ADMINISTRATIVE APPEAL DECISION

SCOTT COUNTY FISCAL COURT; FILE NO. 2003-4

LOUISVILLE DISTRICT

MARCH 23, 2011

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

Appellant: Scott County Fiscal Court

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

Receipt of Request for Appeal (RFA): August 30, 2010

Appeal Conference and Site Visit Date: November 8, 2010

Summary of Decision: The Appellant's request for appeal has merit and the permit denial is remanded to the District to reconsider and document its decision as outlined in the Action section below and further discussed in this document.

Background Information:

In December of 2002, the Appellant, in cooperation with Georgetown Municipal Water and Sewer Service (GMWSS), Scott County, Kentucky, submitted an application to the Louisville District (District) for fill related to construction and operation of a water supply and recreation reservoir. The Appellant's proposed project is located approximately 11 miles northwest of Georgetown, and approximately 0.5-mile north-northeast of the junction of KY 32 and Coppage Road on Lytles Fork Creek, near Longlick, Scott County, Kentucky.

On April 22, 2004, the District published its Public Notice describing the Appellant's request. Subsequently, in October of 2006, the Appellant revised the project purpose and need and submitted a revised analysis of alternatives to the proposed project. In this report, the Appellant removed recreation as a component of the purpose and need for the project. A supplement to the alternatives analysis was provided to the District in February of 2008. The District issued a jurisdictional determination on April 15, 2008, identifying a total of 64,204 linear feet of stream and 2.1 acres of wetland within the project area. A mitigation plan, dated December 10, 2008, was submitted to the District and provided a variety of potential stream and wetland mitigation projects and indicated that additional projects were being investigated. The final supplement to the alternatives analysis was dated April 28, 2009, and was intended to update some of the conclusions in the October 2006 document regarding the practicability of alternatives. It identified two alternatives that are no longer available to the Appellant. The District disagreed with the Appellant's practicability analysis, as it did not consider environmental impacts as required by the 404(b)(1) Guidelines, and instead focused on cost.

Given the changes to the Applicant's project purpose and alternatives analysis, on January 27, 2009, the District published a second Public Notice describing the Appellant's request to construct a concrete dam that would create a 300 acre surface area pool, altering downstream flow to 2,846 feet of Lytles Fork. In addition, at normal pool elevation, the dam would inundate 61,358 linear feet of stream and 2.1 acres of Federal jurisdictional wetland. The Public Notice described the project purpose as the construction and operation of a water supply reservoir that will replace the primary water source (Royal Spring) of the GMWSS. The overall project purpose, as stated in the District's decision document, is to provide an adequate, dependable, and safe water supply for GMWSS customers in Scott County, Kentucky.

The State of Kentucky did not issue or deny 401 Water Quality Certification (WQC) by the date of the District's decision.

On July 2, 2010, the District denied the Appellant's permit request because there are practicable alternatives which accomplish the project purpose with less impact to "waters of the United States." According to the decision document, a minimum of five alternatives, with minor long-term environmental impacts, could satisfy the Appellant's water supply needs. These alternatives were determined to be reasonable, with fewer aquatic resource impacts than the proposed alternative, and warranted further analysis in accordance with the 404(b)(1) Guidelines and public interest review. The District stated that each of the alternatives is considered practicable since each is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. The District deemed the reservoir project to be contrary to the overall public interest, as it had far more aquatic resource impacts than the other alternatives.

The Appellant disagreed with the District's determination and appealed its decision in a letter dated August 27, 2010, and received on August 30, 2010. According to the Appellant, the District's decision document contains several inaccurate statements and incorrect assumptions that led them to a flawed determination regarding the practicability of alternatives.

The Appellant submitted the following list of reasons for appeal

Errors in the District's Decision document:

A. Information Regarding Lytles Fork Reservoir (the Proposal)
- A.1. Alleged Omission of Information on Water Pipeline and Related Facilities (for the proposed reservoir)
- A.2. Criticism of GMWSS Rate Structure

B. Information Regarding Water Purchase Options
- B.1. Questionable Availability and Cost of Water from Frankfort
- B.2. Questionable Availability and Cost of Water from Kentucky American Water (KAW)
- B.3. Incorrect Conclusion that a Combined Water Purchase Option is Practicable

C. Corps Evaluation of Other Alternatives
- C.1. Practicability of Royal Spring
- C.2. Kentucky River Intake Cost and Logistics (Kentucky River Pool 3)

D. Sufficiency of Proposed Mitigation Plan

E. Other Errors in Corps Permit Determination and Conclusions
- E.1. Claims of Insufficient Information
- E.2. U.S. Environmental Protection Agency (EPA) Comments

Reasons for appeal A through E.2 are combined below to facilitate the discussion.

Appeal Evaluation and Findings:

Reason 1: The District's decision document contains several errors. These inaccurate statements and incorrect assumptions regarding the Appellant's proposal and the alternatives analysis contributed to the District's flawed determinations regarding the practicability of alternatives relative to cost, logistics, and water availability. The District applied incorrect information in reaching their decision.

Furthermore, the District's decision was not reasonable because their decision document claimed that there was insufficient information when the requested information was made available. The Appellant was not advised that their most recent submittals were insufficient.

Finding: This reason for appeal has merit.

Action:

1) **Upon remand, the District shall document the project's water dependency and clearly identify the basic project purpose.**
2) **Regarding the Frankfort Alternative (B.1), upon remand, the District shall address the Appellant's logistical concerns surrounding the installation of a water pipeline in the US 460 corridor, and as appropriate address the use of other reasonable locations. If the Frankfort alternative is then eliminated from the list of practicable alternatives, an analysis should be completed to determine whether a combination of the remaining practicable alternatives would provide sufficient water supply.**
3) **Regarding the Kentucky River Pool 3 Alternative (C.2), upon remand, the District shall address the information that was contained in the administrative record (undated cost estimates and the September 2006 letter from the Kentucky Division of Water), regarding practicability of this alternative in terms of costs and logistics. The District shall then clarify whether sufficient information has been provided to determine practicability of this alternative, and if so, clarify whether this alternative is practicable. If the Kentucky River Pool 3 alternative is eliminated from the list of practicable**

alternatives, an analysis should be completed to determine whether a combination of the remaining practicable alternatives would provide sufficient water supply.

Discussion:

A. Information Regarding Lytles Fork Reservoir (the Proposal)

A.1 Alleged Omission of Information on Water Pipeline and Related Facilities (for the proposed reservoir)

The Appellant disagrees with many of the conclusions made by the District regarding the proposed water pipeline and related facilities that would convey water from the proposed reservoir to the existing GMWSS treatment plant.

The Appellant disagrees with the District's conclusion that the Appellant did not provide information on the environmental impacts and cost of the pipeline for the reservoir. The Appellant further disagrees with the District's conclusion that cost calculations for property acquisition, the water pipeline, and mitigation associated with the construction of the reservoir were not provided. Further, the Appellant disagrees with the District's conclusion that a proper comparison of their preferred alternative with other alternatives cannot be made because of the missing information. The Appellant cites the locations within their October 2006 Purpose, Need & Alternatives Report (the October 2006 Alternatives Report) where the Appellant alleges that all of the above information was provided to the District.

Background information on cost analysis reports
Prior to discussing details of this reason for appeal, background information is necessary on the various cost analysis reports contained within the Administrative Record (AR). The AR includes three different cost calculation reports in addition to one cost calculation spreadsheet. Not all of the alternatives were included within all of the cost calculation reports, nor described to the same level of detail. Two cost calculation reports are contained within the October 2006 Alternatives Analysis, and the cost calculation spreadsheet, dated January 2006, was provided in an Excel table. A more recent cost calculation report is dated February 2008, prepared by DLR Consultants for GMWSS instead of the Appellant. These three items were considered by the District when reaching their decision.

In a cover letter dated April 4, 2008, introducing the February 2008 report, GRW Engineers, Inc. (the Appellant's agent) states that the study concluded that "By far the most cost effective long-term water supply alternative would be the reservoir". The report also states "Since the County (not GMWSS) is financing the construction of the reservoir, the cost analysis differs from the one GRW Engineers, Inc. previously prepared. However, this report serves as an update because it includes Kentucky American Water Company's (KAW) proposed plant and transmission line, in addition to water supply from the City of Louisville."

After the appeal conference the Appellant clarified again that this February 2008 report was prepared independently for another entity and was intended to supplement the October 2006 Alternatives Report but not supplant it. The Appellant indicated that the report was prepared by

DLR Consultants for GMWSS to evaluate present viable options and give an independent evaluation as to the course of action GMWSS needs to take for its future water supply needs. The Appellant further clarified that the February 2008 report was primarily focused on the cost implications of the various options from the perspective of GMWSS and its customers – not necessarily Scott County or the District. They indicated that it was submitted to the District as a supplement to the comprehensive October 2006 Alternatives Report and as an update because it included two alternatives not previously evaluated including KAW's proposed plan and transmission line, in addition to water supply from the City of Louisville.

The District acted reasonably by considering the February 2008 report in their decision. The report was submitted by the Appellant, and provided supplemental information to the October 2006 Alternatives Report that could be considered in the District's decision including the introduction of two additional alternatives. Although the cost information was directed toward an entity other than Scott County, that entity (GMWSS) is working in cooperation with Scott County, and nothing in the AR reflects that the Appellant informed the District that any of the cost information in the February 2008 report was invalid. Furthermore, the District's decision document indicates that they considered the cost analysis in the October 2006 Alternatives Report and a cost analysis Excel spreadsheet dated January 2006, in addition to the February 2008 report, when reaching their decision. Finally, because of the large aquatic resource impacts associated with the proposed reservoir in comparison to the other less environmentally damaging alternatives, the District would have reached the same decision regardless of whether they considered the February 2008 report.

Omission of information

U.S. Environmental Protection Agency 404(b)(1) Guidelines at Title 40 Code of Federal Regulations (CFR) Part 230.10(a)(3) 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 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 aquatic 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.

Furthermore, 40 CFR Part 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.

The District identifies several on-site special aquatic sites that would be impacted by the proposed reservoir, including all of the wetlands and numerous riffle and pool complexes associated with the streams. However, the District did not clearly identify the basic project purpose and water dependency determination in their decision document. Documenting these items would clarify the District's alternatives analysis but would not have impacted the District's decision. The District appropriately outlined the importance of identifying the project purposes

under Section I.A. of the decision document and did identify the overall project purpose that was the basis for their alternatives analysis.

Section III.D of the District's decision document includes an entire section devoted to alternatives warranting further analysis. The District's decision document, page 58, states "The actual costs of alternatives compared to the cost of the proposed reservoir becomes even less clear given the applicant's reluctance to factor in land acquisition costs, mitigation costs, and pipeline and other infrastructure costs associated with their proposal. Had all these costs been included in the applicant's analysis of the preferred alternative then it may have been economically comparable to the alternatives." The District's decision document therefore indicates that this information is missing from the Appellant's analysis of the preferred alternative. It is not clear from the AR when the District requested specific cost information. However, information regarding cost estimates was conveyed in a letter dated March 30, 2006, from the District to the Appellant. The letter indicated that the Kentucky River alternative was only 4.1% more expensive than the proposed reservoir, and therefore the Kentucky River alternative was not unreasonable from a cost perspective. The District's letter may have prompted the Appellant to provide further information on costs.

A review of the AR supports much of the District's statement above. For example, the cost analyses within the AR contain no information on the land acquisition costs of the reservoir in its proposed location. The October 2006 Alternatives Report indicates that Scott County chose not to include land costs because Scott County already purchased the land for the reservoir. It is appropriate for the District to request and include the cost of land acquisition as part of their evaluation of project alternatives.

However, the AR does not support the District's statement that pipeline costs were not provided. The District's decision document, page 23, states "According to the applicant, construction of raw transmission pipelines necessary to complete the project would occur at an undetermined future date. No further information was provided by the applicant with regard to the environmental impact or cost of the transmission pipelines despite this issue being raised by the Corps and other agencies." To the contrary, basic pipeline cost information is located in the October 2006 Alternatives Report, Appendix F, page 5, that provides the expected total cost of transmission lines for the proposed 4.25 million gallons per day (mgd) reservoir, but is not detailed. The October 2006 Alternatives Report, Appendix B, page 11 of the RW Beck Report, lumps pipeline costs into the total "capital improvements". (The purpose of the Beck Report was to evaluate the feasibility of utilizing raw water from the proposed reservoir versus the alternatives of purchasing water from Frankfort or KAW.) Additional cost information on the water pipeline for the reservoir was listed in various tables within a February 2008 report prepared by DLR Consultants for GMWSS instead of the Appellant. The tables, such as in Table IV-10, indicate that half of the pipeline cost was included in the revised rate.

Consistent with the District's finding, no information on the environmental and aquatic resource impacts of the pipeline for the reservoir or any of the alternatives were found in the AR. This information is relevant because it would allow for a detailed comparison of aquatic resource impacts for all of the alternatives and would help identify the least environmentally damaging practicable alternative.

The AR does not support the District's statement that mitigation costs were not provided. The December 2008 Scott County Reservoir Proposed Mitigation Plan provides total costs for each of the potential mitigation projects. Although mitigation costs are not detailed in the October 2006 Alternatives Report, it does identify mitigation costs broadly under the heading "Environmental mitigation" on page 5 of Appendix F. Although this information was contained in the AR, further analysis by the District was not warranted because mitigation is normally not determined until after the least environmentally practicable alternative has been identified and supported by avoidance and minimization of remaining aquatic impacts. In other words, it is not appropriate to consider compensatory mitigation in determining whether a proposed discharge will result in non-significant impacts for purposes of the alternatives analysis required by 40 CFR Part 230.10(a). The District denied the permit because the proposed project does not constitute the Least Environmentally Damaging Practicable Alternative and does not comply with the Section 404(b)(1) Guidelines.

Using best professional judgment, the district found that aquatic resource impacts would be far greater for the reservoir than any of the other alternatives. However, as mentioned previously, the AR does not contain detailed quantifiable information on the impacts of any of the other alternatives, as it was not provided by the Appellant. Practicability of the alternatives is discussed throughout the remainder of this document.

A.2 Criticism of GMWSS Rate Structure

The Appellant disagrees with the District's statements regarding the GMWSS rate structure. According to the Appellant, the less environmentally damaging alternatives would provide a 50% – 129% increase in water rates, possibly even more, which would constitute a significant imposition on the existing rate payers, and therefore are not practicable alternatives. The Appellant states that the relevant consideration should not be whether GMWSS's rates are commensurate with surrounding water utilities but rather whether GMWSS should have to select alternatives that require drastic increases in water rates. The Appellant disagrees with the District's position in making value judgments about what GMWSS should be charging for water, and disagrees with the District's alleged criticism of the community for purportedly standing in the way of "cooperative approaches" to address water supply needs.

Practicability is defined at 40 CFR Part 230.10(a)(2):

> An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.

The preamble to the Guidelines, 45 Federal Register 85339 (December 24, 1980), states:

> [i]f an alleged alternative is unreasonably expensive to the applicant, the alternative is not 'practicable.'

Also in the preamble to the Guidelines, "Alternatives" (45 FR 85339) states:

> Therefore, the level of analysis required for determining which alternatives are practicable will vary depending on the type of project proposed. The determination of what constitutes an unreasonable expense should generally consider whether the projected cost is substantially greater than the costs normally associated with the particular type of project. Generally, as the scope/cost of the project increases, the level of analysis should also increase. To the extent the Corps obtains information on the costs associated with the project, such information may be considered when making a determination of what constitutes an unreasonable expense.

The preamble to the Guidelines, "Economic Factors" (45 FR 85339) states:

> Therefore, to the extent that individual homeowners and small businesses may typically be associated with small projects with minor impacts, the nature of the applicant may also be a relevant consideration in determining what constitutes a practicable alternative. It is important to emphasize, however, that it is not a particular applicant's financial standing that is the primary consideration for determining practicability, but rather characteristics of the project and what constitutes a reasonable expense for these projects that are most relevant to practicability determinations.

The regulations do not provide a ceiling for when costs become impracticable. The District's decision document generally addresses the Appellant's concerns regarding rate increases. Although the District's decision document does not address a specific 50-129% rate increase, it does address rate increases to levels commensurate with surrounding water utilities.

The District's decision document, page 58, states:

> The applicant has consistently advanced their intent to maintain water rates that are substantially lower than other water utilities in central Kentucky. The findings presented in the cost analyses cite increased water rates as reason to eliminate various alternatives from further consideration. Increasing water rates to levels commensurate with surrounding water utilities does not render those alternatives "not practicable." Furthermore, the desire to preserve lower than average water rates has likely hindered cooperative approaches to identifying other potential suppliers. The actual costs of alternatives compared to the cost of the proposed reservoir becomes even less clear given the applicant's reluctance to factor in land acquisition costs, mitigation costs, and pipeline and other infrastructure costs associated with their proposal. Had all these costs been included in the applicant's analysis of the preferred alternative then it may have been economically comparable to the alternatives.

The District reached a reasonable conclusion based on their analysis of cost considerations and practicability that does not conflict with existing Corps regulations or guidance.

B. Information Regarding Water Purchase Options

B.1 Questionable Availability and Cost of Water from Frankfort

One of the alternatives evaluated is the purchase of water by GMWSS from the Frankfort Electric and Water Plant Board (Frankfort alternative). According to the RFA, the District

misconstrues the amount of water currently available to GMWSS from Frankfort, and overestimates the likelihood of that water supply being increased in the future.

According to the Appellant, the current contract between GMWSS and Frankfort provides a guaranteed supply of 1.0 mgd, with an additional 1.4 mgd to be provided only if "readily available" such as during non-drought conditions. The Appellant disagrees with the District's statements indicating that this additional 1.4 mgd will be available. The Appellant asserts that this water supply is not dependable because during drought conditions the additional 1.4 mgd would not be available, and therefore does not meet the overall project purpose to provide an adequate, dependable, and safe water supply.

The Appellant also disagrees with the District's assertion that the cost of this alternative is affordable. Discussion on cost considerations and practicability is provided above at Section A.1.

The District acknowledged in their decision document that the Frankfort contract commits Frankfort to sell only 1.0 mgd with an additional 1.4 mgd only if readily available, and continuation of the contract after 2010 is uncertain and cannot be guaranteed. The District concludes that Frankfort may not be adequate as a sole source, but could be used in combination with other sources and must be carried forward as a feasible alternative. The Appellant, however, indicates that combined water purchase options are not practicable due to cost. The practicability of combined water purchase options is discussed later in this document at Section B.3.

A review of the AR revealed that the Appellant's supplement to the Alternatives Analysis, dated April 28, 2009, states that the alternatives to purchase all potable water from Frankfort and Bluegrass Water Supply Commission (BGWSC) and to purchase all potable water from Frankfort and KAW are no longer available. The reasons provided are that the capacity does not currently exist, the increased cost with purchased water, and uncertainty about Frankfort's supply (they are currently planning to expand their plant but it is uncertain when additional water will be available).

More importantly, in a letter dated May 7, 2009, that was addressed to the Appellant's agent (GRW Engineers, Inc.), GMWSS indicated that the February 2008 report was flawed when it stated that the current supply from Frankfort could be doubled from 2.4 mgd to 4.8 mgd with improvements to the system of approximately $3.8 million. According to the letter, since the 2008 report was completed there have been several residential developments with associated utilities along the US 460 corridor, adding to the congestion of existing utilities in the corridor, that would make it very difficult to construct the additional pipeline. The letter indicates that this alternative is virtually impossible unless a longer more difficult pipeline route is used thereby increasing the cost to a non-viable level. No further information was provided by the Appellant regarding the costs of a different pipeline route, or details supporting the impracticability of installing the pipeline within the existing US 460 corridor.

The District's decision document incorrectly states that improvements could be made to the Frankfort connection/transmission system to result in Frankfort selling an additional 2.4 mgd for

a total of 4.8 mgd. However, this incorrect statement does not affect the District's decision, as the District's decision document on page 29 further explains that the Appellant is not limited to a sole source alternative, and can instead purchase potable water from multiple sources. So, if a portion of the Frankfort alternative is not available to the Appellant, the Appellant can also pursue other alternatives in addition to Frankfort. The Appellant, however, indicates that combined water purchase options are not practicable due to cost. This is discussed later in this document at Section B.3.

The District's decision document also does not adequately address the Appellant's logistical concerns surrounding the installation of a water pipeline in the US 460 corridor. The outcome of such an analysis could affect the District's conclusion regarding the practicability of the Frankfort alternative, potentially eliminating it as a practicable alternative. Even so, it would not preclude the Appellant from utilizing a combination of other practicable alternatives, provided that sufficient water supply could still be provided.

Upon remand, the District shall address the Appellant's logistical concerns surrounding the installation of a water pipeline in the US 460 corridor, and as appropriate, address the use of other reasonable locations. If the Frankfort alternative is then eliminated from the list of practicable alternatives, an analysis should be completed to determine whether a combination of the remaining practicable alternatives would provide sufficient water supply.

B.2 Questionable Availability and Cost of Water from KAW

According to the RFA, the District incorrectly concludes that KAW provides a guaranteed supply that is adequate, dependable and safe, either alone or in combination. Further, according to the RFA, the District incorrectly concluded that a combined water purchase option is practicable.

The Appellant indicates that GMWSS currently has two water supply connections with KAW that can provide up to 3.46 mgd of water. However, according to the Appellant, this amount is not a guaranteed supply and cannot be counted on to provide an adequate, dependable and safe water source, either alone or in combination. During the appeal conference the Appellant stated that KAW has no contractual obligation with GMWSS. Even if there was a contract, it would not guarantee water will be available, as drought conditions and other events can limit the amount of water available to customers. The Appellant also disagrees with the District's assertion that the cost of this alternative is affordable.

Discussion on cost considerations and practicability of all the alternatives is provided in the above Section A.2.

The District's decision document explains that while Scott County developed its October 2006 Alternatives Report, KAW was in the process of addressing its supply deficit. KAW's plan was to develop a new water intake and treatment plant on Pool 3 of the Kentucky River, including a new water supply pipeline to Lexington that passed through Scott County. BGWSC was provided the opportunity to "buy in" to the project at a cost of $60 million that would provide an extra 10 mgd treatment capacity. However, the BGWSC opted not to buy into the project due to

the cost. Since the BGWSC did not buy in, the KAW project as currently proposed will not provide an extra 10 mgd treatment capacity.

The District's decision document explained that the Appellant is not limited to a sole source alternative, and can instead purchase potable water from multiple sources. So, even if the additional 10 mgd water is not available, the Appellant could still utilize the 3.46 mgd and pursue other alternatives in combination with the KAW alternative to ensure sufficient water is available to accommodate Scott County.

The District's conclusions do not conflict with existing regulations and guidance.

B.3 Incorrect Conclusion that a Combined Water Purchase Option is Practicable
According to the RFA, numerous flawed assumptions and conclusions led the District to conclude that a combined water purchase option involving Frankfort and KAW is practicable. The RFA claims that even if KAW delivered the full 3.46 mgd, the combined purchase option could provide no more than 4.46 mgd under drought conditions, and possibly much less, which is far short of the projected 6.25 mgd peak demand for the GMWSS system in 2020.

The RFA states that a combination of alternatives would not be practicable due to cost. According to the Appellant, the cost analysis does not take into account the fact that GMWSS would still have to make payments on the outstanding bonds for its existing water treatment plant, even if it purchased its water entirely from Frankfort and/or KAW. The Appellant does not explain how this impacts practicability, nor do they explain why the existing water treatment plant cannot be part of an ultimate solution.

The Appellant disagrees with the District's statement that Scott County did not consider using multiple sources, such as purchasing water from both Frankfort and KAW. The Appellant claims that ample information on the costs and benefits of such combination alternatives was included in the numerous documents submitted to the District.

However, the most recent April 28, 2009, Alternatives Analysis report submitted by the Appellant indicates that the alternatives to purchase all potable water from Frankfort and Bluegrass Water Supply Commission or from Frankfort and KAW are no longer available. Although multiple sources were considered in the older October 2006 Alternatives Analysis report, the updated April 2009 Alternatives Analysis submittal does not consider multiple sources when stating that the above options are no longer available. The reasons why the District disagrees with the Appellant's assertion that these options are no longer available (not practicable) can be found in Sections A.2, B.1, and B.2.

The District disagrees with the Appellant that the least environmentally practicable alternative is the proposed reservoir.

Corps regulations at 30 CFR Part 332.1(c)(2) state:

> The District engineer will issue an individual section 404 permit only upon a determination that the proposed discharge complies with the applicable provisions of 40 CFR part 230, including those which require the permit applicant to take all appropriate

> and practicable steps to avoid and minimize adverse impacts to waters of the United States.

EPA regulations at 40 CFR Part 230.10(a)(2) state that practicable alternatives are available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. Furthermore, it is incumbent upon the applicant to demonstrate compliance with the 404(b)(1) Guidelines, which includes demonstrating that less environmentally damaging alternatives are not practicable because of cost.

The burden of proof to demonstrate compliance with the Guidelines rests with the applicant; where insufficient information is provided to determine compliance, the Guidelines require that no permit be issued. According to the District's AR, the Appellant did not clearly demonstrate that these other alternatives do not exist. The Appellant states that the other alternatives are not practicable, whereas the District determined that the alternatives were practicable, as discussed in the above Sections B.1 and B.2. Following the submittal of the April 2009 Alternatives Analysis, there is no indication in the AR that the District sought further information on this issue, as they had reached a point when they could make a permit decision.

The District's decision document, page 58, states:

> Following years of study of various water supply alternatives and documenting practicable non-reservoir alternatives, it was only in a supplement to the alternatives analysis presented in April 2009 that the applicant concluded that water purchased from Frankfort and KAW could not be considered viable alternatives. This conclusion was based on the uncertainty associated with the amount and cost of water available from suppliers. These conclusions were derived from using sole source supplies and apparently no consideration given to using multiple sources (i.e. purchase from both Frankfort and KAW).

Based on the information that it had, the District identified a minimum of five alternatives demonstrated to satisfy the documented water supply needs while the long-term environmental impacts associated with each would generally be minor or non-existent. The District's decision document, page 19, explains how they determined the other alternatives to be reasonable and to warrant further analysis in accordance with the 404(b)(1) Guidelines and public interest review. Furthermore, Section III.D.6 of the District's decision document describes how the multiple purchase water options are practicable. The District further stated that no alternative, including the proposed project, is capable of meeting the Appellant's needs as a sole source. The AR supports that the alternatives in combination, but not alone, are practicable.

The District's decision document adequately explained that the Appellant is not limited to a sole source alternative, and can instead purchase potable water from multiple sources, as a combination of practicable alternatives that can achieve the overall project purpose must be considered. However, upon remand, the District will sufficiently address the practicability of the Frankfort alternative in their decision document as discussed at Section B.1. If the Frankfort alternative is then eliminated from the list of practicable alternatives, an analysis should be completed to determine whether a combination of the remaining practicable alternatives would provide sufficient water supply.

C. Corps Evaluation of Other Alternatives
The Appellant disagrees with the District's assessment that the other alternatives are practicable. The other alternatives include the no action alternative that results from permit denial or no regulated discharge of dredged or fill material into waters of the U.S., Royal Spring, water conservation, Kentucky River, the proposed project at Lytles Fork Reservoir, and potable water purchase options such as the Frankfort Electric and Water Plan Board, KAW and combination purchase options from multiple sources.

C.1 Practicability of Royal Spring
According to the RFA, the District incorrectly concludes that Royal Spring is a practicable alternative in combination with other potential water sources. The Appellant states that the Royal Spring option does not meet the overall project purpose of providing an adequate, dependable and safe water supply for GMWSS customers in Scott County. The Appellant's concerns stem from the potential for Royal Spring to become re-contaminated in addition to its inadequate supply.

The District's decision document, page 20, states:

> Until such time that Royal Spring is rendered unusable due to contamination or has inadequate supply, then it must be considered a practicable alternative to be considered in combination with other sources because the alternative is capable of producing 2.5 mgd under normal conditions, environmental impacts are minimal, and future use of the source is economically viable.

Discussion on cost considerations and practicability of all the alternatives is provided above at Section A.2, B.1, B.2 and B.3. In addition, discussion regarding sole source vs. multiple source alternatives is provided above at B.3.

The District addressed the feasibility of Royal Spring in their decision document. Their analysis and conclusion is reasonable and does not conflict with existing regulations and guidance.

C.2 Kentucky River Intake Cost and Logistics (Kentucky River Pool 3)
According to the RFA, the District incorrectly concludes that Scott County did not provide information to the District on the cost and logistics of constructing GMWSS's own intake at Pool 3 of the Kentucky River.

The Appellant pointed out that this information was provided in Appendix F to the October 2006 Alternatives Report, which demonstrated that this alternative was much more costly than the proposal and would face significant logistical challenges. Furthermore, the Appellant provided a September 2006 letter from the Kentucky Division of Water which identified DOW's significant concerns about the availability of sufficient water from Pool 3 to meet the needs of water systems in Central Kentucky. Additionally, according to the Appellant, KAW will be constructing a new water intake and treatment plant at Pool 3, so it is unclear from the Appellant's perspective whether any additional utilities can depend on withdrawing any additional water from Pool 3 on a consistent, long-term basis.

Appendix F of the October 2006 Alternatives Analysis Report indicates that this alternative is no longer considered reasonable as a sole source or in combination, and indicates that costs are included for reference. The report provides no further detail, aside from listing the costs, as to why this alternative is no longer considered reasonable as a sole source or in combination. The February 2008 alternatives analysis report entirely omits the alternative to withdraw water from Pool 3.

Undated cost estimates provided on a separate Excel spreadsheet contained within the AR indicate that the Pool 3 option is not much more expensive than the proposed reservoir. The Pool 3 alternative costs an average of $2.55 per 1000 gallons, and the reservoir alternative costs an average of $2.47 per 1000 gallons (average is estimated from 2005-2020). However, the District's decision document did not address the practicability of cost for this alternative, despite the cost information present in the AR.

The September 13, 2006, letter referenced by the Appellant, from the Kentucky Division of Water (DOW), provides several cautionary remarks regarding the cumulative water demand at present and in the future for Pool 3 of the Kentucky River. DOW stated that they must exercise caution when allocating water in areas where they have reason to anticipate a large and sustained growth in demand, which includes Pool 3. However, the letter further states that none of this should imply that GMWSS could not be issued a water withdrawal permit for Pool 3. Rather, the DOW cautions that there is significant uncertainty concerning the eventual growth in demand in Pool 3. At the appeal conference, the Appellant clarified that even though they could be issued a water withdrawal permit, it does not guarantee they will be provided the water quantity stated in their permit.

The District's decision document did not reference this September 2006 letter. However, it did indicate that the availability of the Pool 3 source is unclear because KAW received a Corps permit to construct an intake structure and treatment plant at Pool 3 in November 2007, leaving 10 mgd of available raw water for potential use. The District did not provide further elaboration.

The District's decision document, page 22, states:

> The source remains a viable alternative but cannot be considered further as a sole source or in combination with other sources because the applicant has not provided sufficient information in regard to the cost and logistics (i.e. receiving a permit) of constructing the intake a pool 3. Thus, a determination that complies with the 404(b)(1) Guidelines cannot be made.

Therefore, the District did not adequately address the information in the AR regarding the practicability of this alternative in terms of cost and logistics (e.g. the undated cost Excel cost estimates and the September 2006 letter). The outcome of such an analysis could potentially eliminate the Kentucky River Pool 3 alternative as a practicable alternative.

It is acceptable to presume that practicable alternatives exist unless refuted by the Appellant. It is also acceptable to deny a permit based on lack of information. EPA regulations at 40 CFR Part 230.12(a)(3)(iv) state 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. However, the District's decision document is not clear whether this alternative is presumed practicable and/or if insufficient information was provided to determine practicability.

Upon remand, the District shall address the information that was provided regarding practicability of the Kentucky River Pool 3 alternative in terms of costs and logistics. The District shall then clarify whether sufficient information has been provided to determine practicability of this alternative, and if so, clarify whether this alternative is practicable. If the Kentucky River Pool 3 alternative is eliminated from the list of practicable alternatives, an analysis should be completed to determine whether a combination of the remaining practicable alternatives would provide sufficient water supply.

D. Sufficiency of Proposed Mitigation Plan

According to the RFA, the District incorrectly concluded that the Appellant did not present a "fully developed" mitigation plan to them. The Appellant believes they provided mitigation proposals that are more than sufficient for the District to make a favorable permit decision. Further, according to the RFA, the District never contacted Scott County or its consultants to advise them that its mitigation plans were inadequate.

Adequate mitigation is normally not determined until after the least environmentally practicable alternative has been identified and supported by avoidance and minimization of remaining aquatic impacts. In other words, it is not appropriate to consider compensatory mitigation in determining whether a proposed discharge will result in non-significant impacts for purposes of the alternatives analysis required by 40 CFR Part 230.10(a). The District denied the permit because the proposed project does not constitute the Least Environmentally Damaging Practicable Alternative and does not comply with the Section 404(b)(1) Guidelines.

Corps regulations at 33 CFR Part 332.3 and 33 CFR 320.93(a)(1) state that permit applicants are responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts.

The AR contains a mitigation report dated December 10, 2008, that includes mitigation options associated with the construction of the reservoir. However, the District stated on page 46 of their decision document that the mitigation plan was not fully developed so the potential replacement functions and values associated with the plan could not be fully evaluated. The AR does not indicate that the District requested the Appellant to provide a more fully developed mitigation plan. Instead, the District moved forward with their decision. Regardless, as stated previously, it is appropriate that the District did not fully address all issues surrounding mitigation.

E. Other Errors in Corps Permit Determination and Conclusions

E.1 Claims of Insufficient Information

According to the RFA, the District did not advise the Appellant that their most recent submittals on cost, environmental impacts, and mitigation were insufficient. Further, the Appellant disagrees that the information was insufficient, and therefore believes it is unreasonable for the District to conclude in their decision document that there was insufficient information.

In addition, the Appellant finds it troubling that despite what they characterize as numerous offers to supply additional information the District refused their offers and committed to tell Scott County if they needed any additional information. The Appellant notes that the last significant communication from the District was in June 2009, over twelve months prior to the District's decision, and at that time no additional information was sought. During the appeal conference, the Appellant indicated that they were surprised to receive a permit denial because they did not know that the permit application was going to be denied due to insufficient information.

Further, the Appellant assumed that the information in the October 2006 Alternatives Report was sufficient because the District responded to the report stating that it was "the most current and best available data to evaluate sole source alternatives as well as combinations of sources." According to the Appellant, the District did not indicate there were any flaws in the information on the alternatives.

The AR indicates that the Appellant was requested to submit additional information, and in response the Appellant had provided what they thought was sufficient information. However, the AR also indicates that the District did not inform the Appellant that the information was insufficient. Although several phone conversations occurred in the year prior to the District's decision, according to the District's phone log these conversations did not include requests for additional information. The District instead provided a permit decision based on the available information. The District's decision document indicates that the information provided by the Appellant was insufficient, and cited several areas where additional information was needed in order to make an adequate permit determination. The District indicated during the appeal conference that they had reached a point where they needed to make a permit decision, as it was clear that the reservoir had far greater environmentally damaging impacts than the other alternatives, that no volume of additional information would show otherwise, and therefore did not continue to request additional information. The District's position as described during the appeal conference is supported by information in the AR.

Although there is no requirement in the Clean Water Act, Corps Regulations (33 CFR Part 320-332), or in any Corps policy guidance that a District notify a permit applicant of an intent to deny a permit prior to the final decision, 33 CFR 325.2(d)(5) states that the District must "clearly inform the applicant that if he does not respond with the requested information or a justification why additional time is necessary, then his application will be considered withdrawn or a final decision will be made, whichever is appropriate." It is troubling that none of the correspondence or phone logs from the District to the Appellant indicate that the District would deny the permit if the information was not provided. The Appellant was therefore not provided notice of the consequences of not providing sufficient information on a timely basis. Furthermore, the Appellant was not provided notification that the information they submitted in response to the District's request was insufficient. Had the Appellant known about the pending denial or the insufficient information, they could have chosen to withdraw their permit application. The District made a final decision to deny the Appellant's permit request because there are practicable alternatives which accomplish the project purpose with less impact to "waters of the United States."

With regard to the Appellant's concern regarding the statement in the District's October 24, 2006, letter "...the alternatives analysis provides the most current and best available data to evaluate sole source alternatives as well as combinations of sources.", the District also states in the following sentence that "Our request to finalize the alternatives analysis should not be construed to be our final approval of the findings contained therein." Therefore, this has no merit because the District did not intend to mean that no additional information was necessary. The District requested additional information in various meetings following the receipt of the October 2006 Alternatives Report, and although information was provided in response to those meetings, the information was insufficient for the District to evaluate all of the feasible alternatives.

E.2. U.S. Environmental Protection Agency (EPA) Comments.
The Appellant stated in their RFA that the comments provided by the EPA were made in response to the older 2004 public notice, not the newer 2009 public notice, and that EPA's comments regarding the need for additional information were addressed in the Appellant's submittals following the older 2004 public notice.

The District's decision document summarizes two correspondence letters from EPA dated July 7 and August 2, 2004. The EPA did not respond to the newer 2009 public notice. The AR does not include any additional correspondence from EPA.

Corps regulations at 33 CFR 325.3 state that it is presumed that all interested parties and agencies will wish to respond to public notices; therefore, a lack of response will be interpreted as meaning that there is no objection to the proposed project.

Since EPA did not respond to the newer 2009 public notice, it is presumed that they did not object to the proposed project. The District's decision is based not only on comments received in response to the public notices but also on their evaluation of the public interest factors and information contained in the AR. The District's decision was not based on EPA's earlier comments.

Additional Items Recognized by the Review Officer
The Review Officer reviewed the entire AR and identified a discrepancy in the District's decision document.

The District's decision document, pages 42-45, described the various physical/chemical characteristics and anticipated changes. However, the District did not consistently identify whether the impact was minimal or major, or positive or negative. Correcting this matter would clarify the District's impact discussion but would not have impacted their final decision.

Other Information
The Appellant submitted a letter dated November 16, 2010, and an e-mail dated December 7, 2010, in response to draft conference notes. The District submitted an e-mail dated November 10, 2010, in response to questions from the Review Officer at the conference. These items were considered in this appeal review.

In addition, during the appeal conference the Appellant submitted a Newsweek news article dated October 18, 2010, regarding the privatization of public water supplies. This was new information as it was not considered by the District in their permit decision on this action. Therefore, it was not considered in this appeal decision.

Conclusion:
For the reasons stated above, I conclude that this request for appeal has merit. The District's AR does not document the project's water dependency nor clearly identify the basic project purpose. Also, the District's AR does not address the Appellant's logistical concerns of the Frankfort Alternative surrounding the installation of a water pipeline in the US 460 corridor, nor does it address the information that was provided regarding practicability of the Kentucky River Pool 3 Alternative in terms of cost and logistics. The District's determination is not otherwise arbitrary, capricious or an abuse of discretion, and is not plainly contrary to applicable law or policy.

With regard to the aspects of the appeal on which merit has been found, I am remanding the decision back to the district to document the project's water dependency and clearly identify the basic project purpose. The District shall also address the Appellant's logistical concerns surrounding the installation of a water pipeline in the US 460 corridor (Frankfort alternative), and as appropriate, address the use of other reasonable locations. The District shall also address the information that was provided regarding practicability of the Kentucky Pool 3 alternative in terms of costs and logistics. The District shall then clarify whether sufficient information has been provided to determine practicability of this alternative, and if so, clarify whether this alternative is practicable. If the Frankfort or Kentucky Pool 3 alternatives are then eliminated from the list of practicable alternatives, an analysis should be completed to determine whether a combination of the remaining practicable alternatives would provide sufficient water supply. 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