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

REPLY TO
ATTENTION OF:
CECW-OR

13 SEP 1990

MEMORANDUM THRU COMMANDER, SOUTH ATLANTIC DIVISION

FOR COMMANDER, JACKSONVILLE DISTRICT

SUBJECT: Permit Elevation, Old Cutler Bay Associates

1. By memorandum dated 25 June 1990, the Assistant Secretary of the Army (Civil Works) advised me that he had granted the requests of the Environmental Protection Agency (EPA), the Department of the Interior, and the Department of Commerce to elevate the permit case for Old Cutler Bay Associates. In this regard, the case was elevated to HQUSACE for national policy level review of the definition of project purpose and the analysis of practicable alternatives under the Section 404(b)(1) Guidelines. HQUSACE was also asked to ensure consistency with our previous guidance resulting from section 404(q) elevations of the Plantation Landing Resort and the Hartz Mountain Development Corporation cases.

2. We have reviewed the administrative record, conducted a meeting with the involved Federal agencies on 2 August 1990, met with your staff and the applicant on 15 August 1990. I traveled to the site with the Chief, CECW-OR, on 4 September 1990 and met with your staff, the applicant, and the involved Federal agencies. Based on our review, we have determined that the definition of project purpose utilized in the analysis of alternatives was too specific to the applicant's proposal and may have inappropriately limited the analysis, especially potential onsite alternative configurations of the project. We have also determined that additional discussion of mitigation in the decision documents is warranted.

3. Please reevaluate the subject permit in light of the guidance provided in our findings copy enclosed and take action accordingly. In order for us to comply with paragraph 8 of the Army/EPA Memorandum of Agreement, please notify HQUSACE Regulatory Branch as soon as you reach a permit decision. Questions or comments concerning this elevated case may be directed to Mr. Zell Steever at (202) 272-1780 or Mr. Kirk Stark at (202) 272-1786.

FOR THE COMMANDER:

Encl

PATRICK J. KELLY
Major General, USA
Director of Civil Works

HQUSACE REVIEW AND FINDINGS
OLD CUTLER BAY PERMIT 404(q) ELEVATION

PREPARED BY CECW-OR
13 SEPTEMBER 1990

ENCLOSURE

HQUSACE REVIEW AND FINDINGS
OLD CUTLER BAY PERMIT 404(q) ELEVATION

The purpose of this document is to present the findings of the Headquarters U.S. Army Corps of Engineers (HQUSACE) review of policy issues associated with the Old Cutler Bay Associates (OCBA) permit application pending before the Corps Jacksonville District (District). This review was undertaken in accordance with the 1985 Memoranda of Agreement (MOAs) between the Department of the Army and the Environmental Protection Agency (EPA), the Department of Interior (DOI) and the Department of Commerce (DOC). This document provides guidance to the Jacksonville District to re-evaluate its decision on the OCBA application. This document also provides general guidance that should be applied by all districts on project purpose and alternatives analysis.

I. BACKGROUND

On 6 August 1987, the OCBA requested Department of the Army authorization, in accordance with local requirements, to discharge 724,300 cubic yards (cy) of fill material into 125 acres of wetlands and to dredge 496,000 cy from 20.6 acres of wetlands for the purpose of constructing an upscale residential/(Jack Nicklaus designed) championship golf course community in south Dade County, Florida. Approximately 100 acres (or 75%) of the project site wetlands are surrounded by an old agricultural berm (agri-berm). The wetlands inside the agri-berm were subject to agriculture, which was abandoned in the 1950's, providing the opportunity for the area to return to wetlands dominated by white mangrove and Brazilian Pepper. The wetlands bounded by this agri-berm hydrologically communicate with the adjacent coastal system only through a single 24 inch diameter culvert.

The proposal is to create land suitable for the construction of 428 upscale single-family attached and detached dwelling units, an eighteen-hole championship golf course designed by Jack Nicklaus, a clubhouse facility, and attendant uses. In addition, the applicant proposed to preserve 77.4 acres of coastal mangrove wetlands onsite, in its present state, east and channelward of the agri-berm. The application was determined to be complete on 9 September 1987, and a public notice describing the proposal was issued on 17 September 1987. A number of comments both for and against the project were received in response to the public notice. Four Federal agencies, the EPA, the Fish and Wildlife Service (FWS), the National Park Service (NPS), and the National Marine Fisheries Service (NMFS) all objected to the issuance of a

permit for the project as originally proposed. State agencies also expressed strong reservation about the OCBA application. The Florida Department of Environmental Regulation (FDER), for example, recommended that the applicant substantially reduce the acreage of wetlands to be impacted by this proposal. The Florida Department of Community Affairs identified the area proposed for development as hazardous in the event of a hurricane.

The comments received in response to the public notice were provided to the applicant for their response. In addition, the District requested OCBA to provide further information necessary for analysis under the Section 404(b)(1) Guidelines (Guidelines), by letters of 12 November and 9 December 1987. In response to a request from the applicant, following receipt of the adverse comments on the original proposal from State and Federal agencies, the application was deactivated on 14 January 1988. The applicant requested reactivation of the application on 7 June 1988 and submitted a revised permit application which reduced the proposed fill to 100.4 acres (which included wetlands both channelward of and inside the agri-berm) and proposed increased onsite and offsite mitigation. However, the revised application did not contain information responsive to the District's aforementioned request for information necessary for analysis pursuant to the Guidelines, (project alternatives, project purpose, etc.). The revisions to the application were provided to EPA, NMFS and FWS on 25 June 1988. All three Federal agencies continued to recommend denial of the application. In August 1988, the Florida Wildlife Federation and the Friends of the Everglades objected to the project and requested a public hearing. The FDER formally proposed to deny the state permit and Water Quality Certification on 2 September 1988.

Interagency coordination on the permit application proceeded for approximately 18 more months during which the project was further reduced to the currently proposed fill area and additional modifications were made to the mitigation plans in response to District concerns, as well as those of other State and Federal agencies. During this period FDER issued its permit and the required Section 401 Water Quality Certification. The District requested OCBA to provide the information previously requested to facilitate analysis pursuant to the Guidelines on at least three separate occasions by letters during this period. Finally, late in December 1989, the District received OCBA's alternatives analysis. In February 1990, after its analysis of this and other pertinent information, the District completed the preliminary permit decision process and notified the Federal resource agencies, on 22 February 1990, of its intention to issue a permit for the project initiating the informal consultation process pursuant to the MOAs. Since the three Federal resource agencies continued to object to the issuance of a permit, meetings were held in accordance with the procedures of the MOAs.

During the period of these meetings, EPA had tentatively advised that it would not seek elevation of the permit decision, but subsequently reversed this position. FWS had requested permit conditions, all of which were acceptable to the applicant and the Corps, except for one condition , which, contrary to FDER permit conditions, required that the excavated agri-berm material not be placed in the adjacent ditches. FWS subsequently requested elevation when neither the aforementioned permit condition nor reduction of the project footprint was incorporated into the proposed permit.

On 4 May 1990, after the District and Division completed the informal consultation process, written "Notice of Intent to Issue" letters were sent to EPA, FWS, and NMFS along with a copy of the District's Environmental Assessment and Statement of Findings, in a Memorandum for the Record (EA/SOF) dated 4 May 1990. The proposed issuance of a permit to OCBA would authorize placement of fill material into 59.2 acres of wetlands adjacent to Biscayne Bay, which, in conjunction with the 210 acres of adjacent uplands, would provide a construction base for the project. Approximately 47 acres of the wetlands proposed to be filled are located landward of a line, delineated by EPA in conjunction with District staff; those wetlands are dominated by the exotic species, Brazilian Pepper. Wetlands dominated by Brazilian Pepper are considered stressed and of relatively low value as wildlife habitat by the Corps and the Federal resource agencies. White mangrove is the predominant vegetation in the remaining 12 acres of wetlands. All of the aforementioned 47 acre area and all but approximately 4 acres of this 12 acre area lie within the aforementioned agri-berm.

The applicant has proposed an extensive onsite and offsite mitigation package as a result of negotiations with the District and FDER and in response to a Habitat Evaluation Procedure (HEP) analysis performed by the FWS. The mitigation involves onsite and offsite wetlands creation, preservation, and enhancement within the Biscayne Bay system. The onsite mitigation is comprised of: (1) creation of 39.4 acres of aquatic habitat from uplands which includes 2.2 acres of transitional and freshwater wetlands and 8.9 acres of littoral zone in conjunction with 24.7 acres of freshwater lakes (excavated to receive storm water and act as traps for the proposed golf course); (2) creation of 12.4 acres of transitional, freshwater and high marsh and 1.2 acres of littoral zone associated with 2.2 acres of freshwater lakes from existing wetlands; (3) enhancement of 22 acres of wetlands via removal of the aforementioned agri-berm [create 8 acres of tidal brackish wetlands in agri-berm footprint (3.6 acres) and filled ditches (4.4 acres)], thus increasing the frequency and extent of tidal communication of these wetlands with adjacent, coastal wetlands; (4) donation of 65.6 acres of wetlands as well as the 22 aforementioned acres of enhanced wetlands to the NPS/Biscayne

National Park (BNP); and (5) placement of 28.3 acres of wetlands in a conservation easement to FDER. The offsite mitigation is comprised of: (1) creating 26.5 acres of wetlands after removing an existing dike (13 acres) and filling an existing man-made canal (13.5 acres) with dike material and additional fill; enhance flushing of 144 acres of wetlands by restoring a stream - the stream's course ran diagonally across and is currently interrupted by the existing canal and associated dikes; and (2) enhance flushing to 255 acres of wetlands by adding additional culverts under a Florida Power and Light Company power line road.

In accordance with the MOAs, EPA, DOI, and DOC, in letters of 4 June 1990, requested that the Assistant Secretary of the Army (Civil Works) [ASA(CW)] elevate the OCBA permit decision for higher level review. Each of these Federal agencies identified the District's acceptance of the applicant's definition of project purpose as a major policy issue. On 25 June 1990, the ASA(CW) granted the elevation requests from all three agencies and forwarded the action to HQUSACE for national policy level review, to ensure consistency with the guidance on Hartz Mountain and Plantation Landing cases, and to provide additional guidance in this case. The ASA(CW) direction for review to HQUSACE states, in part:

> ". . . guidance should prevent District Engineers from so narrowly defining the project purpose that it unreasonably limits the consideration of alternatives and, thereby, subverting a key provision of the guidelines."

The ASA(CW) directive for elevation was not based on insufficient interagency coordination.

The information in the following sections presents the result of the HQUSACE review of the current policy and administrative record from the District on the OCBA permit application. Clarification of information contained in the case record was obtained through meetings with the applicant and his consultants, District staff, the EPA, the FWS, and the NMFS, and other interested parties.

The 404(b)(1) Guidelines found at 40 CFR 230 are the substantive environmental criteria the Corps uses in evaluating the impacts of the discharge of dredged or fill material in the Nation's waters, including wetlands, and form an essential component of the Corps' environmental protection of the Nation's wetlands. Pursuant to the Corps regulations (33 CFR 320-330), a Section 404 permit cannot be issued unless the District determines that the project complies with the Guidelines. As in the Hartz Mountain and Plantation Landing cases, the HQUSACE's review of this case focused principally on the policy issues concerning compliance with the Guidelines.

II. GUIDELINES CONSIDERATIONS and the PERMIT PROCESS:

As we have stated before, in both the Plantation Landing and Hartz Mountain elevation cases, a key provision of the Section 404 (b)(1) Guidelines is the "practicable alternatives test" which provides that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem" [40 CFR 230.10(a)]. This means that if a 404 discharge "may reasonably be avoided, it should be avoided."(quoted from the Preamble of the Guidelines under "Alternatives") Moreover, the applicant must provide evidence convincing to the Corps district that there are no practicable alternative sites available to the applicant and that the applicant has avoided impacts onsite to the extent practicable.

In addition to the basic "practicable alternatives test", Section 230.10(a)(3) establishes rebuttable presumptions that alternatives for discharges into "special aquatic sites" for non-water dependent activities exist and that such alternatives are less environmentally damaging. A non-water dependent activity is one that does not require access or proximity to, or siting within, a special aquatic site to fulfill its "basic purpose." Practicable alternatives to non-water dependent activities are presumed to be available and are presumed to result in less environmental loss unless clearly demonstrated otherwise by the applicant. The OCBA project (residential housing with amenities) is clearly a non-water dependent activity. This fact is documented in the District's decision document (EA/SOF; p 13.; 8. b. 1.; 5/4/90) and has not been contested by the applicant. The burden of demonstrating that no practicable alternative exists is the sole responsibility of the applicant, not the Corps district or the Federal resource agencies. It is intended that "this presumption should have the effect of forcing a hard look at the feasibility of using environmentally preferable sites" to discourage avoidable discharges in special aquatic sites, including wetlands. (quoted from the preamble of the Guidelines under "Water Dependency") It is the responsibility of the Corps district, with the cooperation of the Federal resource agencies, to provide guidance and/or clarification of Guidelines requirements to attempt to optimize the applicant's efforts in this regard. Finally, it is the sole responsibility of the Corps district to determine, after considering all information submitted by the applicant and after considering the views of EPA, whether the presumption of the existence of less environmentally damaging, practicable alternatives has been rebutted. To repeat the language of the Guidelines: if a 404 discharge "may reasonably be avoided, it should be avoided."

Clearly, the principal prerequisite for both the applicant and the Corps to evaluate practicable alternatives is to establish the "basic purpose" of the proposed activity for the purposes of the Guidelines. In this regard, as with other aspects of the Guidelines, it is the responsibility of the Corps district to exercise independent judgement. While the Corps needs to consider the applicant's views and information regarding the project purpose and existence of practicable alternatives, this must be undertaken without undue deference to the applicant's wishes. It is only when the "basic project purpose" is reasonably defined that the alternatives analysis required by the Guidelines can be usefully undertaken by the applicant and evaluated by the Corps. The basic project purpose can be neither so broadly defined nor alternatively so narrowly defined so as render the alternative analysis meaningless or impracticable. In both cases this would subvert the intent of the Guidelines. The alternatives analysis required under the Guidelines relies on a reasonably defined "project purpose" (See 40 CFR 230.10(a)(1) and (a)(3)), and requires substantive evaluations and judgement on the part of the Corps. Finally, the project purpose should be concisely stated in one or two sentences.

In this case, OCBA stated in the 1987 application that the project purpose was:

> "Development of single family residential homes and golf course by removal of white mangrove and transitional wetland communities and placement of clean fill." page 21.

However, in the appended Exhibit A, page A-3, attached to the permit application, it states the following:

> "The present development proposal is for 428 upscale single-family attached and detached dwellings units, and eighteen-hole championship golf course designed by Jack Nicklaus, a clubhouse facility, and attendant uses. The coastal portion of the property (77.4 acres), east of the saltwater dike, is proposed to be preserved in its present state." page A-3.

The Jacksonville District in the public notice of 1987 provided under the heading, "WORK & PURPOSE:"

> "The applicant proposes to place 724,300 cubic yards of clean fill material over 173.1 acres (later corrected to 125.08 acres) of wetlands in conjunction with the construction of a residential/commercial development. The applicant also proposes to dredge 20.6 acres of wetlands to provide fill material and to provide lakes as an amenity to the development. The applicant proposes to preserve 77.4 acres of mangroves adjacent to Biscayne Bay."

There was apparently no special significance to the fact that, in the public notice under WORK & PURPOSE, the description characterizes the project in very general terms. In contrast to the public notice, the project purpose in the EA/SOF dated 5/4/90 reflects a narrowly defined project purpose, stated as follows:

> "to construct an upscale residential/(Jack Nicklaus designed) championship golf course community in south Dade County. The project's basic purpose is to realize a reasonable profit by providing luxury country club type housing to an affluent segment of the Miami area population. . . . 428 units"

In this case, as in both the Plantation Landing and Hartz Mountain cases, the Corps district defined a project purpose that is too specific to the applicant's proposal. The District's project purpose paragraph contains information which it may or may not have intended to be part of the statement of basic purpose. Such information includes specific numbers of units (428), which is inappropriate for a statement of basic purpose. The project purpose must be defined so that an applicant is not in the position to direct, or attempt to direct, or appear to direct, the outcome of the Corps evaluation required under the 404(b)(1) Guidelines. Full cooperation between an applicant and the Corps is required for this process to work. Our review of the record indicates that the District's formulation of project purpose was nearly correct, but was too restrictive. The project purpose should be stated as:

> "to construct a viable upscale residential community with an associated regulation golf course in the south Dade County area."

The record does not explicitly demonstrate that the applicant's alternatives analysis (specifically, the use of the seven criteria) and the Corps' subsequent analysis of same supports the conclusion that the applicant's proposed project site is the least environmentally damaging, practicable alternative site. We are concerned that application of the overly restrictive definition of project purpose could have resulted in an incomplete analysis of alternative sites. Also, in this instance, the consideration of onsite alternatives could have been limited by the project purpose statement. The applicant had, in 1986, requested a consultant to conduct an alternatives analysis for the proposed project which evaluated 21 potential alternative sites in a 125 square mile area utilizing the following seven criteria: size (275 - 300 acres), limited or no apparent wetlands, availability, within South Dade County Urban Development Boundary, limited number of private owners, and no commercial/industrial zoning on or adjacent to the site. To

the extent that a less specific project purpose might result in less required acreage, a subsequent analysis might have identified either potential alternative sites or onsite configurations requiring less filling of wetlands.

It also appears that the District relied primarily on confidential financial data supplied by the applicant evaluating the potential profitability/economic viability of practicable alternatives, especially in regard to less environmentally damaging onsite configurations. For example, the EA/SOF states, "Any further reduction in the project would jeopardize the financial viability of the project; consequently, further reduction of the project fill would not be practicable" and, "The project has been minimized to the point that further reduction would make the project uneconomical". This raises the question of the relationship of economic viability to practicability. It also raises the question of the degree of consideration that should be afforded to an applicant's potential for profitability when evaluating the practicability of less environmentally damaging alternatives.

Section 230.10(a)(2) of the 404(b)(1) Guidelines states "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes".[1] In addition, the Preamble of the 1980 Guidelines (under "Alternatives") states that the word "cost" replaced the word "economic" within the definition of practicability because, "The term economic might be construed to include consideration of the applicant's financial standing, or investment, or market share, a cumbersome inquiry which is not necessarily material to the objectives of the Guidelines". Further, the Preamble states, "Our intent is to consider those alternatives which are reasonable in terms of the overall scope/cost of the proposed project". Generally, an alternative cannot be practicable to the applicant if it does not provide economically viable opportunities relative to the basic project purpose(s). However, from an economic perspective, the Guidelines must presume that the potential for economic viability is maintained (to various degrees on a site to site or onsite configuration to onsite configuration basis) through the application of the aforementioned practicability factors in 230.10(a)(2) rather than applying economic viability as a specific valuative factor. That is, to the extent that potential alternative sites or potential

[1] Although not at issue in this case, it is important to recognize that there are circumstances where the impacts of the project to the aquatic environment are of such magnitude that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed [Section 230.10(c) of the 404(b)(1) Guidelines].

onsite configurations provide similar logistical opportunities, provide that the project can realistically be operated and/or constructed and result in the applicant's incurring no more than reasonable, additional costs, the project's economic viability should be preserved through such alternative sites or onsite configurations. These determinations should generally be made based on a "typical" applicant, in this case a "typical" upscale housing and golf course applicant. Districts should not focus too heavily on the specific profitability statements of the particular applicant before them. As previously stated, the principal prerequisite is to establish the "basic purpose" of the proposed activity and to apply the aforementioned practicability factors with the intent of avoiding significant impacts to aquatic resources and not necessarily providing either the optimal project location or the highest and best property use. Conducting an alternatives analysis by assessing economic viability based upon a specific project purpose does not serve this intent. Of course, an applicant can attempt to demonstrate that the alternatives are not practicable for reasons of logistics, technology, cost, or other elements of project viability.

Our review indicates that there are several instances in the evaluation of this project pursuant to the Guidelines in which the District needs to more clearly document the basis of its decision. These include the documentation of how the seven alternatives analysis criteria were developed and utilized, the timing of the receipt of the applicant's alternatives analysis, the level to which the District focused on the financial data of the applicant, and the level of site plan specificity (i.e., show locations of attached and detached houses, etc.). Our review suggests that, although additional documentation of these results is needed in the EA/SOF, the issues were completely and carefully evaluated by the District.

We have additional comments concerning Sections 230.10(c) (significant degradation) and 230.10(d) (mitigation) requirements of the Guidelines. Regarding significant degradation, negotiations have resulted in significant reductions in the project's encroachment to 47 acres of impounded Brazilian Pepper wetlands, 8 acres of impounded White Mangrove wetlands and 4 acres of White Mangrove wetlands which are not impounded. This project reduction reflects the professional judgement of the District as well as that of the Federal resource agencies that Brazilian Pepper wetlands are of relatively less value to wildlife and the District's professional judgment that the impounded White Mangrove wetlands are of relatively less value to the Biscayne Bay system than wetlands which are not impounded, due to reduced detrital export. We agree that the judgment of the District and the Federal resource agencies provides a reasonable basis for the pursuit of practicable, less

environmentally damaging onsite project configurations in this case. We note that once avoidance has been demonstrated and concluded to be impracticable, delineating low and/or high value wetlands and other aquatic resources can serve the purposes of the Guidelines [particularly 230.10(a)(1)(ii)] by directing offsite and onsite alternatives evaluations that are less damaging to aquatic resources.

The District's acceptance of the mitigation plan has drawn criticism (aside from the belief by some that some mitigated impacts may be avoidable) primarily because the plan offers out-of-kind wetland replacement that is not quantified or explained; because the plan allegedly depends too much upon preservation, and upon the conversion of one wetland and/or aquatic habitat to another; and, ultimately, because the mitigation plan allegedly fails to offset a net loss of wetlands (primarily 12 acres of White Mangroves). We note that the applicant's mitigation proposal resulted from negotiations with the District and FDER and is in response to, and satisfies, a Habitat Evaluation Procedure analysis performed by the FWS.

Conversations with District personnel reveal that the proposed mitigation plan reflects the District's professional judgement that: (1) the White Mangrove community was created as a result of a significant storm depositing seed landward of the agri-berm, which continues to restrict tidal exchange so as to sustain the area's current vegetative cover; (2) removal of the agri-berm will have the benefit of increasing the frequency and extent of exchange of Biscayne Bay waters with the aforementioned 22 acres of White Mangrove which would be more consistent with natural circumstances than the current tidal situation; (3) based upon the current level of knowledge, the mitigation plan's proposed planting of Red Mangrove (as well as the other wetland types), as opposed to White Mangrove, more accurately reflects the natural vegetative character of the wetland areas where wetland creation is proposed to occur, has an increased probably of establishment success and is of significant ecological value to the Biscayne Bay system; and (4) preservation, in this case, provides ecological benefits because the wetlands to be preserved perform important wetland functions within the Biscayne Bay ecosystem, which has suffered significant cumulative wetlands losses and would otherwise be subject to continued developmental pressure.

Our review of the record reveals that onsite alternatives evaluations proceeded to including the 47 acres of Brazilian Pepper wetlands within the proposed project reflecting the aforementioned judgment that these wetlands are of lower value. Out-of-kind mitigation for these wetlands losses was acceptable to the Federal resource agencies and, we believe, is both logical and appropriate under these circumstances. In addition, we

believe that reestablishing hydrological connections provides significant benefits to the Biscayne Bay ecosystem (although difficult to quantify), and is a desirable element of a mitigation plan. Further, we believe the District's conclusion was well reasoned that the species proposed for planting have a higher probability of success, given, among other factors, the existing hydrology and vegetation of the wetlands within which wetland creation is to be attempted. Also, preservation, in this case, would address a potentially high degree of developmental pressure (considering the wetlands at issue have the potential to provide access to Biscayne Bay) and the corresponding regulatory efforts that would be necessary to address this pressure. Furthermore, we note that the mitigation package will create, in addition to the creation, enhancement and/or conversion of other wetland types, approximately 30 acres of Red Mangrove-Spartina wetlands from disturbed/altered habitat (agri-berm, offsite canal and associated dikes) and enhance tidal interchange with 22 acres of onsite wetlands and 144 acres of offsite wetlands, and install additional culverts in an attempt to improve tidal exchange to an additional 255 acres of offsite wetlands. The resulting wetlands as well as the resultant interchange of these wetlands with the Bay will provide fish and wildlife habitat, water quality maintenance, and detritus, thereby positively influencing the total Biscayne Bay estuarine system. All but 4 acres of the wetlands to be filled are currently impounded by the agri-berm, which limits this system's hydrological connection and detrital export to Biscayne Bay when compared to a system which communicates freely with open water. In addition, we agree with the Federal resource agencies that the cumulative losses of coastal wetlands within the entire Biscayne Bay ecosystem should be considered; we submit that the proposed mitigation plan properly and adequately addresses the losses which the proposed project would cause.

We agree that the District's judgment provides a reasonable basis for the pursuit of appropriate and practicable mitigation in this case. It would seem, however, that while the EA/SOF articulates the merits of the mitigation plan, it generally does not explain the District's conclusions, particularly with regard to out-of-kind wetland replacement.

III. RELATIONSHIP TO PREVIOUS GUIDANCE:

These general issues were discussed and guidance provided in HQUSACE findings for both the "Permit Elevation, Plantation Landing Resort, Inc." dated 21 April 1989, and the "Permit Elevation, Hartz Mountain Development Corporation" dated 17 August 1989.

As in both the Plantation Landing and Hartz Mountain cases, in this case the Corps district appears to have defined a project

purpose that is too specific. The Corps' permit decision documents define the OCBA project purpose as "an upscale residential/(Jack Nicklaus designed) championship golf course community in south Dade County. The project's basic purpose is to realize a reasonable profit by providing luxury country club-type housing to an affluent segment of the Miami area population." It also appears that in rendering its conclusions with respect to alternatives, especially in regard to less environmentally damaging onsite configurations, the District relied heavily on financial data supplied by the applicant evaluating the profitability/economic viability of alternatives to the aforementioned project purpose. Although project viability is one legitimate component of the concept of "practicability" regarding any alternative being considered in the practicable alternatives review, that component is addressed in terms of the logistics, technical feasibility, and costs criteria in Section 230.10(a)(2) of the Guidelines. Other issues addressed in these former guidance documents (e.g., Corps deference to applicant, mitigation, water dependency, and etc.) were properly handled in this case.

IV. CONCLUSIONS:

1. The District's efforts in conjunction with those of the resource agencies resulted in substantial project revisions by OCBA with a correspondingly substantial reduction in adverse impacts on valuable aquatic resources. Moreover, the District proposed to issue a permit for a project on 4 May 1990 that would have, in the context of the District's defined purpose statement, resulted in substantial mitigation for, in its opinion, unavoidably impacted low value wetlands. Our review indicates that the mitigation proposed for the project would result in a positive influence on the Biscayne Bay ecosystem.

2. For the purposes of this case only, the "basic project purpose" for this application and the analysis required pursuant to the Guidelines should be defined as: "to construct a viable upscale residential community with an associated regulation golf course in the south Dade County area". Nevertheless, it may be that a project with a championship golf course or even a Jack Nicklaus designed course and luxury homes at one location is reasonable and possible at the proposed site. The District may require OCBA to provide information that facilitates a Corps analysis and conclusions with respect to Guidelines compliance, particularly with onsite alternative configurations of the project. The decision documents should be corrected to reflect the reformulated basic project purpose.

3. The District will require the applicant to demonstrate clearly that the existing alternatives analysis is adequate for this reformulated project purpose and, if not, to prepare a new

analysis (see paragraph 2, page 7). The District will again independently determine whether the analysis has demonstrated that the site is the least environmentally damaging, practicable site and document its findings in the EA/SOF. The area defined by the applicant in which to look for alternatives is reasonable.

4. If the District determines that the Salcedo site is the least environmentally damaging, practicable site, the District will require the applicant to demonstrate that onsite avoidance of wetland impacts has been incorporated to the maximum extent practicable. This demonstration will be based on the revised project purpose statement. Based on this submittal by the applicant the District will either:

a. document in the EA/SOF how it determined, based on its independent review of the applicant's submittal, that all practicable onsite avoidance has been incorporated, or,

b. require additional review by the applicant of onsite configurations for the project, as defined by the revised project purpose, which may further reduce impacts to waters of the U.S.

In this case, limiting the encroachment of the proposed project to the aforementioned 47 acres of wetlands landward of the low/high wetland value line has been identified as a less environmentally damaging alternative (with appropriate mitigation) than the current proposal. The District will view the alternative of restricting all fill to the area landward of the low/high wetland value line as a goal for onsite configurations. If any fill remains channelward of this line, the District must be convinced, and document its determination, that the applicant has clearly demonstrated that it would not be practicable to reduce the fill to this line.

5. The District should provide additional discussion in the EA/SOF in support of its conclusion that mitigation proposed for unavoidable wetlands losses is both appropriate and practicable. In particular, the District should qualify those White Mangrove wetlands values that are provided for and those that are not provided for by the mitigation plan and discuss its rationale for out-of-kind mitigation. We leave it to the District's discretion to solicit additional information from the Federal resource agencies in this regard.

6. In this case, as in the Plantation Landing and Hartz Mountain cases, we have stated that great care must be used in determining the basic project purpose for purposes of the 404(b)(1) Guidelines alternatives analysis. We have also emphasized that Corps districts must use independent judgement in determining project purpose. The basic project purpose must not

be so narrowly identified so as to unduly restrict a reasonable search for potential practicable alternatives. In this case, the project purpose description was determined to be too restrictive because it referenced a specific number of units (428) and a golf course of specific design. In this case the area of consideration in which the applicant searched for alternatives was reasonable; however, this requires careful attention and must not be too narrowly defined as we determined in the Hartz Mountain case.

Patrick J. Kelly

PATRICK J. KELLY
Major General, USA
Director of Civil Works