conduits for electricity and other utilities to Robinson Island as part of a proposed development of the island as a residential subdivision." Currently, one of the conduits is proposed to carry electricity between Robinson Island and Orange Beach, with three remaining conduits for future utilities (e.g., sewage, water).

**Frank A. Hughes** – The project is a proposed 34 home residential subdivision located on Robinson Island, an approximate 14 acre private island owned by Mr. Frank A Hughes. The project involves the dredging of 2,190 cubic yards of sand from an area approximately 130 feet by 130 feet on the northeast end of the island, to a depth of 3.5 feet below mean low water. A community pier with 19 boat slips is proposed at the proposed dredge site. A 24-foot by 30-foot boat slip would also be built adjacent to the pier to accommodate supply boats. Twenty-nine 30-foot by 12-foot-long piers would be constructed; one at each of 29 proposed residential lots along the shoreline of Robinson Island. Pile-supported, 5-foot-wide wooden walkways, where needed, without placement of fill, would be built over wetlands to access the piers from the proposed homes. Riprap is proposed, as needed below the mean low tide line to control erosion. No riprap materials are proposed in fringe marsh areas. A hard-surfaced, 14-foot-wide road is proposed from the northeast to the southwest ends of the island with no associated wetland fill (approximately 200 feet of marsh in the central interior of the island would be bridged). All wetlands (seven acres) within the center of Robinson Island are proposed to be preserved in perpetuity by deed restriction. All upland areas located in the center portion of the island, between Lots 8, 9, 22, and 23, excluding the road, would be set aside for a period of six years, at which time they could be used for development. The District's decision document identifies the project purpose as, "to provide community docking facilities, individual piers, and shoreline protection, allowing future residents access to a proposed residential subdivision on a privately owned island to be accessible only by boat."

**Preliminary Findings** – HQUSACE reviewed DOI's 404(q) request and the District's decision documents (for both permits) and concurred that the aquatic resources on and adjacent to Robinson Island are ARNIs. Robinson Island is a 14 acre uninhabited island. According to the District's decision document and U.S. DOI Fish and Wildlife Service (FWS) letters, the southwestern 1/3 of the island has been used for the disposal of dredged sand with vegetative cover restricted to grasses, herbaceous dicots, and dwarf pine trees. The northeastern 2/3 of the island, in contrast, is a mix of uplands (medium

aged oak and pine dominated forests, scrub vegetation and grasses and herbaceous species) and wetlands (pine dominated, pine flatwoods or savannah type habitat) that provides valuable wildlife habitat especially for birds. The center of the island contains a large rookery providing roosting and nesting habitat for Great Blue Herons (approximately 100), Cattle Egrets (75 – 100), as well as Little Blue Herons, and Green Herons. The seagrass beds (dominant species, Halodule wrightii) surrounding the island and the intertidal wetlands (Spartina and Juncus species) provide important fish and wildlife habitat in the Gulf Coast region that has been heavily impacted by past development.

In addition, we agreed that DOI's 404(q) referral request raised important national issues requiring further review of both the Baldwin County EMC and the Frank A. Hughes permits. These issues include: (1) whether it was appropriate for the District to process the applications via separate public notices, reaching separate permit decisions on different timetables and whether this constitutes piecemealing the NEPA analysis (inappropriately separating projects into parts which do not have independent utility and therefore, should not be analyzed separately pursuant to NEPA); (2) whether the District applied the proper scope of analysis to include consideration of the secondary and cumulative adverse impacts of home construction on the bird rookery and high value aquatic habitat as well as upland habitat that directly supports high value aquatic areas; and, (3) whether the District provided adequate consideration of secondary and cumulative impacts to the aquatic environment surrounding the island. We also agreed that additional information is necessary to support the District's conclusion that the residential subdivision portion of the project represented the least environmentally damaging, practicable alternative. To facilitate the analysis of these important issues, it was requested that the previously issued permit to Mr. Hughes be revoked and the administrative records for both permits be forwarded to HQUSACE for review. The permit to Mr. Hughes was subsequently revoked, pending the results of Section 404(q) process. The ASA (CW) advised the DOI in a letter dated January 7, 2000, and the Deputy Commander for Civil Works advised the Mobile District, through the South Atlantic Division, in a memorandum dated January 13, 2000, that the permits were to be elevated to HQUSACE for analysis and recommendations.

## II. ISSUE DISCUSSION

The information in the following sections presents the results of the HQUSACE review of the administrative records of the Baldwin County EMC and Frank A. Hughes permit applications. Clarification of information contained in the record was obtained from discussions with District personnel and Mr. Hughes. Project site information was obtained from discussions with the aforementioned individuals along with review of pictures and information in the administrative record; no site visit was performed by HQUSACE personnel.

**Processing Separate Applications** – As previously stated, DOI contends that since adverse impacts to ANRIs from both the Baldwin County EMC and Hughes permits would not occur but for the Corps permit authorizing the installation of utilities,

that it was inappropriate not to consider both the Baldwin County EMC and the Hughes permits as one project.

The district did separate the project into two applications, one from the owner/developer of the island and one from the utility company. The separation, however, was to accommodate Baldwin County EMC requirements that the utility, rather than a private applicant, be the recipient of permits associated with utility lines. From HQUSACE's review, it seems clear that, even though the District processed two separate applications, it intended to evaluate both applications as the applicant's project (one action) meeting the test that all reasonably related actions requiring a permit be included in the application (33 CFR 325.1(d)(2)). The notices for the applications were issued on the same date and were cross - referenced. The environmental assessments for both applications were also cross - referenced, with the assessment for the later permit (for the utility lines) referencing and relying heavily on information developed for and contained in the assessment for the residential subdivision.

However, while we understand the necessity to accommodate the utility company (with appropriate cross - referencing of permit documents to identify the applications as one project) we cannot agree with the decision to issue the permits within separate time frames. The Baldwin County permit clearly does not have independent utility since it is in support of the development of the residential subdivision proposed in the Hughes permit application. The final decisions on both permits should have been made simultaneously as would have been the case if no utility company requirements existed.

**Scope of Analysis** – As previously stated, DOI contends that the District did not properly expand its NEPA scope of analysis to include consideration of the secondary and cumulative impacts of the proposed residential subdivision on the bird rookery in the island's center.

In general for standard permit applications, the scope of analysis determination is made for each of the primary statutes that affect permitting decisions. The scope of analysis for the NEPA decisions, as well as decisions pursuant to the National Historic Preservation Act (NHPA) and the Endangered Species Act (ESA) are all formulated through an iterative process. The scope of analysis is generally the same, but each uses different criteria to establish the scope of analysis. That process begins with the determination of the Corps geographic jurisdiction related to the statutory authority at issue (i.e., Section 10 of the Rivers and Harbors Act, Section 404 CWA, and Section 103 of the Marine Protection, Research, and Sanctuaries Act). This determination itself may change during the evaluation process as new information is developed relating to all reasonably related activities that would require a permit. Impacts within the geographic jurisdiction of the Corps, i.e. within the waters regulated by the Corps, are always subject to full evaluation. As a part of the determination that an application is complete, a scope of analysis should be formulated by the Corps, for NEPA, NHPA, and ESA resulting in a clear project purpose statement. These scopes, and resultant project purpose, provide the basis for information collection and evaluation, including the alternatives analysis and the limit of consideration of indirect effects. As information is collected to support a final

decision, that information may result in refined scope(s) of analysis. The final decision, however, should include consideration of all reasonably related activities requiring a permit [33 CFR 325.1 (d)(2)], as well as any appropriate conditions pertaining to activities within the scope of analysis pursuant to each particular statute [33 CFR 325.4 (a)(1)-(3)].

Because the NEPA scope is at issue in this case, the following is a more detailed discussion on how to define that scope. The Corps issued its NEPA regulations in 1988 (33 CFR 325 Appendix B). This regulation addresses the scope of analysis as it pertains to those portions of a project over which the district engineer has sufficient control and responsibility to warrant Federal review. These include:

1. activities within Corps jurisdiction, and
2. activities beyond limits of Corps jurisdiction when there is sufficient Federal involvement to turn essentially private action into Federal action.

Factors which influence the limits of the permit area include the following (33 CFR 325.7(b)(2)):

- (i) Whether or not the regulated activity comprises “merely a link” in a corridor type project (e.g., a transportation or utility transmission project).
- (ii) Whether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.
- (iii) The extent to which the entire project will be within Corps jurisdiction.
- (iv) The extent of cumulative Federal control and responsibility.”

The Corps will occasionally expand its NEPA scope of analysis to include consideration of secondary impacts in areas outside the Corps geographic jurisdiction where such Federal control and responsibility are established. There are several situations in which this would happen such as the three listed below;

1. One situation is when the authorized activity (the activity within the Corps geographic jurisdiction) has a causal physical, water-related effect outside the permit area, and, where there is no feasible alternative means of developing the area outside the Corps jurisdiction without the Corps permit (i.e., “but for”).
2. Another situation is when an agency or interested party informs the Corps that a project will affect an important environmental resource near, but outside, the Corps geographic jurisdiction. In this case, the Corps, through its control over the activity requiring a permit, may reasonably be able to steer the project around the resource. In other words, the Corps can encourage the project proponent to utilize

a practicable alternative location for the proposed activity, and thereby lead an applicant to reroute, relocate, or reconfigure all or a portion of the project to avoid the adverse effects on the resource. In such a case, the Corps will do so only when such an alternative site or configuration is reasonably available and practicable to the applicant. When doing so, the Corps would not be acknowledging any legal obligation under NEPA or obligating itself to identify any resources outside the permit area; the Corps would instead be voluntarily taking such action solely in the interests of protecting the resource.

3. A third situation is when a project requires the Corps to issue such a substantial number of permits, or permits authorizing such a large portion of a project (e.g., if three miles of a five mile road is proposed in waters of the U.S.), that by granting the permits the Corps is essentially authorizing the entire project.

Islands are physically (and often biologically) unique environments. Their development or lack thereof, is intimately tied to the availability of practicable transportation access. Unless such access exists, island development either does not occur, or else it occurs slowly, sporadically, and to a small degree. Courts have recognized that the Corps bears a special responsibility when it considers permitting access to be constructed to undeveloped islands. In Conservation Council of North Carolina v. Costanzo, 398 F.Supp. 653 (E.D.N.C. 1975) (Bald Head Island) and Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985) (Sears Island), for instance, separate courts found that the Corps' decision to permit transportation access to an undeveloped island would induce growth, and that the Corps could not reach that decision before it had completed a NEPA review of the secondary impacts of reasonably foreseeable upland development on the island. The Bald Head Island situation was particularly similar to the Robinson Island project in that transportation access was proposed by boat, utilizing a marina to be permitted by the Corps (Sears Island involved a Corps-permitted causeway). In both cases, island development was the intent of the permit applicants, island development would be a certainty after issuance of the Corps permits, the only feasible means of accessing the island required Corps permits, and denial of the Corps permits would make the kind of island development sought by the applicant virtually impossible. Some might argue that these facts exist every time the Corps permits a road crossing to access any upland development, but island development differs greatly. After all, every piece of property that is not an island is, by definition, accessible by land. The land access route might well cost more to construct than a road across a stream, and doing so might require obtaining legal access rights through other properties which do not presently exist, but the existence of alternate land access routes makes all such cases clearly distinguishable from island development.

Since access determines whether an island is developed, when the Corps has complete control over that access (as it does and did with Robinson Island, Bald Head Island, and Sears Island), the Corps essentially controls the island's development. Since the Corps is responsible for its decision to permit access to an island, the Corps is responsible for that access' existence. As stated in our 1988 NEPA regulations (33 CFR 325 Appendix B, at 7b), the Corps' NEPA scope of analysis includes "the impacts of the

specific activity requiring a DA permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review."

Clearly on the Baldwin County and Hughes permit applications, the scope of analysis for the permit application should be expanded to include secondary impacts outside the permit area (i.e. beyond the area to be dredged, the community pier for 19 boats, the 29 individual piers, the boatslip, the limited amount of riprap, and the four submerged conduits) to the wetland and upland resources on the island, which include the bird rookery. First, impacts to the bird rookery and aquatic resources surrounding Robinson Island constitute a causal physical, water-related effect outside the permit area. Regarding the rookery, although the proposed work that is subject to the Corps of Engineers direct regulatory authority does not physically cause the impacts to the rookery, a causal relationship is not limited to direct physical causation alone. We believe a causal relationship is established when the Corps – permitted activity not only allows other, non—jurisdictional activities to occur (as is the case in most "but for" situations), but the Corps permitted activity actually induces them. In the instant case, where utilities and construction access are being introduced for the specific purpose of inducing residential construction and human habitation, we believe that the Corps permit for the installation of the utility structures and construction access constitutes more than an ancillary involvement in the subsequent construction and habitation. In our view, the Corps regulated introduction of utilities and construction access to Robinson Island constitutes an overt and fundamental stimulus to subsequent development and human habitation. We believe these circumstances constitute a causal relationship that conveys control and responsibility for impacts outside the immediate permit area to the Corps. In addition, the indirect effects of the residential subdivision will clearly effect the adjoining high value aquatic ecosystem (i.e., coastal salt marsh, seagrass beds, and other shallow marine resources) as well as use of the area by aquatic resource – dependent birds. Second, the applicant can not accomplish his project as desired, without the essential items requiring authorization via a Corps permit. The most notable of these are the four submerged conduits to be used for electricity, as well as other utilities, and the dredging, to facilitate the delivery of construction equipment and materials, which are necessary for a practicable project for the applicant. These Corps regulated activities can not be feasibly accomplished without the need for a Corps permit. HQUSACE believes this satisfies the "but for" test discussed in 1. above and the impacts of the development on the entire island are within the Corps scope of analysis.

**Consideration of Secondary/Cumulative Impacts** – Given that the NEPA scope of analysis should be expanded to address impacts to the bird rookery and upland resources on the island, were these impacts adequately considered? The FWS, in correspondence to the District, indicated that it believed that a heron rookery located on the Island is "an important environmental resource near, but outside, the permit area." The records provided by the District have been reviewed to determine if due consideration was given to the issues raised by the FWS concerning impacts to the rookery. Specifically, HQUSACE review focussed on whether the record revealed that the district either required mitigation through avoidance minimization or compensation for the impacts to the rookery, as described and requested by the FWS, or demonstrated

that the FWS contentions and recommendations were without standing or substance. In either event, the permits' decision documents should reflect the District's judgement on the issue.

HQUSACE's review of the record revealed that the District did a good job of addressing potential direct impacts of the project within the Corps geographic jurisdiction (dredging, riprap, piers, walkways, and utility installation) on water quality, fringe wetlands, seagrass beds, historic resources, endangered species, navigation, public safety, and emergency management and evacuation of the island). In addressing these issues the District coordinated the comments with the applicant, obtained a reply, and applied its professional judgement on the potential and degree of impact, as well as project revisions and /or conditions to address them.

Regarding indirect effects of the overall development of the island, including effects to the bird rookery, the District coordinated comments and responses between the applicant and FWS and negotiated project revisions eliminating proposed fill in wetlands in the center of the island where the rookery is located. However, the District did not evaluate, in any detail, the impacts associated with the upland residential subdivision on the rookery or the adjoining marine ecosystem, because they believed these impacts were outside of the Corps scope of analysis. The FWS provided specific recommendations to reduce the predicted adverse impacts to the rookery. These recommendations included: (1) maintain a 100 meter buffer between the rookery perimeter and the homes (and limiting the number of homes to 11 instead of the proposed 34); (2) conduct all construction from October 1 to February 15, when the rookery is inactive; and, (3) maintain 20 to 30 foot high visual barriers between the homes and the rookery until one nesting season after the last home is constructed. The record indicates that the District did not address these comments, or FWS comments on the site specific and regional importance of the rookery to the birds, we believe because the District did not view these impacts to be within its scope of analysis.

Had the district been correct in concluding that a limited scope of analysis was appropriate, its treatment of secondary and cumulative effects would have been entirely adequate. In this case, pursuant to Regulatory Guidance Letter (RGL) 88-13<sup>1</sup>, indirect impacts of the subdivision on the bird rookery and marine environment are not too attenuated and, should properly be addressed through expansion of the Corps NEPA scope of analysis. In the development of this island there is a clear causal relationship between the permitted work and the impacts in the uplands and to the rookery in the island setting. The development of the island could not feasibly occur (and thus the secondary impact of the proposed residential subdivision), "but for" the work authorized by the Corps. We believe that all other feasible alternative approaches would also require a Corps permit. Specifically, we know of no way the applicant could provide utilities, or construction materials to the island that would not require a Corps permit. In this case, the District should have considered/evaluated FWS concerns and effected

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<sup>1</sup> Corps RGLs are sequentially numbered and expire on a specified date. However, unless superseded by specific provisions of subsequently issued regulations or RGLs, the guidance provided in RGLs generally remains valid after the expiration date. The guidance in RGL 88-13 remains valid.

project revisions (including revisions to the proposed residential subdivision, if deemed necessary), to address the impacts of the upland development on the aquatic bird rookery and the adjoining marine ecosystem. We expect that when the District expands its scope to include the entire island, it will fully address the FWS' comments concerning upland impacts.

It should be kept in mind that the Corps will only consider future impacts which are reasonably foreseeable; our investigations and analyses should not attempt to consider impacts which are largely or entirely speculative. One way to determine what is reasonably foreseeable in terms of island development would be to assume a similar pattern of development and similar impacts as with other islands in the region, unless that development and those impacts are specifically precluded by enforceable restrictions. Also, it should be noted that considering the entire island as the Corps' scope of analysis does not extend the reach of the Corps' regulatory authority; our geographic jurisdiction under Sections 10 and 404 remains unchanged. Thus, the best time to act on foreseeable future impacts is at the time of the permit decision. If, for instance, the preservation of particular areas of an island or restrictions on how the island is developed are deemed essential to the Corps' decision to approve its permit, steps should be taken to insure the area's preservation through separate and legally binding instruments (e.g., deed restrictions, conservation easements, etc.). Otherwise, once the permit is issued and the construction which required the Corps permit is completed, the Corps may have little if any legal control over impacts caused by third parties at a later date in areas outside waters of the United States (although impacts caused at a later date *by the permittee* may result in permit revocation and possible legal action if they contradict information which the district engineer relied upon in reaching his decision).

**Alternatives Analysis** - Given that the NEPA scope of analysis should be expanded to address impacts of the upland residential subdivision to the bird rookery and near shore marine areas, it is legitimate for the Corps to pursue avoidance and minimization of impacts through consideration of alternative project designs and reductions in the entire island development. These alternatives could include reorienting the residential subdivision, reducing the number of homes, or, a combination of these approaches. The decision document for the Hughes permit adequately covers the alternatives of not building the project and building the project at another location. However, alternatives which reduce/eliminate encroachment and indirect adverse effects on the bird rookery and nearshore marine environment are not adequately addressed. The record indicates that while the District coordinated the comments of the FWS and the applicant, it did not articulate the rationale for its conclusion that the applicant's proposal represented the least environmentally damaging, practicable alternative. There was no discussion, for example, addressing the practicability of an 11 home development as recommended by the FWS. Stating; "The applicant has indicated that the proposed development of 29 lots would be the least that would make the subdivision viable." in the decision document gives the impression it is the applicant's view is determinative, not an independent evaluation by the Corps, as is required. Further, the applicant's statements in this regard stand in sharp contrast to those in a letter dated May 30, 1998, in which the applicant stated, "I don't know if we will have 3 or 38 homes on the island, but I do know

that the island development will be a place of beauty, developed with the environment in mind, which will result in being an outstanding resort community for the city of Orange Beach.” The record indicates that the applicant modified his proposal many times to avoid or reduce direct impacts to other resources (e.g., seagrass beds) yet there is no indication that this course was pursued with regard to reducing the projected impacts to the bird rookery by the residential subdivision. Without such discussions it is difficult to see how the district arrived at the conclusions quoted above, and the degree to which the other alternatives were evaluated and rejected becomes questionable. The District also did not adequately evaluate the potential adverse indirect effects of the upland residential subdivision to the near shore aquatic areas. Such potential adverse indirect effects include nutrient loading from lot maintenance, erosion, and other adverse effects. We believe that all of the omissions in the District’s analysis were a result of its view of the project scope of analysis, which we have broadened with this guidance.

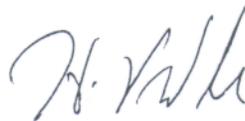
III. CONCLUSIONS – We agree with the FWS that the District should have expanded its NEPA scope of analysis and evaluated the secondary and cumulative impacts of the entire island development to the bird rookery in the center of the island and the adjoining marine waters. These impacts, resulting from the construction of the residential subdivision, would not occur but for the installation of utilities and dredging and docking facilities to facilitate home construction. It would not be feasible, in our judgement, to develop the island without Corps authorization. The applicant could not feasibly get construction materials to the island without, (1) dredging, (2) construction of a pier, or (3) prop dredging while beaching watercraft with the construction materials. A Corps permit is required to develop the island. Therefore, it is appropriate in this case for the Corps to evaluate the direct and indirect impacts of the entire island development and, consider reorienting and/or reducing the number of homes in the proposed residential subdivision, to address those impacts. Addressing these impacts is important because impacts to nesting and brood rearing habitat are serious for any species. Furthermore, the indirect effects of the residential subdivision on water quality and marine habitat must be considered and can be properly controlled through permit conditions on the Corps permit. For example, we concur with the District’s proposed permit condition requiring connection of all island residences to the City of Orange Beach treatment system in lieu of septic tanks. Other conditions to address these indirect impacts may include reducing the number of homes to be built, and control fertilizer/pesticide applications and erosion control. Also, while we do not agree that the District necessarily piecemealed (from a NEPA perspective) its decisions regarding the Baldwin County EMC and Hughes permits, we do agree that the District should have processed/evaluated these applications on the same timetable, rendering the permit decisions concurrently.

While we agree with FWS that Robinson Island provides habitat for migrating Neotropical birds, we do not agree that it is particularly unique or important to these species as the aforementioned breeding habitat is to waterbirds. We note that reorientation and/or reduction of the residential subdivision would benefit Neotropical birds as well as the waterbirds.

We believe the District adequately addressed direct effects of the project concerning long term degradation of aquatic habitats on and adjacent to the island. The proposed riprap will control erosion and will not be placed in fringe wetlands, dredging plans will be based on up – to – date surveys of seagrass beds, the boards in the walkways and piers will be spaced to limit shading impacts, and the record indicates that the District will require sewage to be piped to Orange Beach for treatment in lieu of septic tanks. However, the District needs to evaluate the indirect effects of the residential subdivision on the bird rookery and coastal marine resources.

#### IV. FINDINGS

1. The District should give full consideration to the information provided by FWS regarding the bird rookery. This review should include the FWS information on the regional importance of the rookery as well as the recommendations to minimize impacts of the proposed residential subdivision on the rookery.
2. The District should perform a new 404(b)(1) Guidelines analysis and public interest review based on an expanded scope of analysis, which includes consideration of the indirect effects of the entire upland development which is expected to be caused by the permitted activities. This reevaluation should consider any practicable reductions and/or revisions to the proposed residential subdivision, which would minimize the potential loss of the bird rookery and effects on adjoining marine waters.
3. The reevaluation of the permits should be based on a purpose statement similar to the following: "To develop a viable water oriented residential subdivision in the coastal Baldwin County area." The original purpose ("provide ... facilities ... allowing future residents access to a proposed residential subdivision on a privately owned island to be accessible only by boat") is too restrictive.
4. The District should revisit and revise the documentation for the suspended permit to Mr. Hughes, AL98-00542-L, and the pending permit application from Baldwin County EMC, AL98-00541-L, providing additional documentation of the District's evaluation and decision as discussed above.
5. Upon completion of its reevaluation and documentation, the District will make final decisions concerning the revocation, modification, or reissuance, of permit AL98-00542-L and for the pending permit application AL98-00541-L. Both decisions will be made concurrently, to avoid raising any concerns about "piecemealing" Corps decisions.



20 OCT 2000

HANS A. VAN WINKLE  
Major General, USA  
Deputy Commander for Civil Works