

**ADMINISTRATIVE APPEAL DECISION  
PROFFERED PERMIT DECISION – CHERRY TREE INN  
DETROIT DISTRICT FILE # 00-056-124-1**

**April 15, 2005**

**Review Officer:** Douglas R. Pomeroy, U.S. Army Corps of Engineers, South Pacific Division, San Francisco, California, of behalf of the Great Lakes and Ohio River Division

**Appellant:** Michael and Nancy MacColeman, owners, Cherry Tree Inn, Traverse City, Michigan

**Appellant Representative:** David Powers, Smith, Martin, Powers & Knier

**Authority:** Clean Water Act Section 404 (33 U.S.C. 1344) and Rivers and Harbors Act, Section 10 (33 U.S.C. 403)

**Receipt of Request For Appeal:** August 27, 2004

**Appeal Conference/ Site Visit Date:** March 16, 2005

**Summary of Decision:** The administrative record of the District's permit decision shows that the District considered the issues the Appellant identified in his administrative appeal but reached different conclusions on those issues than the Appellant. The District's conclusions were reasonable and do not conflict with the laws, regulations, or policy requirements of the Corps regulatory program. The Appellant's appeal does not have merit.

**Background Information:** The Appellant owns a waterfront hotel, the Cherry Tree Inn, located at the southeast corner of the East Arm of Grand Traverse Bay, Lake Michigan, in Traverse City, Michigan. The Appellant's property includes approximately 400 feet of shoreline. The Appellant has an existing Army Corps of Engineers (Corps) authorization to remove wetland vegetation and conduct beach grooming on 100 linear feet of his property's shoreline between the Ordinary High Water Mark (OHWM) and the current water level of Lake Michigan. This grooming consists of using a Harley rake equipped with a back blade to remove emergent vegetation and smooth the groomed area.

In high water periods, many properties in the Grand Traverse Bay area have unvegetated shorelines directly adjoining open water, while at lower water levels, more bottomland of Lake Michigan is exposed and wetland (hydrophytic) vegetation often begins to grow between the open water and unvegetated areas. The water level of the Great Lakes has been unusually low in recent years. As the Lake Michigan water level has receded, additional areas of bottomland have been exposed in the East and West Arms of Grand Traverse Bay. During low water periods, greater areas of bottomland are exposed on the East Arm of Grand Traverse Bay, as compared to the West Arm, because the water is

shallower for a greater distance in the East Arm. The Appellant's property is located on one of the shallowest areas of the East Arm of Grand Traverse Bay.

When the waterline is near or above the designated OHWM of Lake Michigan (elevation 579.8 feet IGLD, 1985), approximately 60 linear feet of unvegetated beach are present between the north edge of the Appellant's development, as marked by a retaining wall, and the OHWM further to the north. The Corps regulates certain vegetation removal and grooming activities below the OHWM and in adjacent wetlands above the OHWM (no wetlands above the OHWM were present on the Appellant's property) in accordance with the Rivers and Harbors Act and the Clean Water Act, as implemented by 33 CFR 320-331. As the Lake Michigan water level has decreased, the area of exposed bottomland between the OHWM on the north side of the hotel, and the open water of Lake Michigan further to the north, has increased.

Vegetation is now growing in some areas between the OHWM and the current waterline of Lake Michigan, and the Appellant desires to groom his shoreline area to remove most of this vegetation to increase the area of open, unvegetated shoreline that is available to his customers. Many nearby property owners have also expressed a desire to remove such vegetation on their properties between the OHWM and the current lake water. The Appellant also desires to fill pockets of standing water between the OHWM and the current lake level as these ponded areas can generate odors during the warmer summer season. The Appellant also considers these ponded areas as areas that can contribute to the spread of diseases.

In his June 4, 2003 permit application the Appellant proposed to increase the extent of shoreline grooming and wetland vegetation removal on his property from 100 linear feet of shoreline grooming to 349 linear feet of shoreline grooming between the OHWM and the current water level of Lake Michigan. The actual width of the area to be groomed between the OHWM and the water line of Lake Michigan would increase or decrease as the lake level increased or decreased. The Detroit District reviewed the Appellant's application and concluded that it did not meet the requirements to be authorized under any of the District's existing Regional General Permits for shoreline work in Michigan, or under any of the Corps Nationwide Permits. Therefore, the District evaluated the request under the individual permit processing procedures.

After numerous discussions between the District and the Appellant, on February 11, 2004, the Appellant submitted a revised project proposal to remove all wetland vegetation and groom a 200 foot wide area (the 100 foot area authorized by the prior permit plus an additional 100 foot area), and to fill in the approximately 13,045 square feet of ponded areas outside of the 200 foot wide groomed and devegetated area between the OHWM and the current water level of Lake Michigan. The Appellant and the District disagreed on how much of these ponded areas were vegetated.

The District evaluated this proposal and the Appellant's original proposal and provided the Appellant an initial proffered permit for consideration on May 13, 2004. The Appellant objected to some conditions of the initial proffered permit. The District then

reviewed and modified some of the conditions of the initial proffered permit and provided a second proffered permit to the Appellant on June 28, 2004. Although the District increased the area of wetland vegetation removal and beach grooming from 100 feet to 155 feet, and added a 60 foot wide area of beach grooming in unvegetated areas adjacent to the waterline for the entire 400 foot width of the property, the Appellant still objected to the proffered permit and submitted a Request for Appeal to the Great Lakes and Ohio River Division.

***Consolidation of Appellant's Reasons for Appeal***

The Appellant submitted nine generalized and overlapping reasons for appeal. These are consolidated and addressed by topic in this administrative appeal decision. The Appellant's Reasons for Appeal numbers 1, 4, and 9 were consolidated and addressed under Reason 2 in this appeal decision. The Appellant's Reasons for Appeal numbers 2 and 3 were consolidated and are addressed under Reason 1 in this appeal decision. The Appellant's Reason for Appeal number 5 is moot as the special condition the Appellant appealed had already been deleted from the District's proffered permit. The Appellant's Reason for Appeal number 6 is addressed under Reason 3 in this appeal decision. The Appellant's Reason for Appeal number 7 is addressed under Reason 4 in this appeal decision. The Appellant's Reason for Appeal number 8 was not evaluated in this appeal decision because it had not been discussed between the Appellant and the District prior to issuance of the District's proffered permit. Therefore, the Appellant's Reason for Appeal number 8 was determined to be based on new information and is ineligible for evaluation in this administrative appeal in accordance with 33 CFR 331.7(e)(6).

**Appeal Evaluation, Findings and Instructions to the Detroit District Engineer (DE):**

**Reason 1:** The District's policy interpretation of 33 CFR 320.4(j)(2), 33 CFR 320.4(j)(4), and 33 CFR 325.2(a)(6) regarding the determination of significant issues of national importance that can override state or local land use decisions is flawed. The State of Michigan's Vegetation Removal and Shoreline Grooming Law should have been considered a state land use determination and the District's decision not to defer to the State's vegetation removal and shoreline grooming standards was flawed. (This reason for appeal incorporates the Appellant's reasons for appeal numbers 2 and 3).

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

**ACTION:** None required.

**DISCUSSION:** The Corps regulations at 33 CFR 320.4(j)(2) state that:

“The primary responsibility for determining zoning and land use matters rests with state, local and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance. Such issues would include but are not necessarily limited to national security, navigation, national economic development, water quality, preservation of special aquatic areas, including

wetlands, with significant interstate importance, and national energy needs. Whether a factor has overriding importance will depend on the degree of impact in an individual case.”

The Corps regulations at 33 CFR 320.4(j)(4) state that:

“In the absence of overriding national factors of the public interest that may be revealed during the evaluation of the permit application, a permit will generally be issued following receipt of a favorable state determination provided the concerns, policies, goals, and requirements as expressed in 33 CFR parts 320-324, and the applicable statutes have been considered and followed: e.g., the National Environmental Policy Act; the Fish and Wildlife Coordination Act; the Historical and Archeological Preservation Act; the National Historic Preservation Act; the Endangered Species Act; the Coastal Zone Management Act; the Marine Protection, Research and Sanctuaries Act of 1972, as amended; the Clean Water Act, the Archeological Resources Act, and the American Indian Religious Freedom Act. Similarly, a permit will generally be issued for Federal and Federally-authorized activities; another federal agency's determination to proceed is entitled to substantial consideration in the Corps' public interest review.”

The Corps regulations at 33 CFR 325.2(a)(6) state that:

“...the district engineer will determine in accordance with the record and applicable regulations whether or not the permit should be issued. He shall prepare a statement of findings (SOF)...The SOF... shall include the district engineer's views on the probable effect of the proposed work on the public interest including conformity with the guidelines published for the discharge of dredged or fill material into waters of the United States (40 CFR part 230)... and the conclusions of the district engineer. The SOF shall be dated, signed, and included in the record prior to final action on the application. If a district engineer makes a decision on a permit application which is contrary to state or local decisions (33 CFR 320.4(j)(2) & (4)), the district engineer will include in the decision document the significant national issues and explain how they are overriding in importance. If a permit is warranted, the district engineer will determine the special conditions, if any, and duration which should be incorporated into the permit....”

During the review of this administrative appeal, two District documents were submitted as possible clarifying information regarding the District's interpretation of 33 CFR 320.4(j)(2) and 33 CFR 320.4(j)(4). The Appellant submitted as clarifying information the District's internal Memorandum for Record (MFR) titled “*Issues of overriding national importance vis a vis state or local authorizations,*” dated January 24, 2001, that describes how the District would interpret 33 CFR 320.4(j)(2). The District submitted an updated, more comprehensive version of the January 24, 2001, MFR that includes much of the same text. This updated MFR, titled “*Issues of overriding national importance vis a vis state or local authorizations,*” dated March 3, 2005, further clarified the District's

policy interpretation of this portion of the regulations. As both memorandums provided clarification regarding the District's policy position of how it interpreted 33 CFR 320.4(j)(2) and (j)(4), both policy memorandums were considered clarifying information and considered during this appeal decision.

The District's policy MFRs reviewed the development of the language in 33 CFR 320.4(j)(2) and (j)(4), and concluded that conditioning of a permit to meet the requirements of the Clean Water Act, its implementing regulations, or other federal laws, does not necessarily override a state or local zoning decision. Both District policy MFRs include the statement that:

“Other ‘public interest factors’ listed in Part 320.4(a) are the same as the ‘significant issues of overriding national importance’ mentioned in Part 320.4(j)(2), to be considered from a national perspective that may be overriding of zoning or land use considerations based upon the degree of impact in a particular case.”

In cases where the District does override a state or local zoning or land use decision, it must follow 33 CFR 325.2(a)(6), and document the significant national issues and explain how they are overriding in importance.

The State of Michigan recently modified its state permit requirements for shoreline maintenance activities when it passed Public Act (PA) 14 of 2003 amendments to Part 325, Great Lakes Submerged Lands, and Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (Michigan vegetation removal and shoreline grooming law). The Michigan law defines grooming as:

“ ‘Grooming of soil’ means raking or dragging, pushing, or pulling metal teeth through the top 4 inches of soil without disturbance of or destruction to plant roots, for the purpose of removing debris”

and defines removal of vegetation as:

“ ‘Removal of vegetation’ means the manual or mechanized removal of vegetation other than the de minimis removal of vegetation.”

After passage of the Michigan vegetation removal and shoreline grooming law, the State designated Grand Traverse Bay and Saginaw Bay as two pilot program areas where removal of vegetation between the OHWM and the water's edge shall be allowed without a permit (but with written authorization from the Michigan Department of Environmental Quality) (MDEQ) in the following amounts:

“The area in which removal of vegetation may occur does not exceed 50% of the width of the upland riparian property or 100 feet, whichever is greater, or a wider area if approved by the director.” [of the MDEQ]

The Appellant's position is that the Michigan vegetation removal and shoreline grooming law represents a state land use decision that the District was required to follow in accordance with 33 CFR 320.4(j)(2) unless the District identified significant issues of overriding national importance. The Appellant asserted that no such significant issues of national importance existed, and that the District should therefore consider the Michigan vegetation removal and grooming law to be a State land use decision and authorize a permit for at least 200 feet of vegetation removal and shoreline grooming. The Michigan vegetation removal and shoreline grooming law applies to all lands in the pilot test areas, except those areas that have been designated as environmental areas under state law or containing State and/or Federally-listed threatened and endangered species. However, the Michigan vegetation removal and shoreline grooming law does not establish a specific use for any particular piece of property; the law would appear to establish State regulation of activities on shoreline property, and in fact applies to properties with a variety of land uses.

The District clarified at the appeal meeting that it did not consider the Michigan vegetation removal and shoreline grooming law to be a State land use law in the sense that term is used in 33 CFR 320.4(j)(2). Thus, the District did not consider its decision not to follow the vegetation removal and shoreline grooming provisions of that law in this instance as overriding a State or local land use decision.

The District's interpretation of 33 CFR 320.4(j)(2) is consistent with an example of this issue discussed in the Army Corps of Engineers discussion of vegetated buffer requirements in the Preamble to the *Final Notice on Nationwide Permits*, Federal Register page 12834, March 9, 2000, that stated:

"The vegetated buffer requirement does not duplicate or conflict with local land use planning"

Further:

"The vegetated buffer requirement is not contrary to 33 CFR 320.4(j)(2) because it does not override state or local zoning decisions."

The District's June 25, 2004, Memorandum for File (MFF), which documented the District's consideration of the Appellant's initial proffered permit, stated that:

"The Corps discussed overriding factors of national importance with regards to water quality, aquatic habitat, including habitat for fish, the interests of Native American Tribes."

The District clarified at the appeal meeting that the above statement in the District's June 25, 2004, MFF was based on its interpretation of 33 CFR 320.4(a), 320.4(j)(2) and (j)(4), (described above), which concluded that other public interest factors could appropriately be considered from a national perspective in reaching a permit decision that might

conflict with a State or local zoning or land use considerations. I conclude the District's policy interpretations of 33 CFR 320.4(j)(2) and (j)(4) and the application of those interpretations to this permit action are reasonable. In this case the District concluded the overall land use of this property is that of a commercial hotel, and that land use will remain unchanged regardless of the permit decision in this matter.

However, even if the District had concluded that the Michigan shoreline grooming law is a land use law within the meaning of 33 CFR 320.4(j)(2), the District was still required to determine whether the Appellant's project complied with the requirements of a variety of federal laws as identified in 33 CFR 320.4(j)(4). In particular, any permit issued by the District must comply with the Clean Water Act Section 404(b)(1) *Guidelines for Specification of Disposal Sites for Dredged or Fill Material* at 40 CFR 230 (CWA 404(b)(1) Guidelines). The determination of whether the District appropriately weighed factors in its public interest review and appropriately considered the CWA 404(b)(1) Guidelines is considered under Reason 2.

**Reason 2:** The District's evaluation under the CWA Section 404(b)(1) Guidelines and the Corps' Public Interest Review was flawed, and did not consider the Appellant's modification to his permit request as put forward in the Appellant's letter of February 11, 2004, and other communications. As a result, the District proffered permit included permit conditions that were unwarranted. (Incorporates Appellant's reasons for appeal numbers 1, 4, and 9).

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

**ACTION:** None required.

**DISCUSSION:** The Appellant asserted that the District's decision to allow less expansive shoreline vegetation removal and grooming activities than allowed under Michigan state law was flawed and unwarranted. However, the Appellant only submitted very general reasons with his Request for Appeal to support these assertions. Therefore, the Appellant's specific reasons for concluding that the District's decision was flawed were discussed in more detail at the appeal conference.

The Corps regulations at 33 CFR 331.9(b) provides the standard under which a division engineer will review an administrative appeal. It states that:

“The division engineer will disapprove the entirety of or any part of the district engineer's decision only if he determines that the decision on some relevant matter was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corps policy guidance. The division engineer will not attempt to substitute his judgment for that of the district engineer regarding a matter of fact, so long as the district engineer's determination was supported by substantial evidence in the administrative record, or regarding any other matter if the district engineer's

determination was reasonable and within the zone of discretion delegated to the district engineer by Corps regulations.”

The District’s decisions regarding the Appellant’s permit application were described in several District documents. The District’s November 10, 2003, Permit Evaluation (PE) document evaluated the Appellant’s project as proposed in his original application as well as several project alternatives. The District supplemented the PE with two May 13, 2004, Statements of Findings (SOFs) as the Appellant had revised his original project proposal. The Appellant then objected to the conditions of the initial proffered permit.

As a result of the Appellant’s objections to the initial proffered permit, the District reconsidered and modified its proposed permit conditions. The District documented these changes in its June 25, 2004, MFF and two June 28, 2004, SOFs, concluding that the conditions included in the proffered permit were appropriate.

The Corps regulations at 33 CFR 320.4(a) state the general guidelines regarding permit decisions for activities involving Section 404 discharges:

“...a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency’s 404(b)(1) guidelines. Subject to the preceding sentence and any other applicable guidelines and criteria (see Secs. 320.2 and 320.3), a permit will be granted unless the district engineer determines that it would be contrary to the public interest.”

The CWA 404(b)(1) Guidelines provide for special consideration of “special aquatic sites” including wetlands that the Guidelines recognize as providing particularly important aquatic functions. The District and the Appellant agree that much of his shoreline area has become vegetated in recent years as the water level of Lake Michigan has receded. The District and the Appellant’s consultant have both identified the type of vegetation growing along the Appellant’s shoreline is hydrophytic vegetation. Both parties agree the vegetation would be expected to die back when higher water levels return and inundate it. However, the District and the Appellant disagree as to whether the conclusion that the vegetation would die back when inundated should be used as evidence that the present situation represents “normal circumstances” and the area is a wetland, as the District concluded, or the area represents an “atypical situation” that is not a wetland, as the Appellant concluded. The Corps of Engineers (33 CFR 328.3(b)) and the Environmental Protection Agency define wetlands as:

“The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”

The 1987 Corps of Engineers Wetland Delineation Manual (1987 Manual), which was developed to assist field staff in determining the presence or absence of a wetland within the Corps definition of a wetland, further states:

“ ‘Normal circumstances’ has been further defined as ‘the soil and hydrologic conditions that are normally present.’ ”

The 1987 Manual also discusses wetlands present in an “atypical situation”, stating that:

“It is necessary to determine whether alterations to an area have resulted in changes that are now the ‘normal circumstances.’ The relative permanence of the change and whether the area is now functioning as a wetland must be considered.”

The District and the Appellant agree that Lake Michigan water levels fluctuate over time. However, the Appellant’s position is that the recent low water levels of Lake Michigan do not represent “normal circumstances,” and therefore the vegetated areas on the Appellant’s property should not be classified as wetlands.

The 1987 Manual uses the presence or absence of three parameters – hydric soils, hydrophytic vegetation, and wetland hydrology – to establish whether a wetland area is present. The substrate/soil composition of bottomland of Lake Michigan along the Appellant’s property has apparently been relatively stable for many years. The hydrologic conditions of some bottomlands on the Appellant’s property have changed as Lake Michigan’s water level decreased, exposing more saturated Lake Michigan bottomland. The District concluded that dormant seed beds of hydrophytic (wetland) vegetation responded to these changes and started growing on the site. The Appellant did not dispute that the three parameters that define a wetland – hydric soils, hydrophytic vegetation, and wetland hydrology – were all present, but instead disputed that the change in the lake water level (i.e. wetland hydrology) that allowed hydrophytic vegetation to establish itself on the Lake Michigan bottomlands was present as the result of atypical conditions that did not represent normal circumstances.

The administrative record supports the District’s conclusion that the hydrophytic vegetation currently occurring on the site is ultimately the result of the periodic cycling of Lake Michigan water levels and should be considered normal circumstances. The District correctly considered the vegetated areas along the Appellant’s shoreline as wetlands, and correctly considered those wetlands as a special aquatic site for purposes of the District’s CWA Section 404(b)(1) analysis.

The District’s CWA Section 404(b)(1) analysis evaluated the Appellant’s project as initially proposed, as well as several alternative projects. In each case, the “no action” alternative was to retain the previously permitted 100 linear foot beach grooming area for use by the Appellant’s customers for recreation and access to the Lake Michigan shoreline. The District’s initial CWA Section 404(b)(1) analysis in its November 10, 2003, PE document (pages 28 – 30) concluded that neither the Appellant’s proposal to remove wetland vegetation and groom an additional 249 linear feet of shoreline, nor an alternative proposal to remove wetland vegetation and groom an additional 100 linear feet of shoreline, would represent a least damaging practicable alternative with no other significant adverse affects as required by 40 CFR 230.12(a)(3)(i). The District also

concluded that these alternatives did not include all appropriate and practicable measures to minimize potential adverse effects of the discharge on the aquatic ecosystem as required by 40 CFR 230.12(a)(3)(iii). The District concluded that a revised project which added minor additional walkways to the existing 100 linear foot groomed area did meet the CWA Section 404(b)(1) guidelines.

On May 13, 2004, the District provided the Appellant an initial proffered permit that allowed more fill than originally considered in the District's November 2003 PE. This initial permit provided for filling and revegetating two ponded areas beyond the 100 linear foot grooming area previously authorized. The District concluded this alternative would also meet the requirements of the CWA Section 404(b)(1) guidelines. However, the Appellant subsequently objected to the terms of this initial proffered permit, and the District again considered other project alternatives that would comply with the CWA Section 404(b)(1) guidelines.

After considering the Appellant's objections to the initial proffered permit, the District concluded that a revised permit with different special conditions was appropriate. The District's June 25, 2004, MFF and two June 28, 2004, SOFs documented that a revised permit that allowed additional wetland vegetation removal and beach grooming in specified areas could still represent the least damaging practicable alternative as required by the CWA Section 404(b)(1) guidelines in light of the Appellant's specific information regarding the loss of revenue due to the conditions of his shoreline area. The District's second proffered permit designated a central 155 linear foot grooming area that extended approximately 250 feet north from the OHWM to the current water line of Lake Michigan. This area represents the most direct access route between the Appellant's hotel and the current shoreline, and is a 55 foot increase in width over the Appellant's current permit. As described in the District's June 26, 2003, site visit memorandum:

“Portions of the water's edge have been affected by earlier sand redistribution efforts in which sand from the center of the lot frontage was pushed up into the authorized cleared area. The result is that the water line is closer to the Inn leaving the effect of two points of sand at the east and west extremes of the property at the water's edge....Areas outside the areas proposed in current permit application are at times inundated by bay waters, especially if winds have a northerly component.”

The distance between the current waterline and the OHWM increases rapidly to the east and west (towards the two points of sand) outside of the 155 foot wide central area proposed for vegetation removal and shoreline grooming. As the distance between the OHWM and the water's edge is larger along the west and east edges of the property, there is also a larger area for wetland vegetation to grow in these areas as compared to the 155 foot wide central vegetation removal and shoreline grooming area proposed in the second proffered permit.

The District's proffered permit would also authorize the Appellant to clear a 60 linear foot-wide area along the current Lake Michigan water line for the entire 400 linear foot

width of the Appellant's property, except in areas currently vegetated to the water's edge (which as of the Appellant's August 27, 2003, survey was an approximately 25 foot area at the eastern boundary of the property). When taken together, these measures provide access via the most direct route to the water's edge of Lake Michigan, and a groomed shoreline area to walk along once the Appellant's customers reach the water's edge. However, the District's proffered permit also preserves wetlands in areas that are not such direct travel routes to the current water line.

The District discussed this on page 3 of its June 25, 2004, MFF stating that:

“The net result (of changes between the initial proffered permit and the proffered permit)...would be to allow a wider and contiguous vegetation removal area, that would affect 39% of the Applicant's frontage, but only 34 % or one third of the potential wetland areas on exposed bottomlands at the site. Thus, while more than one quarter of the total wetland area would be altered, the ultimate cumulative impacts would be greatly reduced from that envisioned by removal of all vegetation in front of shoreline hotels in the vicinity and also substantially reduced from the possible cumulative impacts that could result if all property owners obtained shoreline vegetation removal waivers from the MDEQ”

Thus, the District's second proffered permit provided compelling documentation that it was the least damaging practical alternative unless the Appellant could produce documentation that the District's proffered permit either (a) was not practicable (did not meet the Appellant's overall project purpose), or (b) had other significant adverse environmental consequences. The Appellant's position is that the District did not correctly evaluate and weigh a variety of public interest review factors under consideration in this permit action, and that if the District had done so, it would have concluded that the Appellant's proposed project would have represented the least damaging practicable alternative.

In evaluating the Appellant's project the District had to weigh the various public interest review factors that were of concern in this permit decision. The District identified these factors based on comments on the public notice by agencies, organizations, and individuals, the District's determination of important public interest review factors based on prior experience with similar permits, and communications with the Appellant. The District and the Appellant disagreed as to the findings of fact regarding the environmental effects of the Appellant's proposed project and alternatives. The District and the Appellant also disagreed as to the appropriate weighing of different factors of the public interest in the public interest review. The District considered a variety of public interest factors to be important, while the Appellant considered the Safety and Economic factors to be so important that they should carry a much greater weight than other factors, and that as a result, the Appellant concluded his project should have been approved as requested.

The District's conclusions in its PE and supplemental SOF documents, and the Appellant's objections to those conclusions, were discussed in detail at the administrative

appeal conference. The District and the Appellant disagreed on the environmental effects of the Appellant's proposed project, and project alternatives, on Water Quality, Shore Erosion and Accretion, Aquatic Organisms, Wildlife, and on Conservation and Overall Ecology. The District's positions on these issues were based on its expertise and past experience, as well as consideration of comments from the Appellant, the State of Michigan Department of Natural Resources, the Grand Traverse Band of Ottawa and Chippewa Indians (GTB), the U.S. Fish and Wildlife Service, and members of the public.

The Appellant's general response to the District's evaluation was that many of the environmental effects the District identified were unsubstantiated. In particular, the Appellant asserted that the adverse environmental effects of his proposal identified by others had been based on broad generalizations rather than on specific scientific studies. However, the Michigan Department of Natural Resources identified specific scientific studies in its March 2, 2004, comment letter regarding the use of Great Lakes coastal wetlands by numerous fish species and aquatic invertebrates. The District's conclusion that the Appellant's vegetation removal and shoreline grooming would have an adverse effect is reasonable.

The Appellant also stated his shoreline represented a small percentage of the entire Grand Traverse Bay shoreline and an even smaller percentage of the Great Lakes shoreline, so modifications to his shoreline could only result in minimal effects (This is addressed under cumulative impacts below). The Appellant stated that the vegetation along the shoreline was temporary in nature, and would be inundated and disappear when water levels increased. The District acknowledges that the current vegetation that is extending above the bottomland substrate will eventually die back when inundated by water as Lake Michigan enters another cycle of higher water. However, the District concluded that the vegetation is currently providing several functions such as improving water quality by absorbing non-point source pollutants, and providing current habitat for fish and wildlife and small aquatic organisms. The District also concluded that the rhizomes, roots, and stems left behind when higher water levels returned would provide important aquatic habitat.

The administrative record also shows that these vegetated and ponded areas provide vegetation that serves as waterfowl food, and is a source of aquatic invertebrates that serve as food for shorebirds, waterfowl, and larval fish. The ponded areas are periodically connected to Lake Michigan waters by wind-driven seiches. The Appellant's position was that the District had weighed the preservation of these vegetated and ponded areas too heavily in its public interest review, particularly in relation to what the Appellant considered adverse economic effects that were occurring as a result of restrictions on shoreline grooming. The Appellant also noted that he believed one commenter, the GTB, had a conflict of interest regarding the Appellant's permit request, because the GTB is a direct economic competitor with the Appellant's business and operates several hotels and casinos within a few miles of the Appellant's property.

The District's determinations of the environmental effects of the Appellant's proposed project and alternative projects on Water Quality, Shore Erosion and Accretion, Aquatic

Organisms, Wildlife, and on Conservation and Overall Ecology were reasonable interpretations of the administrative record and the information available to the District. The District's conclusions of fact regarding these factors were based on actual observations or reasonable assumptions based on general knowledge of the plants, animals, and environmental setting under consideration. The Appellant's position that the District's conclusions on these factors are flawed does not have merit.

The District and the Appellant also disagreed on the environmental effects of the Appellant's proposed and alternative projects on Visual/Aesthetic Resources; Designated Historic, Cultural, Scenic, and Recreational Values; Safety (Public Health), Economics, and Recreation.

The District's evaluation of Visual/Aesthetic Resources in the PE document concluded on page 19 that:

"The area of vegetation removal work is certainly not 'sugar sand.' Clean white sand" only exists above the Ordinary High Water Mark next to the base of buildings on this property. Whether one prefers a view of grassy vegetation with randomly spaced puddles, or brown wet sand with randomly spaced puddles is a matter of personal preference."

The District acknowledged in the PE document on page 18 that the Appellant had shown that he, many of his customers, and some neighboring property owners, consider an unvegetated shoreline preferable to a vegetated shoreline. While the District's evaluation of Visual/Aesthetic resources is accurate as far as it goes, the administrative record supports the Appellant's conclusion that the people most directly affected by the Visual/Aesthetic condition of the property - the Appellant and his customers - would generally prefer an unvegetated shoreline to a vegetated shoreline. As the District's proffered permit would increase the amount of groomed, unvegetated shoreline on the Appellant's property, this discrepancy in the District's and the Appellant's characterization of Visual/Aesthetic Resources does not establish that the District's permit decision was flawed. However, it does show that a careful weighing of public interest review factors was necessary in this instance.

The District's PE document page 20 concluded that there would be no effects on Designated Historic, Cultural, Scenic, and Recreational Values. At the appeal conference, the Appellant objected to this conclusion as he asserted that there were substantial positive impacts from his project on recreation values. The Appellant misinterpreted the purpose of this section of the PE document. The Designated Historic, Cultural, Scenic, and Recreational Values section is designed to address effects on designated resources such as federal, state, regional, or local sites specifically identified as historic, cultural, scenic, or recreational sites such as National Parks, National Monuments, National Recreation Areas, National Lakeshores, National Historic Sites, National Rivers, and similar designations by state, regional or local authorities. The nearest substantial recreation facility is the beach at Traverse City State Park, approximately one mile west of the Appellant's property. The District reasonably

concluded that the District's permit decision on the Appellant's property would not adversely affect recreational access to the Traverse City State Park nor any other similarly designated recreational facility.

The District's November 30, 2003, PE document page 23 stated the effects of the Appellant's original proposed project (wetland vegetation removal and grooming an additional 249 feet of shoreline) on Recreation as:

"The proposed project would alter an area which contributes to maintenance of populations of fish and waterfowl, although it is not in itself open to public use for hunting and fishing. In summary, the project's effect on recreation would be minor, short term, and negative."

That initial conclusion by the District was based on the assumption that the only recreation values that needed to be considered were hunting and fishing opportunities. The administrative record does not support that assumption.

There were clearly other recreational values that could be affected by the Appellant's project. The District's PE document on page 23 stated the Appellant's conclusion regarding the effect of the project on Recreation as:

"The applicant's stated purpose is to allow for more recreation use of the shoreline area for guests, such as sunbathing and volleyball. Removal of vegetation will not change the fact that the shoreline is subject to water flowing over and seeping into parts of the site. The resulting expanse of brown wet sand after nearly complete vegetation removal would result in less than ideal conditions for sunbathing and volleyball."

While the District's conclusion that "brown wet sand...would result in less than ideal conditions for sunbathing or volleyball" may be accurate, the additional unvegetated area would be more readily available for other recreational uses typically associated with unvegetated shorelines in comparison to a vegetated area.

If the administrative record and the District's initial and second proffered permit decisions had only reflected the conclusion in the District's November 30, 2003, PE document, that would not have represented sufficient consideration of the effects of the Appellant's proposed project and the project alternatives on recreation. However, there are numerous discussions in the administrative record of the desire of recreational users to visit unvegetated sand beach shorelines in general, and the beaches of Traverse City in particular. The administrative record supports the Appellant's conclusion that his project will have a positive effect on shoreline recreational access to Lake Michigan.

As part of its public interest review the District was required to weigh the positive effects on recreation of the proposed project and alternatives against other environmental factors. The District's modifications in its second proffered permit, in response to the Appellant's objections to the District's initial proffered permit, indicate that the District did consider

these other recreational values identified by the Appellant. The District substantially enlarged the area of beach grooming in its second proffered permit in response to the Appellant's comments on the initial proffered permit, and clearly took recreational access to the shoreline into account when this decision was made. The administrative record supports the District's decision that the special conditions of the second proffered permit described earlier in this appeal decision represent a reasonable permit decision that balances the public interest review factor of providing recreational access to the shoreline with the other public interest review factors identified in this appeal decision. While the administrative record does not describe in detail the District's balancing of the recreational access to the shoreline against other public interest review factors, the administrative record shows that such an analysis took place. The administrative record also demonstrates the balancing process used to consider a variety of public interest factors that led to the permit conditions in the District's second proffered permit.

In the evaluation of Economic Effects of the Appellant's proposed project and alternatives, the District stated on page 21 of its PE that:

"The Corps finds that the Cherry Tree Inn is losing some business due to the vegetation stands. However, the loss just because of the vegetation is probably a small fraction of the cited loss of business "since water levels began to fall. Nevertheless, removal of vegetation as requested would likely increase sales somewhat, and this would lead to increased use of the area, which could benefit local businesses. The local tax revenues, community services, community cohesion would benefit. In summary, the project's effect on economics would be minor, short term, and positive."

The District's PE document discussed several national and regional factors that it believed contributed to the downturn in revenue and increase in vacancy rates at the Appellant's property during the past several years. The District's PE document pages 22 and 23 identified several reasons including a decline from higher than average water levels to near record low water levels between 1999 and 2003. The District also identified that there was a serious disruption of the United States economy, including the tourist economy, in the aftermath of the attacks on the World Trade Center in September 2001. The District concluded that tourism revenue decreased statewide between 1999 and 2003. The District made a rough calculation based on state hotel sales and use tax collections between 1999 and 2002, and concluded that there was an approximately 12 to 20 percent drop in hotel and motel sales tax collections and use tax collections during that period. The District also cited unusually cold weather in Spring 2003, higher gasoline prices, and higher unemployment in Michigan as additional factors that may have affected tourism that year. The Appellant chose to construct an expansion of his existing hotel during 2002 – 2003, during this economic downturn.

The Appellant's position is that his loss of revenue and increasing vacancy rates in recent years are entirely due to the inability to remove vegetation from the majority of his waterfront area and maintain the area as an unvegetated beach shoreline. The Appellant's position is that the District's conclusion that the Appellant's loss of income is only

partially due to the shoreline conditions of the property is speculative, underestimates the benefits to the Appellant of his proposed project, and underestimates the cumulative benefits of multiple shoreline grooming projects on the economy of the Traverse City area. The Appellant's position also supports a permit decision that would maximize the Appellant's economic return on his investment.

The administrative record supports the District's conclusion that the declining revenue and increasing vacancy rates in recent years at the Appellant's property is only partially due to the extent of grooming of the shoreline. The District acknowledges that the Appellant has incurred some revenue loss because of an increase in vegetation along his shoreline. But the District's conclusion that the Appellant would be affected by regional and national declines in tourism due to regional and national conditions is a reasonable conclusion and not unduly speculative. The conclusion that the Appellant's vacancy rates could also increase as a result of his decision to construct an addition to his existing hotel during a period of decreased regional tourist activity was also reasonable.

The District's conclusion that the project's effect on economics would be minor, short term, and positive is reasonable when considered in light of the District's conclusion, also reasonable, that the downturn in revenue and increase in vacancy rates at the Appellant's property can only partially be attributed to the extent of shoreline subject to wetland vegetation removal and grooming. Nevertheless, the District's proffered permit conditions would allow an increase in shoreline grooming over the Appellant's current permit authorization, albeit not to the full extent of shoreline grooming the Appellant desires. The Appellant's characterization of the economic benefits of his proposed project, and other similar projects, as having a more significant, positive economic impact than that described by the District represents a difference of opinion between the District and the Appellant. However, as the District's conclusion is based on a reasoned evaluation of information in the administrative record, the difference of opinion between the District and the Appellant on the significance of the economic effects of this project does not establish that the District's conclusion is unreasonable or flawed. The District's evaluation of economic effects is reasonable. The cumulative effect of similar projects on economics is discussed separately below.

The Appellant's position regarding Safety (Public Health) effects of his proposed project is that his project would result in an improvement over current conditions because several pools of standing water would be eliminated. The Appellant believes these pools are breeding areas for mosquitoes that carry West Nile Virus. The Appellant also tested two of these pools and found high levels of fecal coliform. The Appellant's position is that these are both human health and safety issues and that the potential risk from these factors would be reduced if the Appellant was able to fill in more of the ponded areas along his shoreline.

The District stated its findings regarding Safety (Public Health) issues on page 23 of its PE document that:

“No cases of West Nile Virus have been reported in Grand Traverse County. Further, the mosquito species that typically spread the disease are adapted to warm stagnant water found in urban locations such as discarded containers, tires, and clogged drainage structures, rather than coastal wetlands. Removing stands of coastal vegetation will not effectively reduce any existing risk of contracting the disease in the area. Fecal coliform bacteria are present in soil and in both animal and human waste. The standard for swimming is used as an indicator of health threats due to massive sewage overflows into a body of water, and not as an indicator of a disease threat in a pool of standing water...In summary, the project would not have an effect on safety.”

The administrative record supports the District’s conclusions that the mosquitoes known to carry West Nile Virus are more likely to occur in more urbanized areas as opposed to coastal wetlands. Neither the District nor the Appellant addressed that other mosquito control alternatives may be available such as treating the ponds chemically or biologically to control mosquitoes in ways that are compatible with public use. However, based on information in the administrative record that no cases of West Nile Virus had been recorded in humans in Grand Traverse County, the District’s conclusion that none of the alternatives would affect the health risk posed by West Nile Virus in the area is reasonable.

The District concluded that the Appellant misinterpreted the results of the fecal coliform tests conducted on the property. The Appellant only tested two standing pools of water and did not undertake any comparisons with other areas. The District stated these tests are used as water quality indicators when a massive sewage or other pollution event affecting the entire beach area surrounding a waterbody has occurred, but that applying these tests to a small pool of water is an inappropriate measure of a disease threat in the area. The District explained this in its July 14, 2003, letter to Congressman Dave Camp regarding the Appellant’s permit application that:

“With regard to bacteria levels in the shallow ponds, fecal coliform bacteria are present in the digestive tracts of all warm-blooded animals, and can be expected to occur in soil and shallow water where wildlife is present. They are of course also present in human feces. Fecal coliform tests are taken in public swimming areas as an indicator of the possibility of contamination by human fecal material, such as untreated sewage or massive combined sewer overflows. The accepted standard of 200 colonies per 100 milliliters of water is based on ‘full contact recreation’ i.e. swimming. ...since seagulls, mallard ducks, and other wildlife pass through the shoreline area, we feel confident that fecal coliform bacteria are present at similar levels throughout the area, whether it is de-vegetated or not.”

In the administrative record the Michigan Department of Natural Resources identified that the current Michigan Public Health Code and Rule 325.2101 (1) of the Part 4, Water Quality Standards (Promulgated pursuant to Part 31 of the Natural Resources and Environment Protection Act of 1997, PA 451, as amended) as requiring the use of *Escherichia coli* (*E. coli*) concentrations, not fecal coliform bacteria concentrations, to

determine whether beaches are safe for swimming. Michigan's use of an *E. coli* test rather than a fecal coliform test is based on using a test that is more directly related to showing evidence of disease-carrying bacteria.

The suspected source of the fecal coliform in the ponded areas on the Appellant's property is birds and other wildlife. No significant source of disease-causing bacteria, such as large sewage spills or extensive contaminated stormwater runoff, was identified in the administrative record. The District's conclusion that neither the project the District authorized, nor the Appellant's proposed project or other alternative projects, would adversely affect Safety (Public Health) is reasonable. That conclusion is based on reasoning, not explicitly stated by the District, that the presence of fecal coliform, as identified by two spot observations of ponded areas, did not represent evidence of the presence of disease-causing bacteria, and that the levels of any disease-causing bacteria, if present, would not be substantially altered by filling all areas of ponded water on the property.

The Appellant stated at the appeal conference that the District had not appropriately considered the needs and welfare of the people as required by the public interest review factors identified in 33 CFR 320.4(a) and this evaluation was not addressed in a separate section of the District's decision documents. The District stated that it addressed the needs and welfare of the people as it collectively considered all the public interest review factors, instead of evaluating the "needs and welfare of the people" in a separate section of the District's PE and SOF documents. The Appellant stated that the District should have considered Michigan's shoreline grooming law an expression of the needs and welfare of the people, and allowed the Appellant to groom 50 percent of his shoreline (200 feet) as was provided for under state law.

The Appellant's initial proposal to groom a total of 349 feet of shoreline exceeded the amount automatically allowed under state law. The Appellant's revised proposal of February 11, 2004, to groom 200 feet of shoreline and fill all ponded areas outside of the 200 foot area on the property, also appears to exceed the 200 linear feet of shoreline grooming automatically allowed under state law. The District considered an alternative of grooming 200 feet of shoreline, as provided for under Michigan state law, on pages 28 to 30 of its PE document when considering whether the Appellant's original proposal and alternatives met the requirements of the CWA 404(b)(1) guidelines and other regulations. The District concluded that issuing a permit for the amount of area automatically authorized by the Michigan state law did not comply with the CWA Section 404(b)(1) Guidelines. The administrative record supports the District's conclusion that it did consider the Michigan vegetation removal and shoreline grooming law and did consider the "needs and welfare of the people."

### ***Cumulative Impacts***

At the appeal conference, the Appellant clarified his objections to the District's cumulative effects analysis stating that the District's analysis was too speculative because the District had not identified the direct environmental effects of vegetation removal and shoreline grooming projects and had not described what other similar projects were

reasonably foreseeable. However, as discussed under specific topics above, the District did identify a sufficient basis for concluding that there would be direct adverse environmental effects of the Appellant's proposed project. The Appellant also asserted that the District considered the negative cumulative effects of the Appellant's proposed activities but not the positive cumulative effects of the Appellant's activities.

The National Environmental Policy Act (NEPA) implementing regulations of the Council on Environmental Quality at 40 CFR 1508.7 requires that the Corps consider the impact on the environment:

“...which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”

The Corps' more specific NEPA implementing regulations for the Regulatory Program (33 CFR 325 Appendix B) also require that the Corps evaluate the cumulative environmental impacts of providing a permit authorization to an applicant. The Corps regulations regarding its public interest review process at 33 CFR 320.4(a) require that the Corps consider cumulative impacts regarding public interest review factors.

The District identified the area of consideration for cumulative impacts on page 8 of its PE document as:

“For the purpose of this application review, the geographic area for which we are reviewing cumulative effects is the southern end of Grand Traverse Bay. The West Arm of the bay in downtown Traverse City has much steeper beach slopes, and little shoreline vegetation can develop there.”

The District concluded on page 13 of its PE regarding aquatic organisms that:

“In summary, the project will have minor, short term, negative impacts on the aquatic organisms. Cumulative impacts could become major in this part of Grand Traverse Bay if the work were approved as proposed. We are aware of at least 17 commercial properties that have expressed an interest in mechanically leveling the exposed bottomlands. The width of the area that does or does not support vegetation varies with the slope of the shoreline on each property. ....Given these known likely participants, and a very rough estimate of 3 acres of requested shoreline removal per property with very flat bottomlands, approval for clearing all or nearly all of the shoreline area of vegetation could result in a loss (albeit temporary, during extended low water and years of rising water levels) of more than 30 acres of wetlands; approving vegetation removal of half of the shoreline, more than 15 acres, while restricting the larger commercial properties to vegetation removal in 100 foot wide areas may result in perhaps 6 or 7 acres of impact of wetlands in this part of the East Arm.”

In regard to the impacts on wetlands the District stated that:

“Although alteration of the wetland would constitute a minor change, the cumulative effects of many such actions may result in major impairment of wetland resources in the East Arm of Grand Traverse Bay. ...In summary, the project, considering likely cumulative effects will have a major short term, negative impacts on wetlands.”

At the appeal conference the Appellant stated the District’s conclusion regarding the cumulative effects of the Appellant’s project was unreasonably speculative because the administrative record contained insufficient details regarding the vegetation removal and shoreline grooming proposals of other shoreline property owners in the vicinity and the characteristics of their specific properties. The administrative record supports the District’s conclusion that many wetland vegetation removal/shoreline grooming projects would result in progressively more severe cumulative effects on aquatic organisms and wetlands, and that if the District approved many permits similar to the Appellant’s that adverse cumulative effects would increase. The District’s conclusions are reasonable and not unduly speculative. There are numerous statements, including many from the Appellant himself, of the desire of shoreline property owners to remove as much wetland vegetation and groom as much shoreline area as possible. The administrative record includes information from multiple sources that such actions will have adverse environmental effects on aquatic organisms and wetlands.

The Appellant’s position is that the District did not consider the cumulative positive impacts to Recreation, Economics, and Safety (Public Health) that the Appellant believes would occur if the District authorized the Appellant’s beach grooming project and similar beach grooming projects for other property owners. The District’s evaluation of the Appellant’s initial permit request (groom an additional 249 linear feet of shoreline) on page 22 of its November 2003 PE document concluded that:

“...removal of vegetation as requested would likely increase sales somewhat, and this would lead to increased use of the area, which could benefit local businesses. The local tax revenues, community services, community cohesion would benefit.”

The District updated this evaluation in its June 28, 2004, SOF for the proffered permit stating in regard to the Appellant’s proposal to groom 200 feet of shoreline and fill all ponded areas along his 400 feet of shoreline that:

“After weighing the benefits which reasonably may be expected to accrue for the project, as currently proposed by the applicant, against its reasonably foreseeable detriments, including the additional documentation that the applicant is losing a portion of his potential room rental income due to the appearance of the shoreline area, I conclude detriments outweigh the benefits, and that the project as proposed is contrary to the public interest.”

The District further concluded that:

“A modified project, conducted under the special conditions as described in the Permit Evaluation Document would decrease detriments and tip the public interest balance to the point that the benefits would outweigh the detriments. The modified and conditioned project would not be contrary to the public interest.”

The District’s consideration of changes between the initial proffered permit and the proffered permit shows the District considered that there would be some additional benefit to the recreational beach users of the Appellant’s property, and an economic benefit to the Appellant, if the District had approved a larger beach grooming project than it ultimately did. The District was faced with a situation of attempting to balance needs of individual property owners and recreational shoreline users who prefer the shoreline unvegetated with concerns for protection of aquatic resources and the aesthetic and environmental concerns of other shoreline visitors and residents who prefer that the shoreline remain vegetated.

In regard to cumulative impacts to recreational access to the Lake Michigan shoreline, the District’s second proffered permit provides a 155 foot wide groomed beach area as access between the Appellant’s hotel and the water line of Lake Michigan via the most direct route possible. The proffered permit also provides a 60 foot wide corridor along the current Lake Michigan shoreline for recreational access by the Appellant’s customers. The District’s proffered permit represents a concerted effort by the District to balance the Appellant’s need to retain recreational access to the shoreline as a necessary amenity to his hotel business against other public interests factors such as the conservation of Lake Michigan’s aquatic organisms, wetlands, and water quality.

The District’s efforts to do this represents a recognition that there are cumulative positive effects to the public interest of providing recreational access to the shoreline, and providing for use of private property that must be balanced against environmental impacts on public resources. Based on the District’s analysis of adverse cumulative effects on aquatic resources, the only way for the District to approve the Appellant’s request to extensively groom his shoreline, but avoid adverse cumulative effects to aquatic resources, would be to deny similar requests of other Traverse Bay shoreline property owners that applied after the Appellant. The District concluded that such disparate treatment between the Appellant and other property owners is inappropriate, as will be discussed in more detail under Reason 3. The Appellant disagrees with the District’s weighing of these various public interest review factors and would prefer to have them weighed in a different manner which the Appellant believes would be of greater economic benefit to him, other shoreline property owners, and local municipalities who collect hotel taxes. The administrative record supports the District’s conclusion to weigh these public interest factors in a different manner than advocated by the Appellant - a manner that provides greater environmental protection while also providing some vegetation removal and shoreline grooming for this and most other permit applicants, but with potentially a less than maximum economic return for this Appellant and other resort owners.

In regard to cumulative impacts on Safety (Public Health), the administrative record supports the District's analysis and conclusions that there would be no adverse Safety (Public Health) effects as a result of issuing the proposed proffered permit and no cumulative adverse effects on Safety (Public Health) from issuing permits for multiple similar projects because West Nile Virus has not been documented in humans in Grand Traverse County, and the fecal coliform test results did not establish that a human health risk beyond background levels existed in the ponds on the Appellant's property.

The administrative record shows the District's permit decisionmaking process considered and balanced a wide range of public interest review factors ranging from wetlands, aquatic resources, and water quality issues of concern to conservation agencies and some members of the public, to recreational access, employment, economic return, and local tax base concerns identified by the Appellant and other members of the public. The District's decision on the proffered permit that resulted from that process represents a reasonable evaluation of the various public interest review factors and does not conflict with the Clean Water Act or the Corps regulations, policy, or guidance. This reason for appeal does not have merit.

**Reason 3:** The proffered permit would result in disparate treatment between the applicant and other resorts and public beaches on the Grand Traverse Bay, including those that have obtained permits and those who conduct unauthorized work without interference by the Corps. (Appellant's reason for appeal number 6).

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

**ACTION:** None required.

**DISCUSSION:** The Appellant submitted clarifying information on specific permit actions that he asserted represented evidence that he had received a disparate (i.e. markedly different) permit decision from other applicants for beach grooming permits in the Traverse City area. The Appellant's examples of what he considered to be disparate treatment and the conclusions regarding those areas are as follows:

Grand Beach Resort Hotel file number 00-056-092-0A, an individual permit which expired on December 31, 2003. The District stated on page 8 of its PE document that this property had a sand beach with essentially no other vegetation. Thus, the site conditions are not comparable to the Appellant's property.

Northport, Michigan file numbers 86-056-385-4 and 99-056-103-1 were authorized by the District under Regional General permit 80-200-001-6, which allows shoreline grooming for designated municipal public swimming areas. These properties are not comparable to the Appellant's property as his property is not a designated municipal swimming area that is designated to provide access to the general public (those not customers of his facility), and so the public interest review factors are not fully comparable.

Northport, Michigan file numbers 03-056-013-0 and 03-056-014-0 were authorized under Corps Nationwide Permit number 18, which is restricted to discharges of 25 cubic yards or less. The Appellant's project is much more extensive than these projects and so is not comparable to them.

Northport, Michigan file number 03-056-015-0 was authorized under Corps Regional General permit 80-200-001-6, which allows shoreline grooming for designated municipal public swimming areas, and Corps Nationwide Permit number 18, which is restricted to discharges of 25 cubic yards or less. This property is not comparable to the Appellant's property as his property is not a designated municipal swimming area designed to provide access to the general public (those not customers of his facility), and the Appellant proposed a discharge of greater than 25 cubic yards of fill. Therefore the project scopes and public interest review factors are not fully comparable.

East Tawas, Michigan file number 01-016-051-0. The District evaluated the proposed project and concluded that the beach cleaning machine proposed for use did not result in a discharge of dredged or fill material that required a permit authorization under the Corps regulations. The Appellant's project is not comparable to this project as it does not use the same equipment.

None of the permits specifically identified by the Appellant as examples of disparate treatment represent the same conditions as those on the Appellant's property. The examples cited include several permits with substantially less work authorized than was authorized for the Appellant, and dissimilar site conditions such as little or no vegetation on the shoreline or steeper beaches. The District identified several permits for resorts on page 8 of its PE, including several permits for waterfront hotels with similar conditions to those in the proffered permit for the Appellant's property.

The Appellant also asserted as evidence of disparate treatment that other waterfront properties would have wetland vegetation if they had not been groomed. A detailed investigation of that question was beyond the scope of this administrative appeal. However, even if the Appellant's assertion was correct, his suggested solution was incorrect. If the District had mistakenly classified a wetland area as an unvegetated shoreline and issued a permit on that basis, the correct resolution for the District is to reconsider that prior decision and possibly issue a permit that is more protective of such wetlands, not issue the Appellant a permit that is less protective of wetlands. I find that the administrative record and the clarifying information provided by the Appellant do not support the conclusion that the Appellant received disparate treatment from the District. This reason for appeal does not have merit.

**Reason 4:** The proffered permit, public interest review, and the delays in its consideration reflect a bias against applicant and its project, contrary to 33 CFR 320.1(a)(4), is arbitrary, and result-driven. (Appellant's reason for appeal number 7)

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

**ACTION:** None required.

**DISCUSSION:** The Corps regulations at 33 CFR 320.1(a)(4) state that:

“The Corps is neither a proponent nor opponent of any permit proposal. However, the Corps believes that applicants are due a timely decision. Reducing unnecessary paperwork and delays is a continuing Corps goal.”

The Appellant’s position is that the District was acting as an opponent to his project rather than neither a proponent or opponent of the project as required by the Corps regulations. The Appellant clarified his position at the appeal conference and identified several types of evidence that he considered as supporting his position. The Appellant stated that the former District Engineer was biased against his project because he had a wetland engineering background, and that the former District Engineer’s father had also been involved in aquatic resources protection in the Detroit District. The Appellant also stated that since most of the District regulatory staff had biological or wetland training that they would be inherently biased against his wetland vegetation removal and shoreline grooming project.

The Appellant submitted an April 3, 2003, letter from Detroit District Engineer Lt. Colonel Thomas Magness to the Director of the MDEQ, Mr. Steven Chester, regarding the proposed legislation on shoreline grooming as evidence that the District Engineer was biased against shoreline grooming permits. This letter’s conclusion simply stated that:

“...we have established a process – the Shoreline Task Force – to deal with the issue of controlling wetland vegetation growing on exposed Great Lake bottomland with respect to Michigan’s and the Corps’ regulatory programs. ... I suggest we let the task force process run to completion before action is taken on the proposed bills.”

The April 3, 2003, letter identifies the desire of the District Engineer to engage a large variety of stakeholders in reaching a consensus on controlling wetland vegetation on Great Lakes bottomland. Other actions of the District Engineer show a similar intent, such as making a variety of media representatives familiar with Michigan shoreline grooming issues. The administrative record does not support the conclusion that these actions represent bias on the part of the District Engineer or other regulatory staff of the Detroit District. The proffered permit offered to the Appellant is similar to several other permits identified in the District’s PE document, and the District modified its initial proffered permit to provide an additional area of wetland vegetation removal in response to the Appellant’s comments. This reason for appeal does not have merit.

**Information Received and its Disposition During the Appeal Review:** The Division evaluated this appeal based on the Appellant's reasons for appeal, the District's administrative record, clarification of the administrative record at the appeal conference including the Review Officer's appeal meeting summary and addendums to the appeal meeting summary submitted by the Appellant and the District, and the following submittals:

The following items were considered clarifying information and considered during this administrative appeal:

Grand Beach Resort Hotel file number 00-056-092-0A Detroit District permit which expired on December 31, 2003, and photographs.

Traverse City State Park shoreline photographs dated Spring 2002, Summer 2004, and June 17, 2004.

Traverse City county boat ramp photographs dated 2003.

Northport, Michigan file number 86-056-385-4 Detroit District authorization letter dated April 9, 2003.

Northport, Michigan file number 99-056-103-1 Detroit District authorization letter of April 9, 2003, and photographs.

Northport, Michigan file number 03-056-013-0 Detroit District authorization letter of March 18, 2003

Northport, Michigan file number 03-056-014-0 Detroit District authorization letter of March 18, 2003.

Northport, Michigan file number 03-056-015-0 Detroit District authorization letter of April 9, 2003.

Lake Huron – Michigan monthly lake levels as compiled by the Detroit District, 1860 – 1963.

Historical beach photographs from 1952, 1960's, 1973, 1981, 1993, 1997, and 2004 of the East Arm of Grand Traverse Bay and the Appellant's property.

Undated summer same day comparison photographs of Traverse City State Park Beach and Traverse County Park Beach.

Cherry Tree Inn occupancy rates for June 2000–2003, July 2000– 2003, and August 2000-2003.

East Tawas, Michigan file number 01-016-051-0 Detroit District determination of non-regulated activity letter of April 30, 2001, and photographs.

NOAA navigation chart for the East Arm of Grand Traverse Bay.

*Economic value of beaches – A 2002 Update* by James Houston, U.S. Army Engineer Research and Development Center, Vicksburg, Mississippi.

Great Lakes Fisheries Trust pamphlets titled *Fish and the Great Lakes – The Wetland Connection* and *Be a Great Lakes Steward!*

District policy MFRs titled *Issues of overriding national importance vis a vis state or local authorizations* dated January 24, 2001, and March 3, 2005, describing how the District interprets 33 CFR 320.4(j)(2).

The following items were determined to be new information and were considered in this administrative appeal in accordance with 33 CFR 331.7(e)(6):

Undated letter from Michael MacColeman to the Detroit District responding to the GTB's comment letter of September 5, 2003, which was transmitted by the District to the Appellant by letter of September 16, 2003. This letter was considered new information because there is no indication in the administrative record that it was ever received by the District. However, most of the information in the letter is also found other places in the District's administrative record.

*Regime Change (Man Made Intervention) and Ongoing Erosion in the St. Clair River and Impacts on Lake Michigan-Huron Lake Levels* by W.F. Baird and Associates dated January 2005. This report was identified as new information and not considered in this appeal decision because it had not been issued at the time the District made its permit decision. However, the Appellant stated at the appeal meeting that his main reason for introducing this report was for the information on Great Lakes Water Levels. That information was presented in other parts of the District's administrative record and was considered in reaching this administrative appeal decision.

Northport, Michigan demographic information. This information was not provided elsewhere in the District's administrative record and was determined to be new information that could not be considered.

In accordance with 33 CFR 331.7(g) appeal decisions are applicable only to the instant appeal, have no other precedential value, and may not be cited or used as precedent for the evaluation of any other permit action. Therefore, the following item was also not considered.

Great Lakes and Ohio River Division, Pittman administrative appeal decision dated August 20, 2004.

**Conclusion:** The District's administrative record of this decision shows that the District considered the issues the Appellant identified in this administrative appeal during its evaluation of the Appellant's project proposals. The District completed its CWA Section 404(b)(1) analysis in a reasonable manner and weighed the factors of concern to the Appellant in the District's public interest review. The District described its basis for determining that the special conditions in the proffered permit were appropriate. The Appellant's appeal does not have merit.

A handwritten signature in black ink, appearing to read "Bruce A. Berwick". The signature is fluid and cursive, with the first and last names being more prominent.

BRUCE A. BERWICK  
Brigadier General, U.S. Army  
Commanding

End note 1. Appellant's reasons for appeal as stated in his August 27, 2004, Request for Appeal

Reason 1: The rejected permit fails to authorize all of the activities requested in our permit application, and the attachment of conditions was not warranted under the public interest requirement or otherwise.

Reason 2: The rejected permit fails to authorize the same amount of shoreline – 200 feet – as authorized by the State of Michigan. 33 CFR 320.4(j)(2).

Reason 3: In making a decision contrary to the state decision authorizing 200 feet of beach grooming (which Appellant advised the Detroit District he would accept from the Detroit District), the decision document fails to properly identify the significant national issues and explain how they are overriding in importance. 33 CFR 325.2(a)(6); see also 33 CFR 320.4(j)(2), (4). This is especially objectionable in light of a nearly unanimous legislative act in Michigan in 2003 to specifically authorize the beach grooming at issue in this matter (see 2003 PA 14), even though the District Engineer lobbied against that law (see enclosed letter).

Reason 4: The rejected permit fails to properly take into account and analyze all of the factors required by 33 CFR 320.4, or their cumulative effects. Further, factual assumptions made by the Detroit District in that analysis are inaccurate and argumentative, and the Detroit District ignored, or casually disregarded, important facts presented by the Applicant.

Reason 5: The rejected permit improperly requires the applicant to perform affirmative work -- revegetation of ponds -- which conflicts with its purpose of presenting a beach for use of its occupancy of approximately 220 guests.

Reason 6: The proffered permit would result in disparate treatment between applicant and other resorts and public beaches on the Grand Traverse Bay, including those that have obtained permits and those who conduct unauthorized work without interference by the Corps.

Reason 7: The proffered permit, public interest review, and the delays in its consideration reflect a bias against applicant and its project, contrary to 33 CFR 320.1(a)(4), is arbitrary, and result-driven.

Reason 8: In light of the time required for consideration of the Application and the expense incurred by Applicant, a completion date of December 31, 2007 is unfair and unreasonable.

Reason 9: The Detroit District's public interest review fails to consider the Applicant's modification of his permit request, limiting that request to 200 feet, with the revegetation of ponds outside that area, as more thoroughly set forth in the letter on February 11, 2004 from Voice Environmental.