

ADMINISTRATIVE APPEAL DECISION

MOHAWK VALLEY EDGE; FILE NO. 2001-00890

BUFFALO DISTRICT

AUGUST 31, 2011

Review Officer (RO): Pauline Thorndike, U.S. Army Corps of Engineers (Corps), Great Lakes and Ohio River Division (LRD)

Appellant: Mohawk Valley Economic Development Growth Enterprises (MV EDGE)

Permit Authority: Clean Water Act, Section 404 (33 U.S.C. 1344)

Receipt of Request for Appeal (RFA): June 13, 2011

Appeal Conference and Site Visit Date: July 29, 2011

Summary of Decision: The permit is remanded to the District to reconsider and document its decision.

Specifically, as discussed further below, the permit is remanded for the District to address deficiencies regarding the Least Environmentally Damaging Practicable Alternative (LEDPA), assessment of overall and basic project purposes, water dependency documentation, project need, shovel ready characterization, and cumulative impacts analysis. While all of these are issues meriting thorough review on remand, the District's failure to analyze cumulative impacts relevant to the site stands out as particularly problematic in light of the applicable legal requirements. The District must conduct a thorough cumulative impacts analysis so as to satisfy the Clean Water Act, the National Environmental Policy Act, and applicable regulations.

The permit decision is not remanded for most of the reasons argued by the Appellant. In particular, the Appellant's overall reason for appeal, an objection to a special condition in the permit that requires an end user and final site plan before the permit can be utilized, does not have merit because the condition is within the discretion of the District Engineer. However, evaluating a permit application without a potential end user and without a final site proposal is unusual given the implications for the District's ability to determine the need for the project related to footprint and associated impacts to waters of the U.S., ability to perform an adequate alternatives analysis, and ability to determine whether the proposed project is the LEDPA. Nevertheless, in imposing this condition, the District Engineer invoked a regulation that provides discretion to condition the permit in a manner to ensure compliance with the Clean Water Act (CWA) 404(b)(1) Guidelines. Based on the current Administrative Record (AR), applicable regulations also may have allowed the District Engineer to deny or withdraw the permit application.

Background Information:

In November 2001, the Appellant submitted an application to the Buffalo District (District) for anticipated wetland and stream impacts for the potential construction and operation of a semiconductor manufacturing facility. The Appellant's proposed project is bound to the north by Hazard Road, to the south by abandoned farm land and a Mohawk-Adirondack rail line, to the west by residences along Morris Road, and to the east by Edic Road and State University of New York Institute of Technology campus, and is located in the Town of Marcy, Oneida County, New York.

In May 2002, the District published its Public Notice describing the Appellant's request. In December 2002 the Appellant withdrew their application with the anticipation of re-submitting once a potential end user was identified. On July 5, 2006, the District received a new permit application package for the same 2001 project. The potential end user identified by the Appellant had chosen another site over the project location described in the application package, however, the end user strongly encouraged the Appellant to proceed with the permit application as their preferred back up site and to better position the site in the event another semiconductor company considers locating in New York State. Evaluating a permit application without a final site proposal is unusual, given the implications for the District's ability to perform an adequate alternatives analysis and to determine whether the proposed project is the LEDPA.

On April 6, 2007, the District published a second Public Notice describing the Appellant's request to permanently impact 9.64 acres of wetland, 3,027 linear feet of intermittent stream, and 2,184 linear feet of ephemeral stream. The Public Notice stated that the basic project purpose is to construct a manufacturing facility, and the overall project purpose is to construct a semiconductor fabricating facility within the Oneida and Herkimer County area consistent with the Semiconductor Manufacturing Initiative – New York (SEMI-NY) criteria.

The SEMI-NY program is a state initiative to assist semiconductor manufacturers and suppliers to locate and expand in New York State. The program is designed to identify strategically placed, pre-permitted sites across New York and to accelerate the environmental and plant permitting process to assist in the location of leading edge semiconductor fabrication facilities in New York. The Appellant's Joint permit application package dated June 2006 indicates that as part of the SEMI-NY program the state contracted with Industrial Design Corporation, Inc. (IDC) to develop the semiconductor manufacturing industry profile to assist local officials in evaluating potential impacts. The project site is one of thirteen statewide sites identified by the Governor's Office of Regulatory Reform (GORR) and the Empire State Development Corporation (ESDC) that meet location criteria required by the semiconductor industry, including 200 or more acres of land; 3 million gallons per day (mgd) of water at 80 pounds per square inch (psi); 2.4 mgd of waste water; 115 kilovolts or 20 megawatts continuous electrical service; 2,000 cubic feet per minute natural gas at 8 psi; ease of access for transportation purposes; and, availability of skilled labor.

According to the Empire State Development website (www.esd.ny.gov/buildnow/), the GORR program no longer exists, and the Empire State Development, ESDC's sole shareholder, is assisting site developers in obtaining Build Now/Shovel Ready certification. Build Now-

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NY/Shovel Ready certification entails preparing sites for development such that the local developer has worked proactively with the State to address all major permitting issues, prior to a business expressing interest in the location.

The New York State Department of Environmental Conservation (NYSDEC) issued a Clean Water Act Section 401 Water Quality Certification (WQC) on November 11, 2009, for the proposal, and subsequently on April 13, 2010, for the mitigation site. On December 3, 2010, the NYSDEC issued a modification to the previously authorized WQC to address additional proposed impacts to waters of the U.S. associated with a road by-pass (known as the Edic Road by-pass) and sewer and water line extensions, further explained in the paragraph below, that the Corps determined to be integral to the overall project. The NYSDEC issued another modification on March 28, 2011, after the project plans changed again.

On May 11, 2010, the District initially proffered a permit authorizing fill in 7.95 acres of wetland, 5,382 linear feet of stream, and temporary impacts to 0.02 acre of wetland. In addition, the District authorized impacts associated with the mitigation project including 1.36 acres of permanent impact to wetlands, 0.76 acre of temporary impacts to wetlands, and 312 linear feet of impacts to streams. The permit included several special conditions, one of which is the focus of this appeal. In a submittal dated July 6, 2010, the Appellant objected to several of the special conditions attached to the permit, and in doing so provided information on additional proposed work involving a road by-pass (known as the Edic Road by-pass) and sewer and water line extensions. This additional work was determined to be integral to the overall project and therefore the District had to evaluate the proposed impacts associated with it, including permanent impacts to 388 linear feet of intermittent stream and temporary impacts to 135 square feet of perennial tributary. The District considered the Appellant's objections and proffered a permit on April 15, 2011. The permanent impacts authorized in the proffered permit include 7.93 acres of wetland, 5,770 linear feet of stream, and temporary impacts to 0.02 acre of wetland and 135 square feet of tributary. Additional permanent impacts, related to the proposed mitigation, include 1.36 acres of wetland and temporary impacts to 0.02 acre of wetland and 343 linear feet of stream.

On-site and off-site mitigation authorized to compensate for the impacts include 1) the creation of 12.1 acres of forested wetland and 1 acre of scrub shrub wetland; 2) the enhancement of 58 acres of shallow emergent marsh, 14.5 acres of upland/grassland, and 740 linear feet of perennial stream; 3) the restoration of 616 linear feet of intermittent stream; 4) the re-creation of 2,889 linear feet of stream; and, 5) the preservation of 29.9 acres on the subject property including 23.63 acres of remaining wetland, 6.27 acres of upland buffer, and 4,300 linear feet of stream.

In a letter dated April 20, 2011, the District clarified that appeal requests should be made to the Division office instead of the District office. The Appellant disagreed with the special conditions attached to the proffered permit and appealed the District's decision in a submittal received by LRD on June 13, 2011.

The Appellant provided three related reasons for appeal surrounding special condition 1 that have been combined into one reason for appeal below to avoid duplication and for clarity of discussion.

The original three reasons for appeal are as follows:

- 1) Special Condition No. 1 thwarts the Project Purpose, and is otherwise arbitrary and capricious and not supported by the record of this proceeding. It prohibits the construction and installation of critical infrastructure that the industry deems a vital component of site marketability.
- 2) The Army Corps of Engineers, Buffalo District, does not possess the statutory or regulatory authority to include Special Condition No. 1 in the Proffered Permit.
- 3) The District has failed to overcome the regulatory presumption that MV EDGE has conducted an economic evaluation of the project, that the project is economically viable and needed in the Mohawk Valley Area, and, as a result, the imposition of Special Condition No. 1 is arbitrary and capricious and not supported by the record of this proceeding.

Appeal Evaluation and Findings:

Reason 1: Permit Special Condition No. 1 thwarts the project purpose, is arbitrary and capricious, is not supported by the AR, prohibits the construction and installation of critical infrastructure that the industry deems a vital component of site marketability, is not within statutory or regulatory authority, and improperly analyzes economic viability and project need.

Finding: This reason for appeal does not have merit with exception to improper analysis of project need. For reasons discussed below the permit is remanded to the District for further consideration.

Action: Upon remand, the District shall:

- 1) **Address conflicting statements regarding the LEDPA.**
- 2) **Re-evaluate the overall and basic project purposes and then determine how this affects the subsequent alternatives analysis and water dependency determination.**
- 3) **Document the project's water dependency determination based on the basic project purpose.**
- 4) **Document the project need.**
- 5) **Include sufficient documentation in the cumulative impacts analysis.**
- 6) **Document conflicts between the Appellant's definition and Build Now-NY's definition of shovel ready sites.**

Discussion:

In their RFA, the Appellant states that the District's permit special condition 1¹ prevents them from fulfilling the project purpose. The overall project purpose that informs the alternatives analysis is to construct a semiconductor fabricating facility within the Oneida and Herkimer County area consistent with the SEMI-NY criteria. The SEMI-NY program is described above in the background section. According to the Appellant, to be consistent with SEMI-NY criteria, the site must be shovel ready, which requires the Appellant to construct and install the essential infrastructure for site marketability in the semiconductor industry. The Appellant states that there is nothing in the regulations that authorizes the District to include a special condition that is contingent on the happening of a future event. According to the Appellant, the special condition is not needed to satisfy the Section 404(b)(1) Guidelines requirements, as those requirements have already been met. The Appellant requests the removal of special condition 1 on the grounds that the District lacks the Congressional, statutory, and regulatory authority to impose the condition; that the condition is arbitrary, capricious and an abuse of discretion; that it is not supported by substantial evidence in the AR; and, is plainly contrary to law and regulation governing the actions of the Corps.

Furthermore, the Appellant is concerned that the condition is not "related to the discharge" so it is not authorized by statute, regulation, or the AR. The Appellant also states that the special condition is not necessary to satisfy the public interest standard.

40 CFR Part 230 - 404(b)(1) Guidelines (Statutory and Regulatory Authority)

The District's memorandum dated April 15, 2011, explains that special condition 1 is related to the discharge because it is necessary to ensure compliance with Title 40 of the Code of Federal Regulations (CFR) Part 230 (the 404(b)(1) Guidelines)². The District further states that in accordance with 33 CFR 325.4, District Engineers will add special conditions to permits when such conditions are necessary to satisfy legal requirements or to otherwise satisfy the public interest requirement. The District's decision documents³ adequately explain that the 404(b)(1) Guidelines are a legal requirement and that special condition 1 is required to fulfill that requirement. The District does not indicate that special condition 1 is required to fulfill the

¹ Special condition 1: "No work authorized by this permit shall occur in waters of the United States until a semiconductor manufacturer (tenant) has committed and been secured by executed written contract to utilize the subject project site for the stated purpose in this permit; and a) the permittee provides to this office, written documentation from the tenant confirming that there is (are) no needed or proposed modifications to the approved site plan appended to this permit and depicted on Sheets 1-57 of 57, and b. the Buffalo District, U.S. Army Corps of Engineers (USACE) has provided written correspondence indicating that work may commence."

² The 404(b)(1) Guidelines sets forth two rebuttable assumptions when a proposed project is located within a "special aquatic site", as defined in Subpart E. Special aquatic sites include sanctuaries and refuges, wetlands, mudflats, vegetated shallows, coral reefs, and riffle pool complexes. If a proposed project is located in a special aquatic site and is "non water dependent", the first presumption is that there are practicable alternatives for non-water dependent activities that do not involve special aquatic sites; and secondly, that those practicable alternatives that do not involve special aquatic sites have less adverse impacts. The applicant is solely responsible for rebutting these presumptions in order for the Corps to determine that the proposed project complies with the 404(b)(1) Guidelines alternatives test.

³ "Decision documents" refers to the District's April 15, 2011 Memorandum for the District Commander and May 11, 2010 Environmental Assessment and Statement of Findings.

public interest standard. Additionally, the District states that the project does not contravene the public interest.

Regulations at 40 CFR 230.12(a)(3)(iv) states that an alternative fails to comply with the requirements of the 404(b)(1) Guidelines where there does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines. Corps regulations at 33 CFR 320.4(a) states that a permit will be denied if the discharge that would be authorized by such permit would not comply with the 404(b)(1) Guidelines. Therefore, a District may deny a permit if it is in non-compliance with the 404(b)(1) Guidelines because of lack of information. In this situation, rather than denying the permit altogether, the District conditioned the permit to ensure compliance with the 404(b)(1) Guidelines. It is unusual for the Corps to offer a permit when there is no identified end user or assurance that one will be found. However, in this situation the District exercised flexibility under 33 CFR 325.4(a)(1) and conditioned the permit to ensure compliance with the 404(b)(1) Guidelines. Special condition 1 was a critical element in the District's ability to proffer the permit because it ensures that no unnecessary work in jurisdictional waters of the U.S. is performed prior to identification of an end-user tenant. Corps regulations are sufficiently flexible such that the District is not required to deny the permit, although there are a number of reasons the permit application might have been denied, nor do the regulations prohibit the District from issuing a conditioned permit. The District did not abuse their discretion by proffering the permit with the special condition.

As for regulatory flexibility, the preamble to the 404(b)(1) Guidelines, Volume 45 of the Federal Register Page 85336 (45 FR 85336 dated December 24, 1980), states that a certain amount of flexibility is intended. For example, the Guidelines allow some room for judgment in determining what must be done to arrive at a conclusion that those conditions have or have not been met, according to a U.S. Environmental Protection Agency and Corps Memorandum to the Field dated August 23, 1993, entitled "Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements".

Notwithstanding this flexibility, the AR must contain sufficient information to demonstrate that the proposed discharge complies with the requirements of Section 230.10(a) of the 404(b)(1) Guidelines. The amount of information needed to make such a determination and the level of scrutiny required by the 404(b)(1) Guidelines is commensurate with the severity of the environmental impact (as determined by the functions of the aquatic resource and the nature of the proposed activity) and the scope/cost of the project.

Regarding a lack of information to make a determination of compliance with the 404(b)(1) Guidelines, at the time of the District's decision, the District documented in their April 15, 2011, memorandum that insufficient information was available to make a reasonable judgment as to whether the proposed discharge will comply with the 404(b)(1) Guidelines. The District could have denied the permit because of lack of information about an end user and final site design, but instead exercised their discretion to condition the permit to achieve the Appellant's goal to the extent possible. They stated that in order to reach the threshold for permit issuance and unequivocal compliance with the 404(b)(1) Guidelines, the District requires confirmation of an end user/tenant. Furthermore, the District documented that until a tenant is

acquired, the needs of the tenant are not confirmed and possibly not met by the design prepared by the Appellant. If the needs of the tenant related to footprint and associated impacts to waters of the U.S. differ from the design prepared by the Appellant, the proposed impacts to waters of the U.S. would not be necessary and therefore would not represent the LEDPA as required in the 404(b)(1) Guidelines, hence the addition of special condition 1. It is reasonable that the condition was added to ensure that any future changes to the project plans are evaluated by the District to ensure compliance with the 404(b)(1) Guidelines.

However, the District's above statements regarding a lack of information to determine compliance with the 404(b)(1) Guidelines are in direct conflict with statements on pages 23 and 25 of their May 2010 Environmental Assessment (EA), and nothing in their April 15, 2011, memorandum directly addresses the conflict. The District states "USACE has determined that the current proposal represents the LEDPA" and "The discharge represents the LEDPA, and if located in a special aquatic site (40 CFR Part 230, Subpart E) the activity associated with the discharge requires direct access or proximity to, or must be located in, the special aquatic site to fulfill its basic purpose." Furthermore, additional statements on page 9 of the District's May 2010 EA conflict with the above statements on pages 23 and 25 of the May 2010 EA. Upon remand, the District shall address these conflicts.

Project Need and Economic Viability

The Appellant states that the District failed to overcome the regulatory presumption that MV EDGE has conducted an economic evaluation of the project, that the project is economically viable and needed in the Mohawk Valley Area, and, as a result, the imposition of special condition 1 is arbitrary and capricious and not supported by the record of this proceeding.

The Appellant's understanding is that the District calls the project "speculative" because it lacks information on the economic viability of the project. The Appellant states that the District is inappropriately and unlawfully questioning MV EDGE's business judgment and the economic viability of the project. The Appellant states that the Corps lacks the legal authority to extend its review beyond wetland impact technical issues and should not review business plans, balance sheets, financial statements, lending commitments or tenant leases relating to a particular project. The Appellant also states that the Corps lacks the experience, expertise and statutory mandate to act as a business consulting firm to determine whether a project will be a successful business or otherwise be economically viable. During the appeal conference, the Appellant expressed concern that the District was inappropriately deferring to U.S. Fish and Wildlife Service (USFWS) in the use of the word "speculative" and the addition of special condition 1.

There is no indication in the AR that the District is questioning MV EDGE's business judgment or the economic viability of the project. Instead, the District appears to be questioning whether an end-user will be identified, as impacts to waters of the U.S. are heavily dependent upon the future tenant's needs. Furthermore, if an end user is never identified, wetland and stream impacts which are clearly within the Corps' regulatory authority do not need to occur. Although the Appellant has worked with industry leaders to design a site plan that contains the components and characteristics of a desirable site for a semiconductor manufacturer, without any

tenant in place there is no guarantee that the proposed plan will satisfy a potential future tenant's needs related to footprint and associated impacts to waters of the U.S.

The District stated that MV EDGE can only speculate as to when or if an end-user would be identified. Without the acquisition of a semiconductor fabricating company tenant/end user, the proposed impacts to waters of the U.S. would not be necessary and therefore would not represent the LEDPA as required under the 404(b)(1) Guidelines. The District further states that MV EDGE cannot guarantee that commencing the authorized impacts would result in obtaining a semiconductor facility end-user. MV EDGE does not intend to build the facility itself. The facility would be constructed by the end user based on their specific criteria/layout. Special condition 1 was added to allow adequate analysis of the full impacts upon securing an end user. Furthermore, although special condition 1 was recommended by USFWS, the District is required to evaluate all public and agency comments. In this case the District concurred with the USFWS comment and is solely responsible for the permit decision. The District documented their rationale for including special condition 1, as described in the previous section of this document regarding the 404(b)(1) Guidelines.

Despite this discussion, the District did not document the project need. Therefore, upon remand, the District shall document the project need, taking into account the fact that no end user has been identified for the site.

Project Purpose

The District's EA states that the basic project purpose is to construct a manufacturing facility, and the overall project purpose is to construct a semiconductor fabricating facility within the Oneida and Herkimer County area consistent with the SEMI-NY criteria.

The District's decision to proffer the permit and the evaluation of compliance with the 404(b)(1) Guidelines was based on a specific overall project purpose, that being construction of a semiconductor manufacturing facility. The overall project purpose documented by the District aligns with the ultimate goal of MV EDGE (to attract a manufacturing facility, specifically a semiconductor fabricating facility to the Oneida and Herkimer County area). However, the purpose of the fill in waters of the U.S. at the time of permit authorization was solely for the grading and earthwork preparation of the site for potential future construction of a prospective semiconductor facility because a tenant has not yet been identified and because the developer's only goal is site preparation and attraction of the end user. In fact, submittals by the Appellant show that a different site was selected by a potential end-user in 2006 under the SEMI-NY program, so no end user stands ready to use the MV EDGE site. The District did not include in the project purpose statements that the work was for grading and site preparation for a prospective semiconductor facility, and that actual construction of a semiconductor facility will be dependent upon the selection of a tenant.

Given that site preparation to attract a manufacturing facility is the Appellant's intent, upon remand, the District shall reconsider both the basic and overall project purposes and consider how grading and site preparation for a prospective semiconductor facility affects the

basic and overall project purposes. The District shall then determine whether this affects the subsequent alternatives analysis and water dependency determination.

Furthermore, identification of the basic project purpose informs the evaluation of whether the project is water dependent. The District did not document a water dependency determination in their decision documents. Upon re-evaluation of the basic project purpose, the District shall make a water dependency determination.

Shovel Ready

The Appellant states that the District does not have the legal authority, experience, or expertise required to opine as to what constitutes a “shovel ready” site or to interpret the SEMI-NY criteria. The Appellant also states that the AR does not support the District’s position. A review of the AR and the Appellant’s RFA indicates that there is a disagreement over the definition of the term “shovel ready”. Any disagreement, however, may be academic because the State’s shovel ready program does not bind the Corps in fulfillment of its obligations. While “shovel ready” may be a relevant component of the Appellant’s own definition of purpose and need, the Corps must assess “purpose and need” independently to ensure that it meets applicable requirements. Ultimately, however, the District has discretion to determine how the phrase “shovel ready” is most appropriately used. As discussed below, the District should resolve conflicting information in the record regarding the definition of shovel ready, and assess how and if the shovel ready program is relevant to the required analyses.

The Appellant states that to fulfill the project purpose and be consistent with SEMI-NY criteria described on page 2 of this document, the site must be shovel ready, which requires the Appellant to construct and install the essential infrastructure for site marketability in the semiconductor industry. The Appellant states that according to an industrial leader in design-build for advanced technologies (letter from Mr. John Frank of CH2M Hill dated July 2, 2010), a site is shovel ready if construction can commence ideally within three months of site selection. As described by the Appellant, in order to develop the site, the site must first be graded and compacted to eliminate post-construction settlements associated with soft ground. The compaction process takes several months to a year, making the site difficult to achieve shovel ready status soon after receiving a permit to perform the grading work⁴. During the appeal conference, the Appellant clarified that the SEMI-NY program is different from the Build Now-NY/Shovel Ready program.

The District’s definition of the term “shovel ready” is derived from the Empire State Development’s Build Now-NY website, and is described on page 7 of the District’s April 15,

⁴ As described in the Appellant’s July 6, 2010, letter to the Corps, avoiding ground settlement is essential to manufacturing in the semiconductor industry. At the project site, topography generally slopes from north to south, and the site must be graded to create terraced elevations that facilitate the flow of materials and operations, regardless of the end user. To accomplish the terracing, excess material from the higher, northern portion needs to be removed and placed on the lower, more southerly portions of the site. The initial placement of fill results in unconsolidated material that cannot immediately be built upon. Instead, the fill is built up to an elevation exceeding final desired height and then left to settle for several months to a year under the load intensity of the surcharged soils to achieve the desired consolidation.

2011, memorandum⁵. Based on this information, the District states that it is evident that special condition 1 does not prohibit the project site from being shovel-ready⁶. The Build Now-NY program does not require Federal permit issuance for a site to be designated shovel-ready. In fact, the language cited by the District and found on the Build Now-NY website states that “additional permits specific to the final end-user of the site will be required. Shovel Ready certification does not eliminate the need for these or local permits...” Also, the shovel ready self-evaluation checklist on the Build Now-NY website indicates that a shovel ready site needs to have a "Pre-Application meeting w/ ACOE [Corps] & DEC [Department of Environmental Conservation], preliminary plan approved, and preliminary mitigation plan approved". According to the RO's interpretation of this language, the District is not expected to proffer a permit decision in order for the site to be determined shovel ready. Furthermore, the State's interpretation of its own programs does not impact the scope of the Corps' discretion.

The District evaluated their decision using the Build Now-NY program definition. The District did not clearly document any conflicts between the Build Now-NY program definition and the Appellant's definition of “shovel ready”. Therefore, upon remand, the District shall explain the conflicts between the two definitions and why one was chosen over the other. The District should then clarify the implications of this issue for their analysis.

Cumulative Impacts

The RO reviewed the entire AR and determined that the District did not assess cumulative impacts relative to the specific site. The District evaluated their cumulative effects analysis under the section of their EA titled “Individual and Cumulative Impacts of the Proposed Action on the Public Interest” on page 15 of the EA. The analysis contains no description of a cumulative impact area (geographical scope), temporal scope, or the effects of past, present, or future foreseeable impacts within such a scope. The law requires a site specific cumulative impact assessment. The Corps' National Environmental Policy Act (NEPA) implementing regulations for the Regulatory Program (33 CFR Part 325, Appendix B) require that the Corps evaluate the cumulative environmental impacts of a proposed action. The 404(b)(1) Guidelines state that information on cumulative impacts shall be documented and considered during the decision-making process. The Corps regulations at 33 CFR 320.4(a) regarding its public interest review process require that the Corps consider cumulative impacts regarding public interest review factors. Furthermore, Corps regulations at 33 CFR 325.3(c) state: “The decision whether to issue a permit will be based on an evaluation of the probable impact including cumulative

⁵ Excerpts from the citation: "Having an economic development site certified as a "Shovel Ready Site" means that the local developer has worked proactively with the State to address all major permitting issues, prior to a business expressing interest in the location...Additional permits specific to the final end-user of the site will be required. Shovel Ready certification does not eliminate the need for these or local permits, but can substantially reduce the overall permitting time needed by acquiring many of the generic permits prior to a company showing interest in the site".

⁶ The District's April 2011 Memorandum states that special condition 1 does not prohibit the project site from being shovel ready based on available information from Empire State Development. The memorandum further states that the state programs SEMI-NY and Build Now-NY/Shovel Ready are voluntary and the sites designated do not represent the only sites available for development in New York State. For example, the District notes that recently a semiconductor facility was developed at the Luther Forest Technology Campus in Saratoga County, NY which was not part of the SEMI-NY program and not designated as “shovel ready”.

impacts of the proposed activity on the public interest.” Applicable NEPA regulations also require consideration of cumulative impacts (40 CFR 1508.25).

The District provided no information on a geographic and temporal scope, or the effects of past, present, or future foreseeable impacts to any resources of concern within that scope. A documented cumulative effects analysis is required by law and is an essential component of a District’s decision to proffer a permit for the LEDPA. Therefore, upon remand the District shall include sufficient documentation on a cumulative effects analysis in their reconsideration.

Proffered Permit Procedural Error

Finally, the District committed a procedural error when it failed to attach the decision document to the proffered permit and then again when it advised the Appellant to submit a Freedom of Information Act (FOIA) request for the document. Applicants should be provided with the rationale for the District’s decision relative to a Section 404 standard permit application. In fact, Corps regulations at 33 CFR 331.6(b) state that a copy of the decision document will be included with the proffered permit.

The Appellant expressed concern that the District subjected them to the FOIA process for the entire AR. The District did not abuse their discretion for requiring the Appellant to follow FOIA procedures for the entire AR. There is no regulation that requires these records be provided to the Appellant.

Permit Evaluation

Throughout the AR many comparisons between this project and other shovel ready-type projects were provided. In response to those comparisons, permit applications must be evaluated on a case by case basis, by careful examination of the individual benefits and detriments of each project, and a site-specific review of the facts. The issuance of an individual permit, along with any special conditions, does not set precedent for a similar permit (or special conditions) to be issued.

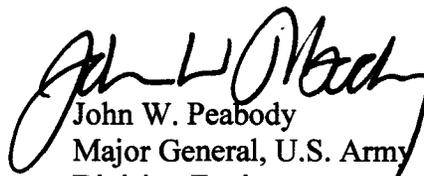
Conclusion:

For the reasons stated above, I remand the permit to the District to reconsider and document its decision as outlined in the Action section on page 4 of this document.

The District’s AR contains deficiencies regarding the LEDPA, assessment of overall and basic project purposes, water dependency documentation, project need, shovel ready characterization; and, cumulative effects analysis. The District’s determination is not otherwise arbitrary, capricious or an abuse of discretion, and is not plainly contrary to applicable law or policy.

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Upon remand, the District shall address the noted Action items and include sufficient documentation in the AR. This concludes the Administrative Appeal Process. The District shall complete these tasks within 60 days of the date of this decision, and upon completion provide the Division office and Appellant with its final decision and the supporting decision document.



John W. Peabody
Major General, U.S. Army
Division Engineer