

ADMINISTRATIVE APPEAL DECISION

DAVID ALMETER

DETROIT DISTRICT FILE NO. LRE-1994-560164-S15

May 30, 2019

Division Engineer: R. Mark Toy, Major General, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio¹

Review Officer (RO): Jacob Siegrist, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio

Appellant: David Almeter

Permit Authority: Section 10 of the River and Harbors Act (33 USC 403) and Section 404 of the Clean Water Act (33 USC 1344)

Receipt of Request for Appeal: June 9, 2017

Informal Meeting: August 30, 2017

Summary: The Appellant is challenging the Detroit District's denial of a permit to mechanically groom 600 feet by 50 feet of Lake Michigan's lakebed near 3804 Lee Point Road in Suttons Bay, Michigan. The Appellant submitted ten reasons for appeal contending the District committed procedural errors; incorrectly applied law, regulation, or officially promulgated policy and guidance; and was biased against the proposal. For reasons detailed in this document, seven reasons for appeal have merit, two reasons for appeal do not have merit, and one reason for appeal is not a valid reason for appeal. The permit denial and associated approved jurisdictional determination is remanded to the District for reconsideration and documentation.

Background Information: Mr. Almeter had two Department of the Army (DA) authorizations to mechanically groom 600 feet of the beach along the Lake Michigan shoreline near 3804 Lee Point Road in Suttons Bay, Michigan. A standard individual permit (IP) authorized in 2005 permitted Mr. Almeter to mechanically groom an area measuring 600 feet long by 70 feet wide waterward of Lake Michigan's ordinary high water mark (OHWM). The IP expired on December 31, 2015. Mr. Almeter also had authorization to mechanically groom the same 600 feet of shoreline, but only to a width of 20 feet, with a Nationwide Permit Number 18 and 19

¹ Pursuant to 33 CFR 331.3, the Division Engineer has the authority and responsibility for administering the administrative appeal process. The Division Engineer may delegate an individual to act as a review officer for permit applications denied with prejudice. The review officer reviews the appeal and assists the Division Engineer to make a decision on the merits of the appeal.

verification that expired on March 18, 2017. Neither permit allowed beach grooming to remove or destroy rooted vegetation.

Prior to expiration of the IP, Mr. Almeter submitted an application to continue beach grooming for another 10 years. The District completed a public notice for the proposed project on November 9, 2015.

The District evaluated Mr. Almeter's proposed project to complete mechanized beach grooming in a 600 foot by 50 foot area below the OHWM, referred to in this document as the project site. The 600 foot project site along the Lake Michigan shoreline comprises three separate parcels identified from west to east. Parcel A contains a condominium complex with 8 units on 350 feet of shoreline frontage. Parcel B is an undeveloped lot owned by Mr. Almeter with 150 feet of shoreline frontage. Parcel C is Mr. Almeter's personal residence with 100 feet of shoreline frontage. The proposed project site extends 50 feet waterward from the OHWM towards Lake Michigan. This area is influenced by variable lake levels which dictate which areas are exposed lakebed and which areas are under water.

The District reviewed the proposal and notified Mr. Almeter on December 3, 2015, and February 23, 2016, that the application for mechanized beach grooming in a 600 foot by 50 foot project site may be denied. In the correspondence to Mr. Almeter, the District suggested alternatives to the proposal, such as reducing the length and waterward extent of the grooming area to minimize impacts.

Mr. Almeter rejected the District's proposed measures to modify the project. In contrast to previous similar permits issued for the project site, the District denied with prejudice the application for a DA permit on April 13, 2017. The District explained in their Environmental Assessment (EA) that this permit was denied when previous permits were issued because the District now had a better understanding of beach grooming impacts at the project site and could better assess the impacts of the activity. The District was able to better quantify and evaluate proposed impacts due to direct observation over many years at the project site, high-quality aerial imagery that showed the regional fluctuations of water levels over many years, the response of shoreline vegetation to those fluctuations, and shoreline property owners' grooming activities. Additionally, studies of beach grooming in similar environments and recent scientific literature informed the District's evaluation of impacts.

The District's EA for the permit denial concluded the proposed project did not comply with two restrictions on discharges provided in the 404(b)(1) Guidelines (Guidelines) of the Clean Water Act (CWA) and would be contrary to the public interest based on the Corps' public interest review. The State of Michigan Department of Environmental Quality (MDEQ) determined the proposed project did not require a state permit under the Great Lakes Submerged Lands and Wetlands Protection provisions of the Natural Resources and Environmental Protection Act, 1994 PA 451. MDEQ did not issue or deny the 401 Water Quality Certification (WQC) and the District presumed the 401 WQC to be waived. Similarly, the MDEQ did not provide a Coastal Zone Management Act consistency determination and the District presumed consistency concurrence.

On June 9, 2017, the Great Lakes and Ohio River Division received a Request for Appeal (RFA) from Mr. David Powers, the attorney and agent for Mr. Almeter (Appellant), of the permit denial and associated approved jurisdictional determination (JD). The Appellant was informed by letter dated July 11, 2017, that the RFA met the criteria for appeal and was accepted.

Information Received and its Disposition During the Appeal Review: The Administrative Record (AR) is limited to information contained in the record as of the date of the Notification of Administrative Appeal Options and Process form. Pursuant to 33 CFR 331.2, no new information may be submitted on appeal. To assist the Division Engineer in making a decision on the appeal and in accordance with 33 CFR 331.7(f), the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. The information received during this appeal review includes:

1. The Appellant's RFA dated June 9, 2017.
2. The District's AR provided to the RO and the Appellant on July 26, 2017.
3. An informal appeal conference and site visit held on August 30, 2017. Details of the meeting are contained within the attached Appeal Conference Memorandum for Record (MFR) dated December 18, 2017. The Appellant provided several handouts attached to the appeal conference MFR that further interpret, clarify, and explain the Appellant's reasons for appeal. The MFR handouts are titled as Appeal Meeting 1 through 9.

The appeal conference MFR and attachments are considered clarifying information in accordance with 33 CFR 331.7(e). No new or additional information was received or used during the appeal review.

In the RFA, the Appellant provided reasons for appeal numbered 1-9 with additional support for the reasons for appeal in a letter attached to the RFA dated April 1, 2016 (April 2016 letter). This letter was a part of the RFA, but it was also previously provided to the District in response to a District letter dated February 23, 2016. A tenth reason for appeal is included below since it was discussed in the April 2016 letter but was not covered by any of the listed nine reasons for appeal on page 19 of the RFA. Reason for Appeal 9 is not a valid reason for appeal and is not included in additional discussion. The reasons for appeal and the references relevant to each reason are:

1. "The decision improperly characterizes Mr. Almeter's beach 'wetland' under 'normal circumstances,' contrary to Regulatory Guidelines Letter (RGL) 86-09 and 05-06."
 - a. See RFA, pages 5-7
 - b. See MFR attachment Appeal Meeting 1
2. "The decision does not properly consider and weigh all factors in the public interest review required by 33 CFR 320.4."
 - a. See RFA, pages 7-9
 - b. See MFR attachment Appeal Meeting 9
3. "The decision fails to defer to Michigan's decision to preserve beaches such as Mr. Almeter's, contrary to 33 CFR 320.4(j)(2) and (4). See 2003 PA 14 and 2012 PA 247."

- a. See RFA, pages 7-9
- b. See MFR attachment Appeal Meeting 4
- c. See MFR attachment Appeal Meeting 5
- d. See MFR attachment Appeal Meeting 6
- e. See MFR attachment Appeal Meeting 9
4. “The decision fails to properly identify the significant national issues of overriding importance and explain how they are overriding contrary to 33 CFR 325.2(a)(6).”
 - a. See RFA, page 9
5. “The Detroit District is an opponent to Mr. Almeter’s permit request, contrary to 33 CFR 320.1[a](4).”
 - a. See MFR attachment Appeal Meeting 7
 - b. See MFR attachment Appeal Meeting 8
 - c. See MFR attachment Appeal Meeting 9
6. “The decision’s conclusion that the proposed beach grooming in fact promotes, rather than inhibits, *Phragmites* growth is incorrect, and evidences Detroit District’s improper bias against his proposal.”
 - a. See RFA, pages 7-9 for additional information
 - b. See MFR attachment Appeal Meeting 6
7. “The permit denial results in disparate treatment between Applicant and other resorts and public beaches on Grand Traverse Bay.”
8. “The Detroit District has not properly determined the Ordinary High Water Mark (OHWM).”
 - a. See MFR attachment Appeal Meeting 2
 - b. See MFR attachment Appeal Meeting 3
9. “Applicant reserves the right to amend or add to these reasons for appeal for any reason, including, but not limited to, Detroit District delays in providing information under the Freedom of Information Act.”
10. “Reasons for appeal set forth in Appellant’s letter dated April 1, 2016...” not included in the above reasons for appeal: The Appellant disagrees that denial of the permit would result in beneficial wetland vegetation because vegetation would not survive mowing and inundation that would occur if the permit is denied.
 - a. See RFA, pages 6-7

APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE DETROIT DISTRICT ENGINEER

Reason for Appeal 1: “The decision improperly characterizes Mr. Almeter’s beach ‘wetland’ under ‘normal circumstances,’ contrary to RGL 86-09 and 05-06.”

Reason for Appeal 8: “The Detroit District has not properly determined the OHWM.”

Finding: The reasons for appeal have merit.

Action: The District must reconsider and document the approved JD, identify and delineate any wetlands, and determine the OHWM of jurisdictional waters, as appropriate. On April 13, 2017,

the date of the permit denial and approved JD, an approved JD to identify the geographic areas regulated as waters of the U.S. was made pursuant to regulations promulgated on November 13, 1986, at 33 CFR 328 (51 FR 41250), and consistent with Supreme Court decisions and longstanding practice, as informed by applicable guidance documents, training, and experience. On the date of this Administrative Appeal Decision, the definition of waters of the U.S. in the State of Michigan is made pursuant to regulations promulgated on August 28, 2015 at 33 CFR 328 (80 FR 37104).

Discussion: The District’s April 13, 2017, letter to the Appellant denied the application for a DA permit for the proposed project and included an approved JD for the project site. Jurisdictional determinations are tools used by the Corps to help implement the regulatory program and they specify what geographic areas are regulated as “waters of the U.S.” under Sections 9 and 10 of the Rivers and Harbors Act of 1899 (RHA) and Section 404 of the CWA.² By definition, an approved JD is “a Corps document stating the presence or absence of waters of the U.S. on a parcel or a written statement and map identifying the limits of waters of the U.S...[that] include a basis of JD with the document.”³ Approved JDs are “[a] definitive official determination that there are, or that there are not, jurisdictional aquatic resources on a parcel and the identification of the geographic limits of jurisdictional aquatic resources on a parcel can only be made by means of an approved JD.”⁴ In this case, the approved JD determined the project site included Lake Michigan and identified the OHWM of Lake Michigan. Lake Michigan is a jurisdictional water of the U.S. pursuant to both Section 10 of the RHA and Section 404 of the CWA. The approved JD did not identify any areas as wetlands that were waters of the U.S. under the RHA or the CWA.

The Appellant’s reasons for appeal 1 and 8 are discussed together since they both relate to the District’s determination of what geographic areas are regulated as waters of the U.S. The Appellant believes the District incorrectly determined the project site was a wetland and incorrectly determined the location of the OHWM based on applicable law, regulation, and official promulgated policy. In the RFA, the Appellant states that wetlands are defined by 33 CFR 328.3(b) where the definition refers to conditions occurring under “normal circumstances.” The Appellant believes that the normal circumstance for the project site is a beach, not a wetland. The Appellant referenced RGL 86-09 as support.⁵ In regards to the OHWM, the Appellant asserts the District did not base the OHWM on a site-specific physical indicator as required by regulation and RGL 05-05, but rather relied on an “administrative OHWM” at 581.5 feet, International Great Lakes Datum of 1985 (IGLD 1985). The Appellant claims an administrative OHWM is not allowed by federal regulation; was previously found to be unreasonable by a federal court; is rarely reached by the monthly mean water elevation; is incongruent with the

² RGL 16-01, page 1. RGLs are developed by Corps Headquarters to organize and track written guidance issued to the field offices, and are intended to promote program consistency and efficiency across the nation. RGLs are used by the Corps only to interpret or clarify Regulatory Program policy or procedures, they do not change, for example, the definition of an approved JD, what constitutes an approved JD per regulation, and do not change how to determine whether an aquatic resource is jurisdictional.

³ 33 CFR 331.2

⁴ RGL 16-01, page 2

⁵ RGL 05-06 affirmed that many expired RGLs, such as RGL 86-09, continue to be generally applicable to the Corps Regulatory Program.

state's OHWM; and is not reasonable because lake levels constantly change due to natural and man-induced activities.

Wetlands as Waters of the U.S.

While the Appellant is arguing that the District improperly determined that wetlands exist on the project site pursuant to 33 CFR 328.3(b) and mischaracterized the normal circumstance of the site, the approved JD did not claim any jurisdiction over wetlands as waters of the U.S. The District explained in the approved JD and EA that wetlands were not delineated because the proposed project required a permit regardless of wetland presence, absence, or location. The additional comments section of the approved JD form stated, "A wetland determination or delineation was not conducted because the [previously] vegetated areas were waterward of the OHWM of Lake Michigan, and wetland presence was not relevant to the site's jurisdictional status."⁶ Essentially the District was saying the previously vegetated areas were not evaluated one way or the other regarding meeting the definition of a wetland because the area would be jurisdictional as Lake Michigan, a water of the U.S., and a permit would be required for the proposed activity regardless of wetland presence or absence. Also, the District stated in the EA that wetlands were not delineated because their "location and extent is dynamic, depending on the lake level history over a period of several years, and because wetlands within the lake lack an upland-wetland boundary."⁷ The District seems to suggest in the EA that coastal fringe wetlands are a natural and regularly occurring resource along Grand Traverse Bay shorelines, but were not delineated since their existence and boundaries are transient and dependent upon lake level fluctuations.

The term waters of the U.S. is defined by regulations at 33 CFR 328.3(a)(7) to include "[w]etlands adjacent to [jurisdictional] waters." The Corps regulations define both wetland and adjacent. Wetlands are defined by regulation at 33 CFR 328.3(b) as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions...[w]etlands generally include swamps, marshes, bogs, and similar areas." Adjacent is defined as "bordering, contiguous, or neighboring."⁸

In order to determine if an area meets the definition of a wetland, Corps policy directs the District to use the 1987 Manual⁹ and the applicable Regional Supplement¹⁰ to identify and delineate areas potentially subject to regulation under Section 404 of the CWA or Section 10 of the RHA. These documents provide the technical guidance to determine if a given geographic

⁶ AR, page 16

⁷ AR, page 33

⁸ 33 CFR 328.3(c)

⁹ Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual. Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS. (1987 Manual).

¹⁰ U.S. Army Corps of Engineers. 2011. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region (Version 2.0), ed. J.S. Wakeley, R.W. Lichvar, and C.V. Noble, and J.F. Berkowitz. ERDC/EL TR-12-1. Vicksburg, MS. U.S. Army Engineer Research and Development Center. (Regional Supplement).

area is or is not a wetland pursuant to the definition of wetland in Corps regulations. When a site is under normal circumstances, the determination that an area is a wetland requires positive evidence of existing hydrophytic vegetation, hydric soils, and wetland hydrology. However, when delineating wetlands it is important to note that “more than one wetland factor (i.e., vegetation, soil, and/or hydrology) may be disturbed or problematic on a given site,” and generally, “wetland determinations on difficult or problematic sites must be based on the best information available to the field inspector, interpreted in light of his or her professional experience and knowledge of the ecology of wetlands in the region.”¹¹ The 1987 Manual and the Regional Supplement contains methods and procedures to delineate atypical areas where one or more of the three wetland factors may be disturbed due to recent human activities or natural events. Even in the absence of disturbance from recent human activities, the Regional Supplement recognizes that natural-undisturbed Great Lakes shorelines can be problematic delineation sites because potential wetlands may not exhibit one or more indicators due to seasonal weather patterns, long-term climactic and lake level fluctuations, soil geomorphology characteristics, and due to complex microtopography of dune and swale systems.

The District’s decision to complete an approved JD for the project site, but not delineate potential wetlands is inconsistent with regulation, policy, and guidance. The District was required to document if the project site contained wetlands or not per the 1987 Manual and Regional Supplement because wetlands are a potential water of the U.S. and the approved JD is the “Corps document stating the presence or absence of waters of the U.S. on a parcel or a written statement and map identifying the limits of waters of the U.S.”¹² The approved JD is the “definitive, official determination that there are, or there are not, jurisdictional aquatic resources on a parcel and the identification of the geographic limits of jurisdictional aquatic resources on a parcel can only be made by means of an approved JD.”¹³

The determination that there are, or there are not wetlands or other special aquatic sites is critical to processing and evaluating many DA permit applications. For example, in order to complete permit processing requirements of the Guidelines, the public interest review, and the evaluation of mitigation, the District must understand if there would be a discharge into wetlands or other special aquatic sites. This topic is discussed in more detail in Reason for Appeal 2.

Additionally, documentation and processing guidance for approved JDs provided in RGL 16-01 directs the District to complete a wetland delineation in this scenario. The RGL became immediately effective in October 2016, several months prior to the April 13, 2017, permit denial and approved JD. The RGL provides guidance on how approved JDs are to be documented and explains that the basis of the approved JD is generally documented on the Approved Jurisdictional Determination Form (approved JD form) with supporting information, such as the identification and rationale for determining the OHWM and wetland delineation data forms. Importantly, the RGL explains that “Districts should ensure the documentation used to support the approved JD addresses any objections from approved JD requestors and/or consultants [and]

¹¹ Regional Supplement, page 114

¹² 33 CFR 331.2

¹³ RGL 16-01, page 2

[i]f the requestor submits materials with which the districts do not agree or do not concur (e.g. wetland delineation report), the districts should clearly document the reasons for reaching a contrary conclusion.”¹⁴ Also, the RGL emphasizes that “Applicants should provide a delineation of aquatic resources in support of an individual permit...[and] Corps regulatory personnel are expected to continue to exercise appropriate judgment and use appropriate information when making technical and scientific determinations as to what areas on the parcel qualify as aquatic resources.”¹⁵ It is clear from the AR that the Appellant and the District disagreed on whether wetlands as waters of the U.S. were present within the project site, and that neither party assessed the review area per the 1987 Manual and Regional Supplement. Therefore, in order to adequately document the approved JD and address contrary conclusions, the District should have followed the 1987 Manual and Regional Supplement as the technical guidance to identify and delineate potential aquatic resources.

The RGL 16-01 also directs the District to discuss the different options for addressing CWA and RHA geographic jurisdiction with applicants and parties requesting JDs. The guidance at page 2 states that “[i]t is the Corps responsibility to ensure that the various types of JDs, their characteristics, and the reason behind the JD request, have been adequately discussed with the requestor so requestors can make an informed decision regarding what type of documentation will best serve their needs.” The record does not contain evidence that this discussion occurred. This could have given the District and the Appellant an opportunity to have a common understanding of the options to address CWA and RHA geographic jurisdiction and explain what information was needed to support District and Appellant positions.

The Appellant stated the District incorrectly determined the normal circumstance of the project site. However, the District’s determination of normal circumstance is incomplete since the District did not complete a wetland delineation or make a determination if wetlands as waters of the U.S. were present on the site. The definition of wetlands includes the phrase normal circumstance and the concept is also captured in the 1987 Manual and Regional Supplement because there are times when recent human activities or natural events result in one or more of the wetland indicators being altered or absent for areas that may still be considered jurisdictional wetlands. The District must determine what the normal circumstances are at the site, and, if appropriate, complete a delineation for difficult and problematic wetlands if the District determines one or more wetland factors are disturbed or problematic at the site.

Ordinary High Water Mark

For purposes of Section 404 of the CWA, the lateral limits of jurisdiction in non-tidal waters such as Lake Michigan, absent adjacent wetlands, is the OHWM.¹⁶ When adjacent wetlands are present, the jurisdiction extends beyond the OHWM to the limit of the wetland.¹⁷ The limits of RHA jurisdiction extends laterally over the entire water surface and bed of a navigable

¹⁴ Questions and Answers for RGL 16-01, #8

¹⁵ Questions and Answers for RGL 16-01, #4

¹⁶ 33 CFR 328.4(c)(1)

¹⁷ 33 CFR 328.4(c)(2)

waterbody below the OHWM, whether or not adjacent wetlands extend landward of the OHWM.¹⁸ The term OHWM is defined by both the CWA and RHA as:

*The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.*¹⁹

In general, the Corps relies on physical evidence that is reliable and verifiable to identify the OHWM. Physical evidence may include the characteristics listed in 33 CFR 328.3(e) and 33 CFR 329.11(a)(1), such as a natural line impressed on the bank, shelving, scour, deposition, multiple observed flow events, bed and banks, and changes in plant community. In certain situations, such as when physical evidence is not reliable or evident, the District may determine the OHWM by “other appropriate means that consider the characteristics of the surrounding areas.” Paragraphs 3.c. and 3.e. of RGL 05-05 advise:

c. Where the physical characteristics are inconclusive, misleading, unreliable, or otherwise not evident, districts may determine the OHWM by using other appropriate means that consider the characteristics of the surrounding areas, provided those other means are reliable. Such other reliable methods that may be indicative of the OHWM include, but are not limited to, lake and stream gage data, elevation data, spillway height, flood predictions, historic records of water flow, and statistical evidence.

e. Districts will document in writing the physical characteristics used to establish the OHWM for CWA and/or RHA jurisdiction. If physical characteristics are inconclusive, misleading, unreliable, or not evident, the Districts’ written documentation will include information about the physical characteristics (or lack thereof) and other appropriate means that consider the characteristics of the surrounding areas, which it used to determine the OHWM.

The District’s approved JD form identified limits of jurisdiction based on an OHWM at 581.5 feet, IGLD 1985. Sections II.A and II.B. of the approved JD form document the review area includes Lake Michigan, a navigable water of the U.S. pursuant to Section 10 of the RHA and a traditional navigable water (TNW) of the U.S. pursuant to Section 404 of the CWA.²⁰ These sections do not indicate there are any adjacent wetlands within the review area for the approved JD. The approved JD form under Section IV.B. states that physical characteristics of an OHWM were not visible in the project site due to anthropogenic disturbance, and an OHWM of 581.5 feet, IGLD 1985 was used as the OHWM that corresponds to the elevation where the physical

¹⁸ 33 CFR 329.11(a)

¹⁹ 33 CFR 328.3(e). See RGL 05-05. “When the definition from 33 CFR Section 329.11(a)(1) was reproduced at 33 CFR 328.3(e), the semi-colons of the former definition were mistakenly changed to commas in the latter definition.”

²⁰ AR, page 9

OHWM has been located on Lake Michigan.²¹ This section also explains that the presence of wetlands, as defined by regulation, were not used to determine the limits of RHA or CWA jurisdiction.

Under Section IV.A. of the approved JD form, the District identified that supporting data for the approved JD included various site visits, aerial images, previous determinations and related site inspections, LiDAR images, lake level data, Appellant provided information, and other state and federal agency resources such as mapping and imagery.²² The approved JD form identified a site visit that was conducted at this location on May 24, 2016, where notes from this site visit are contained at AR pages 222-228. The District's site visit noted the following anthropogenic disturbances along the shoreline: dune grass removal by the Appellant, many tire tracks with sand displacement between 4-6 inches in ruts and ridges, and the appearance of sand redistribution along the shoreline. Based on pictures and descriptions of the project site elsewhere in the AR, the site has also been subject to repeated beach grooming for decades, the seasonal installation of drift fences, and DA permitted beach grooming and filling activities.²³

Based on the AR, after an evaluation of on-site inspections and various supporting data, the District determined the physical characteristics of an OHWM were not visible. Pursuant to RGL 05-05, when physical indicators are not reliable, the District is then required to document other appropriate means that consider the characteristics of the surrounding areas used to determine the OHWM. The District stated the OHWM at elevation 581.5 feet, IGLD 1985 "corresponds to the elevation where the physical OHWM has been located on Lake Michigan."²⁴ Included in the AR was a 1976 Detroit District study titled "Ordinary High Water Mark."²⁵ The District clarified at the appeal conference that this document was used to support the jurisdictional determination and describes the relationship between physical indicators along the shoreline of the Great Lakes and the IGLD, a standard referenced elevation. Additionally, the District's AR demonstrates they evaluated the OHWM of 581.5 feet, IGLD 1985 within the context of the project site and surrounding areas. For example, in 2005 the District measured the OHWM while in the field and established an on-site reference point for the OHWM at 581.5 feet, IGLD 1985 for the property.²⁶ The District noted the elevation of 581.5 feet, IGLD 1985 was "generally consistent with depictions of the OHWM on the applicant's drawings, approximately 70 feet waterward of the existing utility poles," and described the characteristics of the transition area between the OHWM and uplands in the review area:

The exposed lakebed transitions to upland within the dune grass area. The OHWM of Lake Michigan is at or slightly landward of the edge of the dune grass shown in the 2015 aerial photo. The waterward extent of the dune grass area has varied over time, expanding during low water periods and being cut back by the

²¹ AR, page 16

²² AR, page 15

²³ See e.g. AR, pages 23-25, 29-30, 38-39, 46, 49-51, and 196

²⁴ AR, page 16

²⁵ AR, pages 262-437

²⁶ AR, pages 450-452

applicant and by wave action during high water levels. The upland area is approximately 70-80 feet wide between the edge of the road and the OHWM.²⁷

The District described the dynamic nature of Lake Michigan water levels and provided analysis of how lake levels affect vegetation on the exposed lakebed waterward of the OHWM due to the physical process of berm and swale development. The District identified a 1.22 mile stretch along South Lee Point Road and East Hendryx Drive, with similar shoreline and nearshore characteristics. The 1.22 miles of shoreline includes the project site and shoreline east and west of the project site. Due to similar characteristics, the District explained the area would have similar patterns of berm and swale development. For example, the District described how lake levels had generally remained high or above the long term annual average from the late 1960s until a drop in 1999. Lake levels remained below the long term annual average from 1999 until 2014, when water levels increased and remained above the long term annual average through 2016. The District examined how the changes in lake levels, or fluctuation of water, influenced the establishment of vegetation on the project site and surrounding areas.

Based on the typical range of Lake Michigan water levels, the area of exposed lakebed varies in extent but is generally located between the elevation contours of 576.5 feet and 581.5 feet, IGLD 85, although the shoreline profile changes with erosion and accretion as lake levels fluctuate over large time scales. At the project site, the width of exposed lakebed may extend up to 150 feet from the OHWM to the 577-foot contour, an elevation representing the lower lake levels reached during the growing seasons in the recent low-water cycle.

*We documented the presence of wetlands at the site in 2003, consisting of saturated swales vegetated with obligate wetland species including *Scirpus* spp. and *Juncus* spp. Vegetation within the swales had been thinned and mowed at the time of our 2003 inspection (File No. 1994-560163, Encl. 20). On the adjacent property to the east, dense, unmanaged wetland vegetation was apparent along the shoreline and extending into the water during our 2003 and 2005 site visits and is visible in aerial photos of 2005, 2006, and 2009. Similarly, an undeveloped property 400 feet west of the project site shows a vegetated shoreline in aerial photos of 2005 through 2015.²⁸*

The District provided an adequate rationale consistent with regulation and guidance to document the lack of physical characteristics of an OHWM in the review area and the District utilized other appropriate means that considered the characteristics of surrounding areas to support the determination of the OHWM as 581.5 feet, IGLD 1985 under Section 10. However, in this case, the project site may contain wetlands that may be bordering or contiguous with Lake Michigan. If adjacent wetlands are present that extend beyond the OHWM of Lake Michigan, the lateral limit of jurisdiction for the CWA would extend to the limit of the adjacent wetland. Therefore, the District's determination of the OHWM is premature pending the delineation of any wetlands as a water of the U.S.

²⁷ AR, pages 26-27

²⁸ AR, page 27

The Appellant's Appeal Meeting 2 attachment is an excerpt from the 2006 decision by the U.S. District Court for the Eastern District of Michigan in U.S. v. Marion L. Kincaid Trust.²⁹ This decision relates to a CWA Section 404 and RHA civil enforcement action regarding beach grading within the OHWM of Lake Huron in Saginaw Bay, Michigan. The enforcement action was voluntarily dismissed in 2003, and the defendants sought to recover attorney fees under the Equal Access to Justice Act. In regards to the OHWM and jurisdiction, the Court found the government's CWA jurisdiction was substantially justified due to the presence of adjacent and abutting wetlands of Lake Huron. However, the Court found the government's RHA jurisdiction was not substantially justified. The Court found:

...reliance by the government on an administrative OHWM was unreasonable. Likewise, the failure to perform any investigation to determine factually the location of the OHWM on the Kincaids' land based on the definition of that boundary in the government's own regulations was equally unreasonable. Absent such investigation, there was no basis to claim that the Kincaids' beach-grooming activity took place within the navigational servitude of the United States (i.e. the Great Lakes bottomland), and the allegations that they did are not substantially justified.³⁰

The Appellant presented this information to demonstrate the use of IGLD 1985 was not appropriate because an "administrative OHWM" is not in federal regulation, and the federal court found it unreasonable to determine jurisdiction. As described above, in this circumstance the District did perform on-site investigations and considered other resources. The District determined that physical indicators of the OHWM were lacking and used other appropriate means that considered the characteristics of surrounding areas. However, the District's CWA OHWM determination is premature without proper documentation of potential wetlands on the project site which would affect the lateral limits of jurisdiction.

The Appellant also argues that the "administrative OHWM" was not valid because it is at a lake level that is rarely reached by the monthly mean lake level, the State has determined jurisdiction at a lower elevation that is more commonly below the monthly mean level of Lake Michigan, and lake levels constantly change due to natural and man-induced activities. The Appellant's Appeal Meeting 3 handouts included a graphical representation of the Great Lakes waters levels from 1918-2016 and a table of the long term mean, maximum, and minimum monthly water levels of the Great Lakes for this time period. Both of these documents are publically available on the Detroit District website where lake elevations are referenced to the IGLD 1985.³¹ On the ~100 year line graph, the Appellant drew-in a horizontal line at approximately 581.5 feet, IGLD 1985 on the Lake Michigan-Huron lake graph to represent the District's OHWM. Although the District did not include these documents in the AR, the documents were referenced in the "supporting data" section of the approved JD form. It is clear in the AR the District considered the historical trends of Lake Michigan water levels in the determination of the OHWM. In

²⁹ 463 F. Supp.2d 680 (E.D.Mich. 2006)

³⁰ Appeal Meeting 2 from 463 F. Supp.2d 680 (E.D.Mich. 2006) page 695

³¹ <http://www.lre.usace.army.mil/Missions/Great-Lakes-Information/Great-Lakes-Water-Levels/>

regards to natural and man-induced activities that affect the OHWM, the District determined these were outside the scope of the District's evaluation.

Our review does not warrant evaluating the causes of lake level change. These changes occur at large geographic scales over long periods of time. Scientific evidence indicates that Great Lakes water levels fluctuate cyclically on various time scales due to climatic factors (Baedke and Thompson 2000, Fraser et al. 1990). The article provided by the applicant's attorney is from 2012, a year of record low water levels in Lake Michigan. Since that time, water levels have rebounded and have remained above the long-term average since September 2014. We consider fluctuating lake levels within the recorded range for the period of record (1918-present) as a baseline condition to which the project site has been and will continue to be subject. Potential anthropogenic influence on large-scale lake level changes is beyond the scope of this analysis.³²

For the reasons stated above, I have determined these reasons for appeal have merit. The District did not properly identify and delineate if any wetlands were on the site and therefore did not properly determine the location of the OHWM pursuant to the CWA. The District shall have a discussion with the Appellant per RGL 16-01 and respond to the Appellant's request for a JD as appropriate. Regardless of the type of JD requested, permit applicants must submit necessary information required to review their application and complete a permit decision. If an approved JD is requested, the project site should be assessed for potential wetlands in accordance with the 1987 Manual and Regional Supplement following the District's determination of normal circumstances.

Reason for Appeal 2: "The decision does not properly consider and weigh all factors in the public interest review required by 33 CFR 320.4."

Finding: The reason for appeal has merit.

Action: The District must reconsider the proposal's compliance with the Section 404(b)(1) Guidelines and reevaluate the public interest review.

Discussion: The Appellant's RFA asserts that the District did not properly complete the public interest review but did not specifically mention any disagreements with the District's overall evaluation of the Guidelines, even though the District's EA concluded the proposed project would be contrary to the public interest per 33 CFR 320.4 and did not comply with two restrictions on discharges provided in the Guidelines. Each of these three negative findings, either alone or in combination, required that the District deny the permit. Since the public interest review and the Guidelines often rely on similar analyses in the District's decision making process, the District's evaluation of the public interest review at 33 CFR 320.4 and the

³² AR, page 22-23

Guideline's two restrictions on discharges that led to permit denial (40 CFR 230.10(a) and (c)) will both be discussed.³³

404(b)(1) Guidelines – SubPart B 40 CFR 230.10(a) Restrictions on Discharge: Project Purpose, Rebuttable Presumptions, and the LEDPA

The purpose of the Guidelines are to “restore and maintain the chemical, physical, and biological integrity of waters of the U.S.” by establishing mandatory criteria to evaluate the discharges of dredged or fill material into waters of the U.S.³⁴ The fundamental precept of the Guidelines is that no discharge of dredged or fill material should occur in waters of the U.S. unless it can be demonstrated that such discharges will not result in unacceptable adverse effects on the aquatic ecosystem.³⁵ The evaluation procedures used to determine compliance with the Guidelines will vary depending on the project.³⁶ The appropriate level of analysis and documentation should be commensurate with the relative severity of the environmental impact and the complexity of the proposed discharges into waters of the U.S.³⁷ Based on information in the EA, the District determined the proposed project would have substantial individual and cumulative adverse impacts to the aquatic environment. Therefore, the District was required to provide a proportional analysis to determine compliance with the Guidelines.

The Guidelines require permit applicants to take all appropriate and practicable steps to minimize impacts to waters of the U.S. This includes examining practicable alternatives in non-aquatic areas and alternatives that would potentially have less adverse impact on the aquatic ecosystem.³⁸ In order to evaluate alternatives, Corps guidance directs the District to clearly define the basic and overall project purpose for the activity requiring a Section 404 CWA permit.³⁹ The basic project purpose defines the purpose in the most simplistic terms to determine if a project is “water dependent.” A “water dependent” project is one that requires access or proximity to or siting within a special aquatic site in order to fulfill its basic purpose.⁴⁰ Section 230.10(a)(3) of the Guidelines explains that a proposed project “[w]here the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (i.e. is not ‘water dependent’), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise.” The section

³³ Appeal regulations at 33 CFR 331.3(b)(2) allow the RO to conduct an independent review of the AR to verify the record provides an adequate and reasonable basis supporting the District Engineer's decision, that factors for analysis essential to the District Engineer's decision have not been omitted from the AR, and that all relevant requirements of law, regulation, and officially promulgated Corps policy guidance have been satisfied.

³⁴ 40 CFR 230.1(a)

³⁵ 40 CFR 230.1(c)

³⁶ 40 CFR 230.10 and 40 CFR 230.6

³⁷ *Id.*

³⁸ 40 CFR 230.10(a)

³⁹ Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program, 2009 (2009 Regulatory SOP), page 15. The 2009 Regulatory SOP provides a summary of current policies and procedures and should be used as day-to-day informal guidance for the regulatory program.

⁴⁰ 40 CFR 230.10(a)(3). A special aquatic site is defined at 40 CFR 230.40 to include wetlands as defined by 33 CFR 328.3(b) and other aquatic resources, such as vegetated shallows and mud flats.

of regulation continues by stating, “In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.” These two requirements of the Guidelines are often referred to as the rebuttable presumptions, because the presumption is that alternatives that do not impact waters or special aquatic sites are available and are less damaging to the aquatic ecosystem, unless specifically rebutted by the applicant. Essential to this analysis is understanding if the proposed project and the alternatives would in-fact impact special aquatic sites. The Guidelines place a strong emphasis on alternatives in this manner because the “degradation or destruction of special aquatic sites...is considered to be among the most severe environmental impacts covered by these Guidelines.”⁴¹

The District explained that “[w]e have not requested the applicant address the rebuttable presumptions of the 404(b)(1) Guidelines with respect to special aquatic sites due to the variable presence and extent of these wetlands, but we consider in our evaluation the functions and values these wetlands provide, when present.”⁴² As described above in Reasons for Appeal 1 and 8, the District did not properly determine if wetlands exist on site, and there is no other discussion or delineation of special aquatic sites in the EA. The District did not define the basic project purpose or determine water dependency. In order to comply with the Guidelines, the District must first identify if the project site contains any special aquatic sites, define the basic project purpose, and make a determination of water dependency. If the activity is proposed in a special aquatic site, the Appellant must address the rebuttable presumptions of the Guidelines.

In contrast to the basic project purpose, the overall project purpose is more specific since it is used to identify and evaluate practicable alternatives. Corps guidance states that the overall project purpose “should be specific enough to define the applicant’s needs, but not so restrictive as to constrain the range of alternatives that must be considered.”⁴³ While the range of alternatives to consider can vary by project, for an alternative to be practicable, it must satisfy the overall project purpose and be “available and capable of being done after taking into consideration costs, existing technology, and logistics.”⁴⁴ Defining the overall project purpose and evaluating appropriate alternatives is critical to determining compliance with the Guidelines because the Corps may not issue a permit for a proposed project that is not the least environmentally damaging practicable alternative that has no other significant environmental consequences, commonly referred to as the LEDPA.⁴⁵ These topics are particularly relevant in this case since one of the District’s reasons for permit denial was a determination that the proposed project was not the LEDPA.

⁴¹ 40 CFR 230.1(d)

⁴² AR, page 67

⁴³ 2009 Regulatory SOP, page 15

⁴⁴ 40 CFR 230.10(a)(2)

⁴⁵ 40 CFR 230.10(a)

The District is ultimately responsible for defining the overall project purpose after consideration of the applicant's need and type of project being proposed.⁴⁶ The RFA indicated the "expressly stated purpose for this project is removal of feces to maintain a healthy environment."⁴⁷ The Appellant indicated that mechanized beach grooming would limit the "risk of E. coli and other bacteria exposure to humans"⁴⁸ and would allow for recreation "without concerns of bacteria and disease."⁴⁹

The District recognized the Appellant's stated purpose for the project was feces removal, however exercised independent judgment to define the overall project purpose. The District states,

The applicant's stated purpose for the work is to remove waterfowl excrement from the shoreline. The applicant's attorney clarified that the project purpose is not recreation, but rather health and safety (Encl. 11). Specifically, he indicates that the purpose requires removing excrement from the entire waterfront. He cites objectives of limiting risk of E.coli and other bacteria, eliminating foul odors from waterfowl excrement, eliminating threat of invasive species invasion, attracting renters to condominium units, maintaining views, and contributing to property values. Mr. Powers acknowledges the intended use of the proposed work area for recreation, citing activities including volleyball, frisbee, other ball-related games, beach walking, and running.

We are responsible to define the purpose and need in accordance with NEPA Regulations (Appendix B, 7.), the objective of the project (33 CFR 20.4(a)(2)(ii)), and the "overall project purpose" under the 404(b)(1) Guidelines and subsequent guidance. Based on the applicant's past vegetation clearing efforts, previous permit applications at the site (e.g., File LRE-1994-560163), and his expressed desire to maintain lake views and eliminate threat of invasive species, the applicant has made clear his intent to maintain the shoreline in an unvegetated condition. His statements indicate that the maintained shoreline area would provide recreational and aesthetic benefits to him, and we have determined that recreation and aesthetics are integral components of the project purpose and are the underlying reason for removing excrement. The applicant's desired health and safety benefits associated with removal of excrement would only be realized in the context of the recreational and aesthetic uses of the shoreline area.

To include in the project purpose a requirement for an excrement-free shoreline for recreational use along the applicant's entire 600-foot frontage would unduly restrict the project purpose to an extent that other reasonable alternatives would be precluded. In order to evaluate alternatives to the proposal described in

⁴⁶ 2009 Regulatory SOP, page 15

⁴⁷ RFA, page 7

⁴⁸ RFA, page 5

⁴⁹ RFA, page 9

Paragraph B above, we have determined that the overall purpose is to provide a safe, vegetation-free shoreline recreation area for residents and guests.⁵⁰

I agree with the District that removal of waterfowl feces as the overall project purpose would constrain the range of alternatives and lead to alternatives that would ultimately not meet the Appellant's desired outcome for the proposed project. For example, if the removal of waterfowl feces was the overall project purpose, the range of alternatives would likely include the control of waterfowl and their feces in ways that do not require the discharge of dredge or fill material into waters of the U.S. The record lacks sufficient evidence regarding the need to get rid of waterfowl feces along the shoreline, let alone by mechanical grooming.

To formulate the overall project purpose and identify practicable alternatives, the District requested information from the Appellant on multiple occasions. For example, on October 20, 2015, the District requested information on avoidance, minimization, and compensation for proposed impacts. By letter dated December 3, 2015, the District informed the Appellant that the proposed project may cause adverse impacts to jurisdictional waters and requested the Appellant provide information on the project purpose and consider project alternatives that would minimize impacts, such as reducing the grooming area to 117 feet of exposed shoreline on Parcel A and 33 feet on Parcel C to a maximum width of 20 feet from the OHWM. This letter led to several back and forth conversations regarding alternatives to the proposal, where the Appellant identified the preference was to groom the entire length of shoreline along 600 feet of Parcel A, B, and C to a width of 50 feet as frequently as necessary for 10 years, and indicated that grooming to a width of 20 feet was not possible. Based on information provided by the Appellant and after an initial evaluation by the District, the District then notified the Appellant by letter dated February 23, 2016, that the proposal was likely inconsistent with the Guidelines because a LEDPA was available that was not the proposed project. The letter proposed another potential alternative that would minimize impacts to aquatic resources by reducing the grooming area of exposed shoreline on Parcel A to 40 feet and Parcel C to 40 feet to a width of 20 feet from the OHWM. The Appellant responded by letter and stated that the alternative presented by the District would not accomplish the Appellant's stated project purpose of feces removal and maintained the Appellant's proposal was to groom 600 feet of shoreline to a width of 50 feet from the OHWM.

The District presented the alternatives to the Appellant as a way to minimize impacts, to help develop the overall project purpose, and obtain essential information to make a permit decision. In the EA, the District considered numerous alternative locations and methods and determined that there was not a practicable alternative that would avoid impacts to jurisdictional waters. The District's proposed alternatives in the EA were further refined from those presented in the December 3rd and February 23rd letters by recognizing the need to groom the shoreline all the way to the water's edge to interface with the water for recreation, rather than to a maximum width of 20 feet. Besides limiting the grooming length of shoreline, the District considered other efforts to minimize impacts to waters, including authorization for a shorter timeframe, hand-grooming the shoreline, limiting the grooming width, and utilizing upland areas in conjunction

⁵⁰ AR, pages 17-18

with jurisdictional areas. The alternatives identified in the EA's Guidelines compliance summary matrix include:

“P” – The Appellant's proposed project: Groom 600 feet of shoreline to a width of 50 feet as frequently as necessary for 10 years.

“D” – No action alternative: permit denial.

“A1” – Same as “P” but with a special condition that would restrict grooming to exposed shoreline.

“A2” – Reduced length of grooming area with a special condition that would restrict grooming to exposed shoreline.⁵¹

The EA presented the “A2” alternative as the only alternative that met the criteria of the Guidelines and satisfied the overall project purpose. The District determined the “A2” alternative was the LEDPA, that is, “A2” would have less adverse impact on the aquatic ecosystem with no other significant adverse environmental consequences, as compared with the proposed project and other alternatives.

As indicated above, the Appellant's proposed project purpose of feces removal would not meet the definition of the overall project purpose for the Corps' regulatory review based on information in the AR. However, the District's determination of the overall project purpose of providing a safe, vegetation-free shoreline recreation area for residents and guests is not defined with sufficient evidence of the Appellant's needs and purpose for the proposed project. Without this evidence, the District is unable to sufficiently formulate appropriate alternatives and demonstrate the practicability of any given alternative.

For example, the December 3rd letter suggested shoreline grooming lengths of 117 feet for Parcel A and 33 feet for Parcel C, while the February 23rd letter suggested grooming 40 feet for Parcel A and 40 feet for Parcel C. There is no explanation as to how these lengths were calculated in relation to Appellant's stated need for recreational space. Also, the District offers no support for the statement, “We view the private needs for recreational space in a shared recreation area to be less on a per-unit basis than the recreational space needed for a single-family residence with its own shoreline frontage.”⁵² It is unclear how grooming 117 feet and 33 feet would meet the needs of the Appellant's Parcels A and C, or that 40 feet of Parcel A and 40 feet of Parcel C would be an equitable alternative. Parcel A's shoreline is used by a single family residence and Parcel C's shoreline is a common use area for the residents and visitors of eight condominium units.

The EA is not clear if a specific length of shoreline grooming was considered as the “A2” alternative. Rather the LEDPA was merely generalized as being a “reduced length of grooming area.”⁵³ The generalization of the LEDPA along with unclear Appellant needs set the stage for an arbitrary determination regarding practicability. This could be overcome with information provided by the Appellant regarding the use and occupancy of the property that could help

⁵¹ AR, page 66

⁵² AR, page 59

⁵³ AR, page 66

justify space requirements for beach use in a qualitative and quantitative way to develop practicable alternatives. Where there is not “sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines,” the District may determine the proposed project is not in compliance with the Guidelines and deny the permit.⁵⁴

Finally, the District’s generalized description of the “A2” alternative as a grooming area with a “reduced length of grooming area” does not allow the District to demonstrate a discernable difference between the Appellant’s proposed project and the LEDPA. When there is no identifiable or discernable difference in adverse impacts between the Appellant’s proposed project and the practicable alternatives, then the Appellant’s proposed alternative could be considered to satisfy the LEDPA requirement.⁵⁵

404(b)(1) Guidelines – SubPart B 40 CFR 230.10(c) Restrictions on Discharge: Significant Degradation

Another restriction on discharge that led to permit denial was the District’s finding that the proposed project would result in significant degradation of waters of the U.S. This finding must be based on “appropriate factual determinations, evaluations, and tests required by subparts B and G, after consideration of subparts C through F, with special emphasis on the persistence and permanence of the effects.”⁵⁶ The guidelines include a list of effects from the discharge of dredged or fill material that the District must consider both individually and collectively to determine if the proposed project would contribute to significant degradation of waters of the U.S. The District listed the criteria in the Guidelines compliance summary matrix at EA, pages 66-67.⁵⁷ The District concluded the Appellant’s proposed project “P” would have significant adverse effects to three of the four criteria. In summary, the District stated:

*As described in section III.B.1, B.2, B.3, and B.4 above, the proposed work could result in substantial adverse impacts to fish, other aquatic life, and wildlife that depend on aquatic ecosystems. This sum of the impacts to water quality, aquatic organisms, wildlife, wetlands, and conservation and overall ecology caused by the proposed project would constitute significant degradation of the aquatic ecosystem. When considered cumulatively with the impacts of other similar projects, the magnitude of these impacts is greatly increased.*⁵⁸

The District Engineer has the discretion to determine if the proposed project would result in significant degradation of waters of the U.S. based on the criteria identified in the

⁵⁴ 40 CFR 230.12(a)(3)(iv)

⁵⁵ U.S. Environmental Protection Agency and Corps Joint Memorandum to the Field, Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements, August 23, 1993.

⁵⁶ 40 CFR 230.10(c)

⁵⁷ 40 CFR 230.10(c)(1-4)

⁵⁸ AR, page 67. The District’s cumulative impact assessment area was described as the 1.22 miles of shoreline along South Lee Point Road and East Hendryx Drive with a similar west to east shoreline and nearshore characteristics.

Guidelines. However, the District's finding of significant degradation in this case is problematic due to the arbitrary finding of practicable alternatives and the LEDPA determination. As discussed above, the record does not demonstrate an identifiable and discernable difference in adverse impacts between the Appellant's proposed project and the LEDPA alternative. Therefore without additional evidence, the Appellant's proposed alternative could be considered the LEDPA, and the Guidelines would require the District to evaluate whether compensatory mitigation is appropriate and practicable to reduce the overall environmental effects of the discharge prior to making a determination of significant degradation per 40 CFR 230.10(c).⁵⁹

I find the District must reevaluate the Guidelines with sufficient evidence of the Appellant's needs and purpose for the proposed project. The District can then define a specific overall project purpose, supported by the record, to determine the practicability of alternatives and identification of the LEDPA. While compensatory mitigation may not be used as a method to reduce environmental impacts for the determination of the LEDPA, a LEDPA based on the Appellant's needs and purpose defined by the overall project purpose may require compensatory mitigation to reduce impacts that would otherwise contribute to significant degradation of waters of the U.S. In the event that "[t]here is not sufficient information to make a reasonable judgment" on compliance with the Guidelines, regulations require the permit be denied.⁶⁰

Public Interest Review Factors

The Corps' public interest review requires the District consider twenty public interest review factors identified in 33 CFR 320.4(a). A proposal may have an adverse effect, a beneficial effect, a negligible effect, or no effect on any or all of these factors. The level of importance of a factor and how much consideration it receives in the decision process should be proportional to its association with the regulated activity. Not all factors are equally important; the focus should be on the relevant factors that formed the basis for the District's permit decision. The EA for a permit decision must demonstrate the District evaluated the relevant public interest review factors from both the public and applicant perspectives and balanced the foreseeable benefits and detriments of the proposed project, on an individual and cumulative basis, in order to decide whether to issue, condition, or deny a permit on the basis of the public interest.

As part of the public interest review, the following general criteria must be considered in the evaluation of the application:

- (i) The relative extent of the public and private need for the proposed structure or work;
- (ii) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and,

⁵⁹ 33 CFR 332.1(c)

⁶⁰ 40 CFR 230.12(a)(3)(iv)

(iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.

As indicated earlier, compliance with the Guidelines is a prerequisite to the issuance of a CWA Section 404 permit, and when the proposed project is found to not comply with the Guidelines, a positive finding in the public interest review cannot offset the requirement for permit denial. Therefore, except as provided under the CWA Section 404(b)(2), when a proposed project is not compliant with the Guidelines, the public interest review is inevitably contrary to the public interest.

The Appellant believes several public interest review factors were not properly considered and weighed. The concerns are identified at RFA pages 7-9 and include safety, recreation, environmental concerns of *Phragmites*, economics, aesthetics, wetlands, consideration of property ownership, land use, and the needs and welfare of the people. A summary of the District's evaluation of the probable impacts of the proposed project on the public interest review factors identified by the Appellant are discussed first, followed by the overall evaluation of the public interest review.

Safety – The RFA suggests that the public interest factor of safety was ignored by the District. Even though the District determined the project purpose differently from the Appellant as described above, the District considered the safety concerns of the Appellant related to removal of feces from the project site. Based on the review of several scientific studies, the District concluded that “[s]tudies have not consistently demonstrated reduced levels of *E. coli* and other fecal indicator bacteria due to mechanical grooming.”⁶¹ The District continued by stating, “[b]ased on these studies, it is not clear that the proposed mechanical grooming would decrease bacteria levels in shoreline sands,” and “[a]llowing droppings to remain on the sand surface where they would desiccate more rapidly may reduce bacteria levels and odors associated with the droppings to a greater extent than mechanical grooming.” While the District recognized the private interest and purported private benefits of beach grooming on safety and health, the District ultimately concluded that the proposed project would have no impact on safety.⁶²

Recreation - The RFA states that “[i]mplied in Mr. Almeter's request [for a permit] is use of his beach for recreation.”⁶³ The Appellant proposed grooming the properties' entire shoreline (600 foot length) up to 50 feet waterward because the Appellant believes this size project site allowed for beach walking and running and “accommodates games of volleyball, frisbee, and other ball related games.”⁶⁴ Less beach grooming by length or width was not an alternative the Appellant considered or proposed because it would “not help Mr. Almeter accomplish his purpose of an excrement-free waterfront.”⁶⁵

⁶¹ AR, page 56

⁶² AR, page 57

⁶³ RFA, page 7

⁶⁴ *Id.*

⁶⁵ RFA, page 5

The District discussed recreation at several points in the EA. For example, the District recognized the desire for an unvegetated beach for the recreational benefits the Appellant seeks and included this as a component of the project purpose. However, the District said the Appellant's desire to maintain "a recreational shoreline area that provides the safety and aesthetic benefits he seeks" over the entire 600 foot shoreline are "private benefits rather than public" benefits for the evaluation of the public interest review factor.⁶⁶ While an on-site recreational benefit for the public was not expected, recreation was identified as an important public aspect that would be negatively affected by the proposed project. One component of recreation is fishing, where Grand Traverse Bay wetlands are important in spawning, nursery, and habitat for recreational sport fish.⁶⁷ The AR included a study that found "80% of the recreational [fish] harvest in the Great Lakes (Treibitz and Hoffman 2015)" use Great Lakes coastal wetland habitat, and the EA described the impacts of vegetation removal activities within the project site and similar beaches in Michigan on recreational fish species.⁶⁸ The District recognized recreation was an important beneficial effect and need for the proposal in the private interest of the Appellant, however, the District determined the proposed project would have an overall detrimental effect on public interest.

Environment - The RFA states that the proposed project would benefit the environment by eliminating the threat of *Phragmites*, and suggests that in the absence of beach grooming, *Phragmites* will grow in the project site. *Phragmites* is discussed further in this document in Reason for Appeal 6. This public interest review factor covers general environmental concerns such as air, noise, and pollution from contaminants, which are addressed in the EA in various spots. The District determined there would be no impact to ambient air quality, minor short-term impacts to noise, and no impacts from contaminants in the substrate.⁶⁹

Economics - The Appellant asserts grooming less than the entire shoreline would lead to an economic hardship for the Appellant. The RFA explains that the condominiums are rented in the summer by those seeking expansive beaches. The District considered the private economic benefit of the proposed project and evaluated economics from the public perspective in the EA. Ultimately, the proposed project was found to have minor, long-term, beneficial economic benefits. Private economic consideration for the proposed project were further considered under the consideration of property ownership public interest review factor.

Aesthetics - The Appellant asserts the District did not properly consider aesthetics in the public interest review. The RFA indicates that vegetation within the project site, especially *Phragmites*, would block the Appellant's preferred view of an unvegetated beach and water, and would decrease property values.⁷⁰ *Phragmites* is further discussed in this document in Reason for Appeal 6.

⁶⁶ AR, page 58

⁶⁷ AR, pages 20-22, 33-34

⁶⁸ AR, pages 22 and 45-46

⁶⁹ AR, pages 68, 54, 25

⁷⁰ RFA, page 5

The District considered aesthetics in the public interest review under consideration of property ownership and aesthetics, and included the Appellant's aesthetic preference for a vegetation free shoreline in the project purpose. The District determined the proposed project would "maintain the shoreline in a manicured state," free from vegetation.⁷¹ The District concluded the public's aesthetic preference is variable, and either way (beneficial or detrimental) the proposed project would have minor, long-term impacts to aesthetics.

Wetlands - Regarding wetlands, the RFA states, "...Mr. Almeter's property, having been maintained as a beach for decades, does not come within the definition of 'wetland' under your regulation."⁷² As addressed under reasons for appeal 1 and 8, the District failed to evaluate if wetlands as defined by regulation were within the project site. As described above, this determination influences the OHWM and the 404(b)(1) evaluation, and is likewise necessary for the public interest review. The District used terms that contain the word "wetland" interchangeably throughout the AR to characterize vegetated areas below the OHWM of Lake Michigan in the project site and elsewhere, and described the overall functions and values of Lake Michigan shoreline vegetation in the AR. However, the public interest review for "wetlands" is specific to wetlands as defined by regulation and determined using the 1987 Manual and Regional Supplement.

Consideration of Property Ownership - The RFA indicates the project site has been privately owned by Mr. Almeter since 1947. The Appellant desires to maintain the project site as an unvegetated beach, which they claim has always been the case. The Appellant claims "[Corps] regulations recognize [the property owner's] right to reasonable private use and a right of access to the water" and the District's proposed alternatives "would unreasonably interfere with those important rights."⁷³

As indicated in the RFA, by letter dated December 3, 2015, and February 23, 2016, the District asked the Appellant to consider possible ways to avoid or minimize the discharge of dredged and/or fill material in the project site. The Appellant responded by letter dated April 1, 2016, which was also the attachment to the RFA, and said that minimization to the proposal would not satisfy the Appellant's desire to groom the entire 600-feet of shoreline for an excrement free waterfront. The District concluded the Appellant "has a right to reasonable private use of the property...[w]e accept the applicant's perceived benefits of the work on health and safety, recreation, the environment, economics, and aesthetics as benefits to this public interest factor."⁷⁴ Overall, the District found the proposed project would have minor, long-term benefits to property ownership.

Land Use and Needs and Welfare of the People - The RFA combines the discussion of "land use" and the "needs and welfare of the people." The Appellant provided clarification in the appeal conference MFR attachments titled Appeal Meeting 6 and Appeal Meeting 9. Taken

⁷¹ AR, page 54

⁷² RFA, page 6

⁷³ RFA, page 8

⁷⁴ AR, page 57

together, the Appellant asserts the needs and welfare of the people, as well as land use policy, have been established by the people of Michigan through state laws that allow beach grooming to maintain “traditional beaches.”⁷⁵ Text of these state laws were provided as attachments to the appeal conference MFR titled Appeal Meeting 4 and Appeal Meeting 5. This section discusses the Appellant’s claim that the District did not properly consider and weigh land use and the needs and welfare of the people in the public interest review. Reasons for Appeal 3 and 4 discuss the District’s consideration of local zoning and State of Michigan land use matters pursuant to the Appellant’s clarifying information.

In regards to land use, the District concluded there would be no probable impact of the proposed project and stated the following:

*The proposed project is presumably consistent with the existing zoning for the area. The state has determined that their respective permit is not required for the project. Local and state governments have primary responsibility for land use and zoning. We accept local zoning and the state's policy on exempting shoreline grooming and vegetation removal from MDEQ permit requirements, as reflecting consistency with state and local land use goals. The present land use patterns or cultural development would not change due to the proposed work. The project would have no impact on land use. Cumulative impacts are not expected.*⁷⁶

The District recognized the proposed project did not require a permit from the MDEQ, and was presumably consistent with local and state government requirements of zoning and land use. The District described the local land use practices and considered regional characteristics throughout the AR. The District’s evaluation of the proposed project does not interfere with any policies on land use decisions as these are held by the state and local governments.

In regards to the needs and welfare of the people, the District explained on AR pages 58-59 that while the Appellant has a private need and would benefit from the proposed project, there is not a public need for the proposed work. The District discussed the probable detrimental impacts of the proposed project on water quality, erosion, aquatic organisms, wildlife, wetlands, conservation and overall ecology, and recreation, and found probable beneficial impacts to the economy and property ownership. In general, the needs and welfare of the people from the public perspective is tied up in these discussions that reflect a concern for protection and utilization of the Grand Traverse Bay aquatic ecosystem.

District’s weighing of the benefits and detriments of the proposal

In regards to the weight of the benefits and detriments of the proposed project, the District determined that the benefits which may be expected from the proposal on the public interest were outweighed by the detriments. The District stated the proposed project would have minor, long-term beneficial impacts to economics and consideration of property ownership; minor, long-term detrimental impacts to water quality, erosion, wildlife, and recreation; and moderate, long-term detrimental impacts to aquatic organisms, wetlands, and conservation. The District

⁷⁵ RFA, pages 8-9

⁷⁶ AR, page 55

evaluated alternatives and considered how they would potentially affect foreseeable detriments and benefits in their evaluation of the public interest. For example, the District concluded "...a modified permit, limiting the length of shoreline along which grooming may occur, with special conditions prohibiting work waterward of the water's edge would have slightly reduced benefits to the economy and the applicant's rights of property ownership, but these benefits would remain long-term and minor."⁷⁷ In terms of detriments, a modified proposal would still result in the listed detrimental impacts, but aquatic organisms, wetlands, and conservation and overall ecology would be reduced from moderate long-term detrimental impacts to minor long-term detrimental impacts. The District concluded:

*After weighing the benefits that reasonably may be expected to accrue from the project as proposed against its reasonably foreseeable detriments, and upon consideration of all information currently available, we conclude that the detriments outweigh the benefits, and that continued authorization of the past grooming activities as proposed is contrary to the public interest. Individually, the proposed work would adversely impact a substantial length and area of shoreline. Cumulatively with other projects that would clear vegetation along a property's entire shoreline frontage, extensive reaches of shoreline would be adversely impacted, resulting in loss of the important wetland and aquatic ecosystem functions these areas provide at a range of water levels. The special condition identified above, prohibiting work waterward of the water's edge, would decrease adverse impacts, but not to an extent that benefits would outweigh the detriments. A modified project, reducing the length of shoreline along which work is conducted, and including a special condition prohibiting work waterward of the water's edge, would accomplish the project purpose and may tip the public interest balance to the point that the benefits would outweigh the detriments. The applicant has rejected this alternative, and we cannot issue a permit for a modified project.*⁷⁸

Even though the District identified the relevant public interest review factors, identified alternative locations and methods for the proposal, and addressed the extent and permanence of the effects of the proposed project on the relevant factors, the District committed procedural errors while completing the public interest review that must be corrected. I find that the record does not adequately document the extent of the private need for the proposed project. Without this information, the District is unable to appropriately determine the weight of the factors based on their importance and relevance to the proposal and the extent and permanence of the effects of the proposal on the private uses the Appellant seeks. Therefore, the District must reevaluate the public interest review with sufficient evidence of the Appellant's private need for the proposal to appropriately consider the general balancing process of the public interest review. Additionally upon remand, if the District determines that all appropriate and practicable avoidance and minimization has been achieved, then compensatory mitigation must be considered in the public interest determination.⁷⁹

⁷⁷ AR, page 68

⁷⁸ AR, page 69

⁷⁹ 33 CFR 332.1(d)

Reason for Appeal 3: “The decision fails to defer to Michigan’s decision to preserve beaches such as Mr. Almeter’s, contrary to 33 CFR 320.4(j)(2) and (4). See 2003 PA 14 and 2012 PA 247.”

Reason for Appeal 4: “The decision fails to properly identify the significant national issues of overriding importance and explain how they are overriding contrary to 33 CFR 325.2(a)(6).”

Finding: These reasons for appeal have merit.

Action: Since the approved JD, Guidelines compliance evaluation, and the public interest review must be reconsidered, the District must reconsider and address 33 CFR 320.4(j)(2), 33 CFR 320.4(j)(4) and, 33 CFR 325.2(a)(6) as appropriate.

Discussion: The Appellant referenced two state laws that have been enacted in the State of Michigan to provide exemptions from a state permit for beach maintenance activities and vegetation removal. The appeal conference MFR attachment titled Appeal Meeting 4 is the text of Public Acts of 2003, Act No. 14, which allowed beach maintenance activities meeting certain conditions to occur without a state permit subject to other state laws and owner’s regulation. This exemption expired on November 1, 2007. The appeal conference MFR attachment titled Appeal Meeting 5 is Public Acts of 2012, Act No. 247 (2012 PA 247), an amendment of Part 325, Great Lakes Submerged Lands, and Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451. Included in 2012 PA 247 was new language to exempt certain activities from state permit requirements. Section 30305(5) of 2012 PA 247 states:

Except as provided in subsection (6) [subsection 6 is not relevant to the Appellant’s site], the following activities are not subject to regulation under this part by the state:

(a) Leveling of sand, removal of vegetation, grooming of soil, or removal of debris, in an area of unconsolidated material predominantly composed of sand, rock, or pebbles, located between the ordinary high water mark and the water’s edge.

(b) Mowing of vegetation between the ordinary high-water mark and the water’s edge.

The District provided MDEQ with the Appellant’s application on November 2, 2015, for review pursuant to state permitting requirements. By letter dated November 9, 2015, the MDEQ responded and said, “Our review indicates that the proposed project does not require a permit under Part 325, Great Lakes Submerged Lands, and Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended.”⁸⁰ The State’s letter continues by explaining that no further action would be taken by MDEQ, but “permits from other governmental units, including the U.S. Army Corps of Engineers” may be required.

⁸⁰ AR, page 166

In light of the State's decision, the Appellant claims the District incorrectly applied regulation and policy at 33 CFR 320.4(j)(2) and (4) when the District failed to defer to the State's permit decision. The Appellant believes Corps regulations direct the District to defer to MDEQ's decision to exempt the beach maintenance activities as described in Section 30305(5)(a) of 2012 PA 247. The Appellant asserts that since the decision to deny the permit was done contrary to the MDEQ decision, the District was then required to address the contrary conclusion pursuant to 33 CFR 320.4(j)(2), 33 CFR 320.4(j)(4), and 33 CFR 325.2(a)(6).

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

The primary responsibility for determining zoning and land use matters rests with state, local and tribal governments. The district engineer will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance. Such issues would include but are not necessarily limited to national security, navigation, national economic development, water quality, preservation of special aquatic areas, including wetlands, with significant interstate importance, and national energy needs. Whether a factor has overriding importance will depend on the degree of impact in an individual case.

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

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

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

...If a district engineer makes a decision in a permit application which is contrary to state or local decisions (33 CFR 320.4(j)(2) & (4)), the district engineer will include in the decision document the significant national issues and explain how they are overriding in importance...

As support for the reasons for appeal, the RFA states:

Your agency ‘normally accepts decision’ by state and local government absent ‘significant issues of overriding national importance.’ See 33 CFR 320.4(j)(2) and (4). The state has spoken through specific legislation, and has determined that beaches like Mr. Almeter’s should-if he so desires-be preserved. Any contrary decision by the Detroit District requires that you identify significant national issues and explain how they are overriding in importance. See 33 CFR 325.2(a)[6]⁸¹

The Appellant’s explanation here is not entirely consistent with Corps interpretation regarding the cited regulations. First, the regulations require the Corps to “normally accept decisions by such governments on those matters [related to local zoning and/or land use in the public interest review] unless there are significant issues of overriding national importance.” Second, even in the event of a favorable decision at the local or state level, the regulations also require the District to consider and follow “concerns, policies, goals, and requirements as expressed in 33 CFR parts 320-324, and the applicable statutes” during the evaluation of the proposed project.⁸² The Corps interpretation was addressed in the 1984 preamble concerning 33 CFR 320.4(j)(2):

...this paragraph clarifies that the district engineer will normally consider the decisions of state, local, and tribal governments on land use matters to be conclusive as to this factor in the public interest review. Many commenters interpreted this change to mean that the Corps would automatically base its permit decisions on existing or planned zoning or land use designations, or on the permit decisions of a state, local or tribal government rather than its current objective public interest review. This interpretation is not correct. Land use is one of several factors considered by the Corps in the public interest review (33 CFR 320.4(a)). The intent of this paragraph is to recognize that the primary responsibility for addressing this factor (i.e. local zoning and/or land use matters) rests with state, local, and tribal governments. When a state, local or tribal government gives its zoning or other land use approval for a particular project, this will be considered conclusive for this factor. However, the Corps will continue to perform a thorough, objective evaluation of each application in full compliance with applicable regulations and laws.⁸³

This section of the preamble affirms the District’s determination on land use in the public interest review where the District recognized the state and local zoning and land use approval as conclusive. The District permit decision does not change the local zoning or land use designations. These regulations do not support the notion that the District should defer to the MDEQ exemption and issue or exempt the activity from a DA permit.

The MDEQ made a decision on the application and determined the proposed project did not require a state permit. Since the District reached a contrary conclusion and denied the permit after an evaluation of public interest and applicable regulations and laws, the District was

⁸¹ RFA, page 8

⁸² 33 CFR 320.4(j)(4)

⁸³ Vol. 49 Federal Register Page 39478-39479, October 5, 1984

required to include in the decision document the significant national issues and explain how they are overriding in importance.

The District's documentation and explanation of the overriding significant national issues was discussed during the appeal conference, included in the RFA statements mentioned above, and contained in clarifying information included as an attachment to the appeal conference MFR titled Appeal Meeting 6. First, the Appellant asserts the District did not properly identify the issues of overriding national importance. Second, the Appellant believes the District did not explain how or why the issues the District identified were overriding in importance, and the District's reference to "weight" does not meet the requirements of regulation.

The AR included a District memorandum dated March 3, 2005, that provided its interpretation of the pertinent regulations.⁸⁴ The District identified the public interest factors as the significant issues of overriding national importance that may supersede zoning or land use considerations based upon the degree of impact in a particular case.⁸⁵ The District explained how the public interest balancing process can tip toward the detriment factors over the favorable state permitting decision. While not specifically identified in the EA by the District, a finding of non-compliance with the Guidelines weighs heavily in the public interest review. The public interest review makes clear that compliance with the Guidelines is required in order to receive a permit, regardless of the public interest finding. Regarding the public interest review balancing process, the District concluded:

Although MDEQ has determined that a State permit is not required for the proposed work, negligible benefits to land use and the minor benefits to other public interest factors are outweighed by the total detriments to other national public interest factors identified above. By virtue of their respective weight, these detriments become issues that are significant issues of overriding national importance.⁸⁶

I find the District identified the issues of overriding national importance and balanced the project's benefits and detriments. The District determined why these factors were overriding based on the overall outcome of the general balancing process. However, as discussed earlier, the District must reconsider the approved JD, the public interest review, and compliance with the Guidelines, which may affect the significant national issues and explanation of their importance.

Reason for Appeal 5: "The Detroit District is an opponent to Mr. Almeter's permit request, contrary to 33 CFR 320.1[a](4)"

Finding: The reason for appeal does not have merit.

Action: No further action is needed for Reason 5.

⁸⁴ AR, page 258-261

⁸⁵ AR, page 260

⁸⁶ AR, page 68-69

Discussion: This reason for appeal referenced 33 CFR 320.1(a)(4) that states:

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

The Appellant discussed the belief that the District was an opponent of the project several times during the appeal conference and provided several clarifying handouts titled Appeal Meeting 7, 8, and 9.

The Appellant identified a passage from the Detroit District's Regulatory Program webpage that states, "[o]ur mission is to provide strong protection of the Nations aquatic environment ... accomplished through: coordination with agencies and the public; fair, reasonable, and timely decisions; accurate and timely jurisdictional determinations; monitoring, compliance and enforcement of permit laws, regulations and policy."⁸⁷ The Appellant believes the District's statement that their mission to "provide strong protection" of waters is evidence the District is an opponent of the project, and that the District favors strong protection of waters over the utilization of important resources as required by the balancing test of the Corps public interest review. The Appellant believes the utilization of the resource weighs strongly in favor of the Appellant.⁸⁸

The Appellant also raised a concern during the appeal conference that there is inherit bias in the District because regulatory staff are wetland and environmental scientists rather than economists, for example. The discretion to hire and train interdisciplinary regulatory staff is within the District's zone of discretion. The Corps regulations state that the District is responsible to reach a permit decision on the merits of the application, but recognize District regulatory personnel must seek advice from other agencies and request additional information from permit applicants in order to make permitting decisions.⁸⁹ It is the permit applicant's responsibility to provide the District with information on the public interest review and compliance with the Guidelines in order to make a permit decision.⁹⁰ There was no indication in the AR that the District was an opponent to the proposal. I find the District requested additional detailed information on numerous occasions and find no evidence that the regulatory staff unfairly reviewed the application. However, based on other merit findings in this document, the District must reevaluate the public interest review and the Guidelines, which will include reevaluating the Appellant's purpose and need for the proposed project.

Reason for Appeal 6: "The decision's conclusion that the proposed beach grooming in fact promotes, rather than inhibits, *Phragmites* growth is incorrect, and evidences Detroit District's improper bias against his proposal."

Finding: The reason for appeal has merit.

⁸⁷ Appeal Handouts 7 and 8 were taken from <http://www.lre.usace.army.mil/Missions/Regulatory-Program-and-Permits/>

⁸⁸ Appeal Meeting 9

⁸⁹ 33 CFR 325.2(d)

⁹⁰ 33 CFR 325.1(e)

Action: The District must reconsider and document the conclusions reached in regards to *Phragmites*.

Discussion: The Appellant asserts that the proposed “project has a clear environmental benefit: eliminating the threat of invasive species, including *Phragmites*.”⁹¹ The Appellant believes that continual beach grooming in the project site will preclude the ability to spread *Phragmites* because nothing will be able to grow in the project site with continuous grooming. The Appellant asserts that without continuous beach grooming, *Phragmites* will likely grow within the project site and lead to environmental harm. The Appellant stated the environmental detriments of *Phragmites* are well documented and cited two state laws that the Appellant claims authorizes beach grooming to prevent *Phragmites* proliferation.

The District’s overall conclusions regarding *Phragmites* are unclear. In parts, the District recognized the proposed project would authorize continuous mechanical beach grooming that would maintain a shoreline free from vegetation. For example, the District determined “[i]mplementation of the proposed activity would impact upon the ecological balance and integrity of a valuable resource...by inhibiting reestablishment of vegetation and maintaining the shoreline in a relatively sterile condition which supports considerably less diversity than it would in the absence of continued grooming.”⁹² Similarly, the District stated, “frequent mechanical grooming is likely to destroy most seedlings and rhizome fragments of *Phragmites* from the work area, it does so non-selectively, at the expense of native plant communities and the ecosystem functions they provide.”⁹³ For this reason, the District considered continuous beach grooming to be a detriment to the public interest relative to the environmental concerns of conservation and ecology.

However, in other parts, the District suggests that beach grooming leads to a *Phragmites* invasion. The District stated, “Grooming repeatedly disturbs sediment, likely increasing its susceptibility to colonization by *Phragmites* rhizomes and seeds, which germinate more readily in bare, disturbed substrates (Ailstock et al. 2001, Belzile et al. 2010).”⁹⁴ The District goes on to explain that fragments of *Phragmites* could be carried to the project site by water currents where it could more easily start to grow on the bare and disturbed groomed shoreline and grooming would further fragment these roots and rhizomes “then introduce and spread *Phragmites* though the work area” and to “the margins of the grooming area (i.e. to the borders of adjacent properties),” thus “exacerbate rather than eliminate the threat of [*Phragmites*] invasion.”⁹⁵

Also unclear is the District’s conclusions regarding *Phragmites* should grooming stop. The District recorded no previous evidence of *Phragmites* in the project site or on neighboring sites, on groomed or non-groomed shorelines. The EA describes the District’s experience observing neighboring sites with “less active grooming regimes” comprised of “threesquare bulrush and

⁹¹ RFA, page 7

⁹² AR, page 52-53

⁹³ AR, page 53

⁹⁴ *Id.*

⁹⁵ AR, page 52-53

silverweed.”⁹⁶ However, the District explained that in the absence of grooming, a typical native vegetation community would likely return to the project site provided appropriate control of weedy and invasive species, such as *Phragmites* that may become established.

I find the District’s conclusions regarding *Phragmites* were not clear and seemingly contradictory. The EA described the impact of the proposed project as one that will both leave a completely unvegetated shoreline and one where *Phragmites* can flourish. The District considered denial of the permit would lead to both the re-establishment of a native plant community with the ecosystem functions described throughout the AR, as well as an invasion of *Phragmites* with unknown environmental impacts.

Reason for Appeal 7: “The permit denial results in disparate treatment between Applicant and other resorts and public beaches on Grand Traverse Bay”

Finding: The reason for appeal does not have merit.

Action: No further action is needed for Reason 7.

Discussion: The Appellant provided clarifying information during the appeal conference regarding this reason for appeal. The Appellant explained the District shows favoritism for public beaches because public beaches may obtain a general permit for beach grooming that is not available to private individuals. The Appellant also suggested that even though the Appellant’s beach is private, there is still a public need for beach grooming and the private beach still affords the public with some use.

The District explained at the appeal conference a Regional General Permit (RGP) is available for minor work, structures, and discharges of dredged and fill material into waters of the U.S. The District Engineer has discretion to issue general permits for a category or categories of work that are substantially similar in nature and cause only minimal individual and cumulative environmental impacts.⁹⁷ General permits may only be issued after the category of activities are evaluated for their compliance with applicable regulations, including the Guidelines and the public interest review. The decision to deny or condition a permit, including a general permit, depends on the facts, circumstances, and physical conditions particular to the specific project and site being evaluated.

The RGP for Public Beach Grooming was reissued by the District on May 25, 2012, and expired on May 24, 2017.⁹⁸ Among other things, the RGP’s categories of authorized activities include Public Beach Grooming, Leveling of Sand, and Grooming of Sand under Section 10 of the RHA and Section 404 of the CWA subject to the limitations and conditions identified in the RGP. The District informed the Appellant during the evaluation of the application that the proposed project would not meet the RGP terms and conditions for Leveling of Sand and Grooming of Sand

⁹⁶ AR, page 52

⁹⁷ 33 CFR 323.2(h)

⁹⁸ The RGP was re-issued on June 30, 2017, and will expire on June 30, 2022. The current RGP provides similar limitations and conditions for authorized structures and discharges.

because the District determined the project site would be vegetated in the absence of grooming. The District clarified at the appeal conference that the Appellant's proposal was not considered for the Public Beach Grooming RGP because the District considered a public beach as one where a federal, state, county, city, or other municipality, has designated the beach as a public swimming area. These are all RGP terms and limitations outlined in the categories of authorized activities.

Since the District determined the proposed project did not qualify for a general permit, the District proceeded to review the proposal through the standard individual permit process. Therefore, I find the District independently evaluated the proposed project, determined it did not qualify for a general permit, and processed the application as a standard permit. The review of the proposed project was not disparate from permits verified under the RGP, as both of these must be considered on a case-by-case basis, compliant with applicable laws, regulations, and guidance.

Reason for Appeal 10: "Reasons for appeal set forth in Appellant's letter dated April 1, 2016 ..." not included in the above reasons for appeal: The Appellant disagrees that denial of the permit would result in beneficial wetland vegetation because vegetation would not survive mowing and inundation that would occur if the permit is denied.

Finding: The reason for appeal has merit.

Action: The District must reconsider the effects of the "no action" alternative (permit denial).

Discussion: This topic was included in the April 2016 letter and it did not appear to be covered by any of the other ten reasons for appeal found on page 19 of the RFA. The Appellant suggested that in the event the permit was denied, feces removal would still occur, but without grooming. The Appellant said the area would be mowed and believes that vegetation that would grow would eventually die of when inundated. Taken together, the Appellant asserts that denial of the permit would not result in the shoreline providing the functions of a vegetated shoreline the District attributed to it.

National Environmental Policy Act (NEPA) requires that the District include a discussion of the reasonable alternatives, including the "no action" alternative, to make an informed public interest decision.⁹⁹ The "no action" alternative is one which results in no work or discharge requiring a Corps permit, and Corps regulation requires that the consequences of other likely uses of a project site be considered in the event of a permit denial.¹⁰⁰

The District recognized the shoreline was currently not vegetated, but found that in the absence of grooming, the project site would support a shoreline with vegetation that would vary in location, extent, and diversity.

⁹⁹ 33 CFR 325 Appendix B(7)(a)

¹⁰⁰ 33 CFR 325 Appendix B(9)(c)(5)(b)

The proposed grooming area has been maintained in an unvegetated condition, and the work would maintain the area in a similar condition. Currently, most of the proposed work area is submerged. If the proposed work is not continued, vegetation is likely to re-establish in the future at appropriate elevations on the shoreline according to lake level conditions. The shoreline vegetation would provide functions including runoff filtration and purification, erosion protection, food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic and semi-aquatic species... The applicant appears to view the previously authorized work as a permanent impact which should nullify consideration of any further ecological value that the impact areas could provide. We disagree; over time, lake level changes and shoreline erosion and accretion process recreate the natural characteristics of the shoreline. In the absence of continued disturbance, vegetation would re-establish in the emergent zone and would provide the wetland functions described above. When water levels drop, waterward parts of the site which are currently submerged will become exposed and are likely to develop wetland vegetation from the seed bank, as they have in the past.¹⁰¹

In regards to the impacts of inundation on vegetation, the District provided substantial evidence that the natural process of lake level fluctuation is a necessary component of the ecological system. That is, when lake levels decrease, vegetation will grow in the exposed lakebed, and when lake levels increase, the inundated vegetation will die off. The District described how lake fluctuations “reset” the process of coastal wetland development.

Natural lake level changes cause inundation of vegetated areas, eventually causing visible parts of vegetation to die off. Typical wetland plant species of Great Lakes coastal areas are adapted to lake level fluctuations; these species have developed resilient survival and recolonization strategies. Their root systems remain alive but dormant over a period of several years while submerged, or they provide inputs to the seed bank, which may survive extended periods of inundation. Depending on lake levels, such vegetation may grow and persist at the surface for a number of years, such as through the recent low water period of 1999-2013. Undisturbed shoreline areas in the CIA [cumulative impact area] developed dense vegetation communities that persisted and provided a range of aquatic habitat functions during this period. As the vegetation becomes inundated, it provides important cover, feeding, spawning, and nursery habitat for a variety of fish species. Dieback of macrophyte leaves and stems provides a major pathway for energy from primary producers to enter the food web, through detritus consumed by benthos. Fluctuating lake levels and the associated loss and re-establishment of vegetation on the exposed lakebed and nearshore area are critical for maintaining diversity in Great Lakes coastal wetlands (Keddy and Reznicek 1986). The proposed grooming would introduce an artificial change that would remove vegetation and prevent its reestablishment in the work area

¹⁰¹ AR, page 49

regardless of lake level. The applicant's attorney suggests that mowing would prevent vegetation from providing aquatic habitat functions, but mowed vegetation would provide substantially more habitat value than an unvegetated area, as it would still provide organic inputs to the aquatic food chain and habitat structure for aquatic invertebrates (MDEQ 2006).¹⁰²

The District also explained how the physical processes would return to the shoreline when grooming ceases. The District described how long-term repeated grooming on the shoreline redistributes sand and levels the shoreline slope, and when grooming stops, berms and swales will re-establish along the shoreline from waves, storms, wind, and ice. The District explained throughout the EA how berms and swales are important in the establishment and growth of vegetation and the life cycles of aquatic organisms.

I find the District described the cyclical nature of lake levels in Lake Michigan, and the impact the fluctuation of water has on the physical, biological, and chemical characteristics of Lake Michigan. It is clear from the record that vegetation and berm and swale development have occurred on the shoreline in the past, and the evidence suggests that could return to some extent in the event that grooming would cease. However, what is missing from the District's consideration of the "no action" alternative (permit denial) is information from the Appellant on what that alternative would entail and subsequent evaluation of the impacts. For example, the District generally found that permit denial would avoid both the negative and positive impacts of the proposed project but did so without consideration of the actions the Appellant would take without a permit. The Appellant suggested that other more costly means would be taken to remove feces from the shoreline in the event of permit denial and that mowing or other unregulated activities may occur. These actions were not sufficiently considered in the no action alternative.

Therefore, the District's conclusions that permit denial would generally avoid impacts is not supported. The District must define the "no action" alternative based on information provided by the Appellant. The analysis of impacts from the "no action" alternative would then serve to inform the consequences of a denial.

CONCLUSION: For the reasons stated above, I conclude that this request for appeal has merit. The permit denial is remanded back to the Detroit District to include sufficient documentation and analysis in the AR consistent with this decision and applicable laws, regulation, and policy. The Detroit District must reconsider its permit decision and approved JD as appropriate.


R. Mark Toy
Major General, USA
Commanding

¹⁰² AR, page 46-47